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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1873:

COMPRISING
REPORTS OF CASES

**In the House of Lords, In the Privy Council,
and in the Exchequer Chamber;**

IN THE
Courts of Chancery and Bankruptcy;

IN THE COURTS OF
**Queen's Bench and the Bail Court, Common Pleas,
and Exchequer;**

IN THE COURT FOR
Crown Cases Reserved;
**In The High Court of Admiralty, The Court of Probate,
The Court for Divorce and Matrimonial Causes, and
The Ecclesiastical Courts;**

MICHAELMAS TERM, 1872, to MICHAELMAS TERM, 1873.

The House of Lords Cases are in the Chancery and Common Law Volumes respectively; the Decisions in the Exchequer Chamber will be found with the Reports of Cases in the respective Courts from which the Errors and Appeals come; the Appeals from Revising Barristers are in the Common Pleas; and the County Court Appeals are in the Queen's Bench, Common Pleas, and Exchequer respectively.

THESE CASES (EQUITY AND COMMON LAW) FORM TWO DISTINCT VOLUMES OF REPORTS.

THE CASES RELATING TO THE POOR LAWS, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS.

THE PRIVY COUNCIL CASES, THE PROBATE CASES AND DIVORCE AND MATRIMONIAL CASES, THE ECCLESIASTICAL CASES, AND THE ADMIRALTY CASES, ARE SEPARATELY ARRANGED, AND FORM DISTINCT VOLUMES OF REPORTS.

THE REPORTS ARE EDITED BY
**MONTAGU CHAMBERS, Esq., ONE OF HER MAJESTY'S COUNSEL,
FRANCIS TOWERS STREETEN, Esq.,
AND
FREDERICK HOARE COLT, Esq., BARRISTERS-AT-LAW.**

**COMMON LAW.
NEW SERIES, VOL. XLII.**

LONDON:
PRINTED BY SPOTTISWOODE AND CO. NEW-STREET SQUARE.
PUBLISHED BY EDWARD BRET INCE, 5, QUALITY COURT, CHANCERY LANE.

MDCCCLXXIII.

CASES
ARGUED AND DETERMINED
IN THE
Court of Queen's Bench,
AND IN THE
Exchequer Chamber
ON ERROR AND ON APPEAL FROM THE QUEEN'S BENCH,
REPORTED BY
ROBERT SAWYER, Esq., AND ARTHUR PAUL STONE, Esq.,
BARRISTERS-AT-LAW;
AND ON APPEAL FROM THE EXCHEQUER CHAMBER TO
The House of Lords,
REPORTED BY
EDMUND STORY MASKELYNE, Esq., BARRISTER-AT-LAW.

36 & 37 VICTORIAE.

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CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 36 VICTORIÆ.

1872. }
Nov. 8. }

RIMINI v. B. VAN PRAAGH.

Bankruptcy Repeal Act, 1869 (32 & 33 Vict. c. 83), s. 20—Bill given for Debt discharged by Bankruptcy—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 164.

No action can be maintained on a bill accepted in consideration only of a debt discharged by a bankruptcy or arrangement under the Bankruptcy Act, 1861, although such bill was given after the repeal of this Act by the Bankruptcy Repeal Act, 1869 (32 & 33 Vict. c. 83).

Declaration by plaintiff, as the indorsee of a bill for 45*l.* at twenty days, dated January 2nd, 1870, and accepted by defendant; and as indorsee of another bill for 30*l.* at two months, dated January 20th, 1870, and accepted by defendant. Common counts for interest and money due on accounts stated.

Third plea to the first and second counts, and as to so much of the third count as referred to money payable upon an account stated, that before the drawing or acceptance of the bills, or either of them, the defendant carried on business in partnership with J. Van Praagh as a diamond

NEW SERIES, 42.—Q.B.

merchant, and he and J. Van Praagh were indebted to the plaintiff and other persons, and thereupon a deed was made between the plaintiff and J. Van Praagh and their creditors in the words and figures following: [The plea then set out the deed, dated July 13th, 1869, by which B. and J. Van Praagh assigned all their property to a trustee, to be administered for the benefit of their creditors as in bankruptcy, and the creditors, in consideration of the deed, released the debtors in like manner as if they had obtained a discharge in bankruptcy.] The plea then averred performance of all conditions precedent; and that after the deed had become binding on the plaintiff, the bills in the declaration mentioned were drawn, accepted, and indorsed to the plaintiff as in the declaration mentioned, and save as aforesaid there never was any consideration for the drawing, indorsing, acceptance, or payment of the bills or either of them by the defendant, and the plaintiff first received and always held the bills without value, and with notice of the premises.

Demurrer and joinder in demurrer.

Little, in support of the demurrer.—The plea is bad. There can be no doubt that had the bills in question been ac-

B

cepted before the Bankruptcy Act, 1869 (1), no action could be maintained upon them by reason of the express provisions of the Bankruptcy Act, 1861, s. 161. But at the time when the bills were accepted, the old law had been repealed, and as the repealing Act contains no provision against such an action as the present one from being maintained, by the common law, in the absence of express enactment, a debt discharged by bankruptcy is a sufficient consideration for a subsequent agreement. In *Wenmall v. Adney* (2), there is an elaborate note on the effect of an express promise founded simply on a moral obligation, in which the opinion of Lord Mansfield in *Hawkes v. Sanders* (3) and *Trueman v. Fenton* (4),

(1) By the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 164, after the order of discharge takes effect the bankrupt shall not be liable to pay or satisfy any debt, claim, or demand proveable under the bankruptcy, or any part thereof, on any contract, promise, or agreement, verbal or written, made after adjudication, and if he be sued on any such contract, promise, or agreement, he may plead in general that the course of action accrued pending proceedings in bankruptcy, and may give this Act and the special matter in evidence.

With regard to trust deeds for benefit of creditors, it is thus enacted, by section 197—"From and after the registration of every such deed or instrument, the debtor and creditors and trustees parties to such deed, or who have assented thereto, or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of, and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved and the trustees had been appointed creditors' assignees under such bankruptcy."

By the Bankruptcy Repeal and Insolvent Court Act, 1869 (32 & 33 Vict. c. 83), s. 20, The enactments described in the schedule to this Act (the

that an agreement by a bankrupt after his certificate to pay an antecedent debt, is one upon which an action may be brought, is cited, and commented upon.

[QUAIN, J.—Had not the bankrupt at the time of the repeal of the old Act a vested right which could not be defeated by any subsequent enactment?]

In *Flight v. Reed* (5) it was held by the Court of Exchequer, Martin, B., dissenting, that where bills had been given to secure previous bills, which last when given were in respect of a loan at an interest contrary to the existing usury laws, that the second bills upon repeal of these laws could be enforced; and this case has a close analogy to the present one.

Lucius Kelly, in support of the plea.—There is nothing in the Bankruptcy Repeal Act, 1869, which creates a right to sue on these bills. In *Jones v. Phelps* (6), in a case where the respondent became bankrupt in 1868, and after adjudication gave the appellant, a creditor, bills in respect of this debt, and again, after the passing of the Bankruptcy Act, 1869, gave fresh bills in renewal of those originally given, Bacon, V.C., held that a debtor summons in respect of these new bills was properly dismissed. His Honour was inclined to think that for the purposes of the case s. 164 of the Act of 1861 was not repealed, but he preferred to base his decision on the broader ground, that when a debtor was discharged from a debt by bankruptcy, a promise by him to pay it was a mere *nudum pactum*. With regard to *Flight v. Reed* (5), the Court will remember that an usurious transaction was so far valid, that if the schedule includes the Bankruptcy Act, 1861), are hereby repealed, "but this repeal shall not affect the past operation of any such enactment, or revive any Court, office, jurisdiction, authority, or thing abolished by any such enactments, or affect the validity or invalidity of anything done or suffered before the commencement of this Act, or any right, title, obligation, or liability accrued, or restriction imposed before the commencement of this Act."

(2) 3 Bos. & P. 247.

(3) Cowp. 289.

(4) Ibid. 548.

(5) Hurl. & C. 703; s. c. 32 Law J. Rep. (N.S.) Exch. 265.

(6) 20 Weekly Rep. 92.

creditor chose to destroy his securities, he might recover the amount actually advanced, while here there was no consideration whatever for the bills, as the plaintiff's claim was discharged by the deed of arrangement.

Little, in reply.

COCKBURN, C.J.—I think that the plea is good. The action is on bills of exchange accepted by the debtor in respect of a debt which became due while the Bankruptcy Act, 1861, was in force, and it appears that he entered into a deed of arrangement, the effect of which was to discharge him from his debts in the same manner as if he had obtained a discharge in bankruptcy. Now by section 164 of the Act of 1861 the bankrupt is not liable after an order of discharge in bankruptcy to pay any debt or demand provable under the bankruptcy on any contract made after adjudication. Subsequently the Act of 1861 is repealed, and after this repeal the bills were given. It has been contended before us that in the case of a bankruptcy after the repeal bills of exchange like those in question might be given and sued upon. Upon this point I pronounce no opinion whatever; it will be time enough to decide it when it comes before us. It is quite clear that when the Bankruptcy Repeal Act, 1869, was passed the law imposed a restriction upon the right to sue upon these bills; and it seems to me impossible to suppose that the Legislature intended anything so monstrous and anomalous as to remove this restriction in respect of past transactions, though they may have intended to alter the law with respect to future bankruptcies. And when I look at section 20 of the Act of 1869, I find that the repeal is not to affect the past operation of previous enactments, or any right, title, obligation or liability accrued, or restriction imposed, before the commencement of the Act. I think these words are quite large enough to apply to the present case. Under the old law, the plaintiff could not have sued the debtor in respect of these bills, and I cannot suppose that the Legislature intended to take away this restriction, but have every reason to think that they meant to preserve it.

MELLOR, J.—I am of the same opinion. The effect of section 164 of the Act of 1861 is, that after the order of discharge takes effect the bankrupt is not to be liable to satisfy any demand provable under the bankruptcy, on any contract or promise made after adjudication, and if sued on any such contract, may plead that the cause of action accrued pending proceedings in bankruptcy. It seems, therefore, that the question is, whether a bill of exchange given in respect of such a debt before the Act of 1869, comes within the meaning of the words in section 20, "shall not affect the past operation of any such enactment, or affect the validity or invalidity of anything done or suffered before the commencement of the Act." It seems to me that the transaction is clearly within the words of the saving clause.

HANNEN, J., concurred.

QUAIN, J.—I am of the same opinion. When the Act of 1869 was passed, the law which it repealed prohibited the revival of a debt discharged by a bankruptcy. Having regard to the case of *Surtees v. Ellison* (7), where it was held that a bankruptcy founded upon a trading which had only continued previously to the existing Bankrupt Act, 9 Geo. 4. c. 16, could not be supported, as the trading could not be regarded as if it had continued after the passing of the new Act, I should have been disposed to hold, apart from the express words of the saving clause, that the present Act could not make the position of the parties to the transaction different from that in which they stood before the old Act was repealed. But I agree with my Lord and the rest of the Court that the saving clause expressly prevents this action from being maintained.

Judgment for the defendant.

Attorneys—G. S. & H. Brandon, for plaintiff;
E. D. Lewis, for defendant.

1872. } MACAULEY v. THE FURNESS RAIL-
Nov. 15. } WAY COMPANY.

*Negligence—Agreement by Railway—
Passenger to travel at his own Risk.*

Declaration, that plaintiff was received by the defendants, a railway company, as a passenger to be safely carried on their railway on a journey from Piel Pier to Carlisle, and that the defendants so negligently managed the railway and the traffic upon it, that a collision took place, by which the plaintiff was injured. Plea, that the plaintiff was received as a passenger under an agreement that he should travel at his own risk. Replication, that it was by reason of gross and wilful negligence and mismanagement of the defendants that the collision took place:—Held, that the replication was bad, for the agreement stated in the plea must be taken to include the negligence mentioned in the replication.

Declaration. First count—That the plaintiff became and was received by the defendants as a passenger to be safely and securely carried upon a railway of the defendants on a journey from Piel Pier to Carlisle for reward to the defendants. Yet the defendants did not safely and securely carry the plaintiff upon the said railway on the said journey, and so negligently and unskilfully conducted themselves in relation thereto, and in managing the railway and the traffic thereon, that a locomotive engine and tender there being on the railway, ran into and came into collision with the train of carriages in one of which the plaintiff was such passenger, and the plaintiff was thereby greatly shaken, bruised and otherwise injured, &c.

Third plea to the first count—That the defendants received the plaintiff to be carried under a free pass from Piel Pier to Carlisle as a drover, accompanying cattle, which the defendants had contracted to carry from Piel Pier to Carlisle under an agreement, whereby it was provided that any drover accompanying the cattle during the transit from Piel Pier aforesaid to Carlisle should travel at his own risk, and the plaintiff did not become nor was received by the defendants to be by them carried on any other terms, and whilst the defendants were carrying

the cattle, and whilst the plaintiff was accompanying the cattle during the transit, the defendants committed the causes of action in the first count mentioned.

Replication to the defendants' third plea that it was by, and by reason of gross and wilful negligence and mismanagement of the defendants, in and in relation to the matters in the first count mentioned, that the alleged grievances therein mentioned were committed by the defendants.

Demurrer and joinder in demurrer.

Crompton, in support of the demurrer.—The question turns entirely upon the construction of the notice or agreement stated in the plea, and this notice is so worded as to exempt the company from responsibility, even though their servants may have been guilty of gross negligence. The plaintiff is carried gratuitously, and chooses to enter into a contract which takes away his right to maintain this action. The question has been practically decided in several cases. In Carr v. The Lancashire and Yorkshire Railway Company (1), the railway company at the time they received a horse from the plaintiff gave him a ticket which stated that they would not be responsible for any injury or damage, however caused, occurring to live stock travelling upon their railway. It was proved that the plaintiff's horse while in the custody of the defendants was injured through gross negligence on their part. It was held that upon the true construction of the notice the defendants were not responsible for the loss, although occasioned by their negligence. Austin v. The Manchester, Sheffield and Lincolnshire Railway (2), is to the same effect, the Court there, as in the former case, laying stress on the words damage however caused, which was in the notice, and holding that proof of gross negligence did not take the case out of the exemption. In Hinton v. Dibbin (3), where a parcel was handed to a carrier without a declaration of the

(1) 7 Exch. Rep. 707; s. c. 21 Law J. Rep. (N.S.) Exch. 261.

(2) 10 Com. B. Rep. 454; s. c. 21 Law J. Rep. (N.S.) C.P. 179.

(3) 2 Q.B. Rep. 646; s. c. 11 Law J. Rep. (N.S.) Q.B. 113.

nature and value of the goods under the Carriers Act, and it was alleged that the goods were lost by the gross negligence of the carriers, the Court in an elaborate judgment held that this did not make the carrier liable. The principle of these cases is applicable to the facts now before the Court.

Butt (*Murphy* with him), in support of the replication.—The question raised in the present case is simply whether there is not a distinction between ordinary and extraordinary negligence. The agreement only protects the company from the consequences of an accident which might with care have been avoided, but it leaves them liable for the result of gross and outrageous negligence. In *Phillips v. Clark* (4), where goods were carried under a bill of lading which stipulated that the shipowner should not be liable for leakage and breakage, it was held that he remained liable for leakage and breakage caused by his own negligence or by that of his servants.

[BLACKBURN, J.—In *McManus v. The Lancashire and Yorkshire Railway Company* (5), it was held that a condition by which the company were not to be responsible for any injury or damage (however caused) to live stock while travelling upon the railway was unreasonable, as it professed to protect the defendants from all loss, though occasioned by their own misconduct. This seems to assume that the agreement does not bear the construction you seek to put upon it, and on the carriage of passengers you cannot, of course, object that the condition is unreasonable. Why should not the company be at liberty to say, "We will not be liable whether our servant has been lazy or has only made a mistake."]

There is a difference between an accident from a mere oversight, and one arising from a perverse disregard of the ordinary course of traffic.

COCKBURN, C.J.—I am of opinion that the plea is good and the replication bad. It appears from the plea that the plaintiff

(4) 2 Com. B. Rep. N.S. 156; s. c. 26 Law J. Rep. (N.S.) C.P. 167.

(5) 4 Hurl. & N. 327; s. c. 28 Law J. Rep. (N.S.) Exch. 353.

had a free pass, and was carried under an agreement, in which it was provided that he should travel at his own risk, and I think that such an agreement must have been intended to exclude everything to which the company would ordinarily be liable as carriers of passengers. Now I cannot think of anything for which the company would be liable with regard to the plaintiff except negligence. There would, under ordinary circumstances, be an obligation to use due care in carrying the plaintiff. This obligation is excluded by the express terms of the bargain, and consequently there is a good defence to the action.

BLACKBURN, J.—I am of the same opinion. The duty of the defendants as carriers of passengers is to take reasonable care that such passengers shall not be exposed to danger during their journey. If through the want of due care the passenger is killed or injured, the carrier is liable to make compensation, and may even be made criminally responsible. An agreement that the passenger should be carried at his own risk would not take away the carrier's liability to a criminal prosecution. No such agreement could be set up as a defence to an indictment, but there is nothing to prevent it from being pleaded in a civil action. In the present case the agreement substantially amounts to this, that the passenger should be carried at his own risk, and that so far as he is concerned he shall not be at liberty to bring an action for damages against the company. What is meant by the expression "wilful negligence" in the replication I do not know, but I feel convinced that it is included under the terms of the agreement.

MELLOR, J.—I am of the same opinion. The plaintiff appears to have been received as a passenger under unusual circumstances, for he had a free pass, and in consideration of it agreed to be carried at his own risk. This contract clearly exempts the company from all ordinary liability; and although I do not doubt that there may be degrees of negligence, I think that the exemption is applicable to everyone of them.

QUAIN, J.—I am of the same opinion. The action is founded upon negligence,

without which the company, who are not insurers, could not be made liable. But it appears that there was a contract by which they were expressly protected from any such liability. The question is, whether the statement in the replication takes the case out of the contract. I cannot think that it does; the negligence mentioned in the replication is the very thing for which the defendants stipulated that they should not be responsible, and the word "wilful" does not carry the case any further, especially when we consider that a master is not liable for the wilful acts of his servants.

Judgment for the defendants.

Attorneys—Johnston & Mounsey, for plaintiff;
Sharp & Ullithorne, for defendant.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

1872. } MAY v. THE GREAT WESTERN
Nov. 26. } RAILWAY COMPANY.

Lands Clauses Consolidation Act, 1845
(8 & 9 Vict. c. 18), s. 127—*Superfluous*
Land unsold; Property in—Owners of
Lands adjoining.

By the *Lands Clauses Consolidation Act, 1845*, "with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof," it is enacted by section 127 that, "within the prescribed period, or, if no period be prescribed, within ten years after the expiration of the time limited for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase money arising from such sales to the purposes of the special Act; and, in default thereof, all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

The *B. & H. Railway Company* was incorporated for the purpose of making a railway which was to be completed on or before the 30th of June, 1850. The rights

and powers of the *B. & H. Company* became vested in the defendants in the year 1846. The plans and books of reference deposited with the clerk of the peace included a field in the parish of B., the property of M. and others. With the exception of a narrow strip on the north side, the whole field was included within the limit of deviation delineated on the plan. By a notice of the 11th of March, 1846, the owners were required to treat with the defendants for the purchase of part of the field, and the value was settled by arbitration. By a notice of the 5th of November, 1846, the owners were required to treat with the defendants for the purchase of the remainder, the value being subsequently agreed upon. The whole field was conveyed to the defendants in fee simple by indenture of the 12th of May, 1847. The defendants took possession, and on a portion of the field, viz., 5a. Or. 33p. to the south, constructed a portion of their line and a station and other works connected therewith; upon part of the remainder they deposited chalk and other spoil, which, in making the railway, was excavated from a cutting near the said field, and in order to provide, and for the purpose of providing a place for depositing the chalk and spoil from the said cutting, the company purchased the whole of the said field, instead of purchasing a portion only. The chalk and spoil were deposited and remain upon part of the field to the depth of from one to eight or nine feet, the defendants allowing certain persons to use it, and receiving rent from such persons.

By a special Act obtained by the defendants in the year 1861, it was provided that the time limited "for the sale of superfluous lands belonging to and vested in the company within the several parishes enumerated in the schedule to this Act annexed, shall be and the same are hereby extended to the further period of seven years from the passing of this Act."

By another special Act obtained by the defendants in the year 1868, it was provided that "the company may, notwithstanding anything to the contrary in the *Lands Clauses Consolidation Act, 1845*, or in any Act relating to the company, &c., retain and hold any lands belonging to them in the parishes enumerated in schedule A to

this Act, and which have not yet been applied to the purposes of the company for the period of ten years after the passing of this Act," &c.

The above named parish of B., in which the said field was situate, was one of the parishes enumerated in the respective schedules to the above mentioned Acts.

The land to the north having become the property of the plaintiff, he, on the 10th of June, 1869, commenced an action of ejectment to recover from the defendants the portion of the field to which his land adjoined. There being no prescribed period within which the defendants were bound to sell "superfluous" lands, the period of ten years mentioned in section 127 would apply:—

Held, by KELLY, C.B., KEATING, J., and BRETT, J., affirming the judgment of the Court of Queen's Bench (*dissentientibus* MARTIN, B., and BYLES, J.), that the plaintiff was entitled to recover.

This was error upon a Special Case stated for the opinion of the Court of Queen's Bench. The Special Case may be found at length in the report of the case when in the Court below—see 41 Law J. Rep. (N.S.) Q.B. 104, where also the plan referred to is copied. The judgment of Martin, B., so fully states the circumstances, that it is not necessary to set them out here.

Manisty (*Raymond* with him) argued on behalf of the defendants (the plaintiffs in error). He referred to the several Acts of Parliament specified in the Special Case—to the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), to *The City of Glasgow Union Railway Company v. The Caledonian Railway Company* (1), *Moody v. Corbett* (2), *Malins v. Freeman* (3) and *Molton v. Camroux* (4).

(1) Law Rep. 2 Scotch App. 160.

(2) 5 B. & S. 859, in error; 7 B. & S. 544; s. c. 34 Law J. Rep. (N.S.) Q.B. 166, in error; 35 Law J. Rep. (N.S.) Q.B. 161; s. c. Law Rep. 1 Q.B. 510.

(3) 4 Bing. N.C. 395; s. c. 7 Law J. Rep. (N.S.) C.P. 212.

(4) 4 Exch. Rep. 17; s. c. 18 Law J. Rep. (N.S.) Exch. 256.

Pinder (*H. T. Cole* with him), argued on behalf of the plaintiff (the defendant in error).—He referred to the several statutes and to *Doe d. Armistead v. The North Staffordshire Railway Company* (5), *Doe d. Payne v. The Bristol and Exeter Railway Company* (6), *Lord Carington v. The Wycombe Railway Company* (7), *Earl Beauchamp v. The Great Western Railway Company* (8), *Rangeley v. The Midland Railway Company* (9), *Lund v. The Midland Railway Company* (10), *Townson v. Tickell* (11), and to *Moody v. Corbett* (2).

Manisty replied.

Cur. adv. vult.

There being a difference of opinion, the following judgments were delivered on Nov. 26—

MARTIN, B.—The facts of this case are these. In the year 1845 a railway company was created called the Berks and Hants Railway Company. In the year 1846 the interest of this company was transferred to and vested in the defendants. There was a field containing 15a. Or. 33p., which was then the property of Jane May, John Simmonds and Charles Simmonds; the whole of this field was included in the plan and book of reference, but the whole was not included within the limit of deviation delineated on the plan. There was a narrow strip on the northern side of the field beyond the line indicating the limit of deviation. By a notice of the 11th of March, 1846, Jane May and the other two owners were required to treat with the defendants for a purchase of the field towards the south, viz., 3a. 1r. 4p., and the value of this portion was settled by an arbitrator at 571l. 7s. By a further notice of the 5th of November, 1846, Jane May and the other two owners were required by the defend-

(5) 16 Q.B. Rep. 526; s. c. 20 Law J. Rep. (N.S.) Q.B. 249.

(6) 6 Mee. & W. 320; s. c. 9 Law J. Rep. (N.S.) Exch. 232.

(7) 37 Law J. Rep. (N.S.) Chanc. 213; s. c. Law Rep. 3 Chanc. App. 377.

(8) 38 Law J. Rep. (N.S.) Chanc. 162; s. c. Law Rep. 3 Chanc. App. 745.

(9) 37 Law J. Rep. (N.S.) Chanc. 313; s. c. Law Rep. 3 Chanc. App. 306.

(10) 34 Law J. Rep. (N.S.) Chanc. 276.

(11) 3 B. & Ald. 31.

ants to treat with them for the remainder of the field, and its value was subsequently agreed on at 1,768*l*. In both notices it was stated that the land was required for the purposes of the Berks and Hants Railway. By indenture of the 12th of May, 1847, Jane May and the other two owners conveyed the whole field to the defendants in fee simple. Upon the completion of the purchase, the defendants took possession of the field, and upon a portion of it, viz., 5a. Or. 33p. towards the south, constructed a portion of their line and a station and other works connected with the railway, and upon much the larger part of the remainder deposited chalk and spoil which, in making the railway, were excavated from a cutting near the field, for the purpose of which deposit, the defendants had purchased the whole of the field instead of a portion only. The plan shows the extent of the field covered by the spoil and the extent uncovered. The depth of the spoil varies from one foot to eight or nine feet, and since the completion of the railway, the surface has been used for growing vegetables, for which rent has been paid to the defendants and their servants. The time for the completion of the railway expired on the 30th of June, 1850. On that day the land adjoining to the north was the property of the plaintiff. The ejectment was brought on the 10th of June, 1869, and the plaintiff claims to recover, under the 127th section of the Lands Clauses Act, 8 & 9 Vict. c. 18, the space shewn on the plan G B F H as superfluous land, being the space covered by the spoil and the small space uncovered. The defendants contend, first, that the land is not superfluous land, that it was and is required for the purposes of the undertaking, viz., the deposit of the spoil. Secondly, that the strip of land M to N on the plan was not acquired by the defendants compulsorily under the provisions of the Act, but voluntarily by agreement, and that the only land subject to the 127th section is the land south of the line M N, and that the property in the land adjoining thereto on the north was not in the plaintiff but in the defendants themselves as owners of the strip north of the line M N. Thirdly, that by virtue of the provisions of two Acts of Par-

liament 24 & 25 Vict. c. cciv. s. 41, which received the Royal assent 1st of August, 1861, and 31 & 32 Vict. c. c. s. 20 (Royal assent 13th of July, 1868), the defendants are entitled to the land in dispute. With respect to this last point, if the contest of the plaintiff be in other respects right, then by virtue of the 127th section of the Lands Clauses Act, the superfluous land vested in and became the property of the plaintiff on the 30th of June, 1860. The enactment is absolute; there is nothing said about taking possession of the land. The 41st section, above referred to, enacts that the period for the sale of superfluous land now belonging to and vested in the defendants shall be extended for a further period of seven years from the 1st of August, 1861. The plaintiffs seem to have two answers to this contention. First, the seven years had expired before the action was commenced; and, secondly, the land did not, at the time of the passing of the Act, belong to nor was vested in the defendants, because, if the contention of the plaintiff be in other respects right, it was vested in and had become the property of the plaintiff by virtue of the 127th section on the 30th of June, 1850. The enactment in the second Act is that the defendants may retain and hold any lands belonging to them for the period of ten years, from the 13th of July, 1868; but, if the plaintiff be otherwise right, the land in question did not belong to them on the 13th of July, 1868; on the contrary, it belonged to the plaintiff. It, therefore, seems to me that the defendants fail as to this contention. *Moody v. Corbet* (2) is an authority to this effect.

By the 8 & 9 Vict. c. 20 (The Railway Clauses Consolidation Act, 1845), the company are authorised to take, compulsorily, the land within the limits of deviation; and by section 45, in addition to the lands authorised to be compulsorily taken, it was lawful for them to contract with any party willing to sell, for the purchase of land adjoining or near to the railway, not exceeding a certain prescribed quantity, for, amongst other purposes, any purpose which may be requisite or convenient for the formation or use of the railway. The case of *The City of Glasgow*

Union Railway Company v. The Caledonian Railway Company (1) has conclusively determined that, in order to let in the operation of the 127th section, the lands adjoining, which confer upon its owners the property in the superfluous land, must be adjoining to lands compulsorily taken, and that the section does not apply when the lands in respect of which the right is claimed adjoin lands taken by contract or agreement, and, as already said, the contention of the defendants is, first, that the adjoining land, in respect of which the plaintiff claims, does not adjoin upon land compulsorily taken, but upon land acquired by contract. There was no compulsory power under which the strip of land M N could be taken; it could only be taken by reason of the owner of it being willing to sell it. From M to N southward could have been compulsorily taken, and the owners of land adjoining to the north of the line would be within the 127th section, but the defendants themselves, and not the plaintiff, were the owners of this adjoining land. The answer of the plaintiff was that the defendants had estopped themselves from saying that the whole piece of land was not taken compulsorily, because they had dealt with the land under a notice to treat. In my opinion this is not an estoppel, and the question depends upon the true facts. I think the plaintiff has failed to bring himself within the 127th section.

It was further contended that the land was not "superfluous land." The sections relating to superfluous land are introduced by a general heading, "With respect to lands acquired by the promoters of the undertaking, which shall not be required for the purposes thereof." These are the lands which the legislature speaks of as "such superfluous lands." Now lands not required for the purposes of the undertaking must mean lands acquired, and either *never* required, or which having been at one time required, are so no longer for those purposes. There can be no other. The land acquired and sought to be recovered in this ejectment certainly was at one time required for the purposes of the undertaking—*Lund v. The Midland Railway Company* (10);

NEW SERIES, 42.—Q.B.

Earl Beauchamp v. The Great Western Railway Company (8).

Is it so no longer, has it ceased to be so? It seems to me not, for it is still put to the purposes for which it was acquired, viz., the holding of the spoil. The only way this argument can be met is to say, that the spoil has become part of the land, and that, therefore, the land now serves no "purpose," and, therefore, is not required, and is superfluous. Now if the chalk put on it had sublimated or sunk through the land into the bowels of the earth, this would be true. But it has not gone from the surface. It is there, though it has been levelled and treated as land to some extent. If, instead of chalk spoil, old brick ends or clinkers or other things, which would grow nothing, had been put there, the plaintiff's argument could not be used. So also, if the chalk had been on in shapes so irregular that it could not be used. Suppose the company took any of the spoil, could it be said they had opened a chalk pit, or that they were removing some of the soil and were trespassers? In truth, the land is under the spoil still. The chalk is not part of the land. Nobody describing the place would say chalk was the surface of the land; he would say there was the surface-soil with chalk on it. But there are to my mind arguments to the contrary of this argument to be found in the Act of Parliament. By section 127, the "lands" are to be sold; by section 128, the "lands" are to be offered to certain persons. Suppose there was such a sale, would not the purchaser have a right to call for the removal of this spoil? Would he not be at liberty to say, "This is no part of the lands"? "The lands you are to sell are the lands you bought." Further, the promoters are to sell within the prescribed period, or ten years after the expiration of the time limited for the completion of the works. This furnishes two arguments; a general one and a particular. The general one is this. It supposes that the superfluousness of the lands will be apparent within the time limited, or the ten years. It supposes, therefore, that the lands are such as have never been required, or required for temporary purposes. To these alone is it applicable. For suppose a

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station house was built on land, and remained for the ten years and more, and then the station was moved, and the house pulled down, and the land on it became superfluous in fact. It is clear that would not be within the statute. Neither is this case, for the purpose for which the land was taken and used is and was permanent. The special argument it furnishes is this. The lands must become superfluous within ten years. By the plaintiff's argument this became "superfluous" only when it ceased to exist as something on the land by becoming *part* of the land. When was that? If not within the ten years, it is not within the statute, and where is the evidence to shew it was within the ten years?

BYLES, J., concurred with this judgment.

KELLY, C.B.—The plaintiff claims in this action a quantity of land, about four acres, part of a field formerly of ten acres, as "superfluous land," or land not required for the purpose of the defendants' railway; and the action is resisted by the defendants on the ground that the land was and is required for the purposes of the Act of Parliament, or in other words for the purpose of the railway. The 127th section of the Lands Clauses Consolidation Act provides that all such superfluous lands, if not sold within ten years of the completion of the works, shall vest in, and belong to, the proprietors of the adjoining lands. In this case, the period of ten years has elapsed and the land has vested in the plaintiff, if it was superfluous land within the statute. Of the ten acres, about five acres have been used for the purposes of the railway, a portion of the railway and of the station having been constructed upon it. Of the remainder, a considerable portion was originally used as a place of deposit for a quantity of spoil resulting from an excavation made in order to form a cutting. But this operation and the deposit altogether ceased before, or almost immediately after, the completion of the railway, in June, 1850. And from that time, and after the expiration of the ten years, in 1860, the spoil deposited consisting principally of chalk, and which had become incorporated with the earth, remained unapplied to the purposes of the

railway, or to any purpose whatever connected with the undertaking; and the land has been let by persons in the employ of the railway company, and with their permission, as garden-ground, or as arable or pasture land, at rents of from twenty to thirty shillings an acre. Indeed, during the last few years, the land has been thus let by the defendants themselves. Under these circumstances it has been contended on the part of the defendants, that the land having been once applied to the purposes of the Act, by the deposit of the spoil upon it, cannot afterwards become "superfluous" land or land not required for such purposes. And further, that having been used as a place of permanent deposit for the spoil, after the temporary act of deposit had ceased, this use of the land is a permanent application of it to the purposes of the Act.

In addition to the grounds upon which the judges of the Court below have held that this land became "superfluous" land, and no longer required for the purposes of the Act, whenever the deposit had ceased, I may observe that the question turns entirely upon the distinction between lands which, though required for purposes of the Act, are so required for temporary purposes only, and such as are required and used for a permanent purpose. No doubt the land was so required as long as the temporary act of depositing continued; and if the company had thought fit to remove and dispose of the spoil, it would still have been so required for some time longer, and until it should have been all removed. But when removed, or having been thrown upon the land without any intention to remove it, it has become part of the soil, the land ceased to be applied to any of the purposes of the railway, and, I think, became "superfluous" land within the statute. It cannot be said that it was one of the purposes of the Act to preserve upon the land a quantity of spoil perfectly useless, and which never had been and was never intended to be applied to any purpose connected in the remotest degree with the business of the railway. When, therefore, the deposit ceased, and there existed no intention of removing the spoil,

I agree with the Court below that the land being no longer required for the purposes of the Act became "superfluous land" within the meaning of the 127th section. If, indeed, it were one of the purposes of the Act to keep a quantity of spoil upon the land for ever, without any use being made either of the spoil or of the land, the case would be otherwise. But the proposition seems to me self-contradictory, when correctly stated, that a piece of land of some few acres in extent is required for the purposes of an Act of Parliament because it contains a quantity of spoil upon its surface; the railway company having no occasion for the purposes of the railway to take or use the smallest portion of the spoil or a single foot of the land of which it has become a part.

The case has been put of a house built upon land for the residence of a station-master. But this no doubt is a permanent and legitimate purpose, and land so used is as much applied to the purposes of the Act as the land upon which the station itself is built, or the railway itself constructed. And when it is asked, Suppose the station-master to be otherwise provided for, or the station itself to be disused, so that the land would be no longer required for the purposes of the Act, would the case come within the 127th section? The answer is that it would not, for although it is undoubtedly contrary to the policy of these Acts of Parliament, that land which becomes useless for the purposes of the railway, at whatever time such may be its condition, that it should nevertheless be retained and applied to other purposes unconnected with the railway and for the profit of the company; yet such a case may, and often does, occur long after the expiration of ten years from the completion of a railway, and neither the 127th section nor any other provision of the general Acts of Parliament has provided for such a case. But where land is purchased generally for the purposes of the Act, and though so used and applied, is used and applied for a temporary purpose only, which ceases before or a short time after the completion of the railway, it seems to me liable to be dealt with in the same way as

if, although purchased for the purposes of the Act, it had never been so used or applied at all. Upon the literal construction of the Act then, it would seem that when the deposit of the spoil had ceased, and the land had, therefore, ceased to be required for the purposes of the Act, the case at once came strictly within the express terms of the 127th section.

But we must consider whether it is not within the real and actual intention of the Legislature. The object was, that railway companies should be confined in the property they are permitted to purchase, as well as in their dealings and traffic, to the means and the powers and authorities necessary to the carrying on of the business of their railways. They may purchase and hold lands for the purpose of constructing upon them railways, and stations, and bridges, and other necessary buildings and works. But they may not either purchase or hold land to let it out for profit, as arable or pasture or garden grounds, whether to their own officers, or servants, or others. If, therefore, in this case it were permitted as soon as the construction of the railway, and the excavation and deposit of the spoil in question were complete, to hold the ten acres of land, and let it as arable, or pasture, or garden ground, at substantial rents to be received for their own use and profit, the provisions of the 127th section of the Act, and the policy of all the railway Acts that have ever been passed in this country would be at once defeated.

But it is also contended that by the special Acts of 1861 and 1868, the time for the sale of "superfluous" lands by the company has been enlarged, and the title of the plaintiff, if he had acquired a title, was divested, and the land restored to the defendants. If the enlarging clauses of these Acts applied only to the railway in question, the argument might be urged that it must govern the case of all superfluous lands acquired under the Act for that railway, inasmuch as the ten years allowed by the 127th section having already expired, if the above clauses did not apply to these lands, they would be nugatory and useless, and would have no application at all. Though even in this case I should have thought that the words,

"belonging to the company," would have saved the right of the adjoining proprietors in whom the lands had already vested, and to whom they belonged, seeing that the Act, alleged to take away their rights, was a private Act, obtained furtively and behind the backs of the parties interested against it by a trading company for their own benefit; and as annihilating vested rights, it ought to be construed most strictly against the promoters. But when we look to the general enactments of the Acts of 1861 and 1868, and the schedules, and the language of these two clauses themselves, we find that they apply to nearly, if not entirely, the whole of the Acts, and the whole of the railways belonging to the Great Western Railway Company; and among which there are many where the period of ten years had not elapsed since the completion of the railways, and consequently where the superfluous lands still belonged to the company. And I cannot bring myself to entertain a doubt that it was to the superfluous lands acquired under these Acts, and to these only, and which still belonged to the company, and had never passed to the adjoining proprietors, that the clauses applied, enlarging the time for the sale of such lands for the term provided beyond whatever remained of the ten years, limited by the 127th section.

It has also been urged against the plaintiff, upon the authority of *The City of Glasgow Union Railway Company v. The Caledonian Railway Company* (1), that the land in question has been purchased by agreement, and not under the provisions of the Companies Act, and therefore cannot become "superfluous" land within the meaning of the 127th section. It is true that where land has been purchased by a railway company for extraordinary purposes, and under a voluntary agreement, it is not within that section, which applies only to lands acquired under the provisions of the railway Act. But this land was not acquired for extraordinary purposes, or under a voluntary agreement, but strictly under the provisions of the Act. The answer given to this argument by Blackburn, J., is conclusive: he refers to section 16 of

the Act for making this railway (8 & 9 Vict. c. 40), which enables the company "to enter upon, take and use such of the said lands as shall be necessary for such purposes," the "said lands" being the land described in the plans deposited under the Act, and which comprises the whole of the lands in question. This land was purchased upon notices duly given, accepted, and acted upon, and under a conveyance made pursuant to those notices and to the above sections. They are not, therefore, lands purchased for extraordinary purposes, or under a voluntary agreement, and so not within the case of *The City of Glasgow Union Railway Company v. The Caledonian Railway Company* (1).

Upon these grounds, I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed, and in this opinion my brothers Keating and Brett concur.

Judgment affirmed.

NOTE.—Willes, J., was one of the members of the Court before whom the case was argued, but he died before judgment was given.

Attorneys—Young, Maples & Co., for plaintiffs in error; Johnson & Weatherall, agents for Lamb & Brooks, Basingstoke, for defendants in error.

1872. }
Nov. 16. } THE QUEEN v. TOMLINSON.

Amendment—Order of Justices—Certiorari—12 & 13 Vict. c. 45. s. 7—Bastardy.

A bastard child having been born on the 27th of May, 1870, the mother applied on the 11th of August to M., a justice, who issued a summons against T., the alleged father. Several successive summonses were issued, and in March, 1871, T. was served with a summons to appear before the justices on the 11th of April. The mother and T. attended, but the mother withdrew the summons and on the same day applied to B., another justice, who issued a summons requiring T. to appear on the 25th of April. On that day an order was made, which recited the application to M., adjudged T. to be the father of the child, and ordered him

to pay 2s. 6d. per week, commencing from the 11th of August, 1870, the day on which the mother applied to M.:—Held, that the 7th section of 12 & 13 Vict. c. 45 gave the Court no power to amend this invalid order, by alleging the application to B. instead of the application to M., or by making the payments to begin from the 11th of April, 1871, instead of from the 11th of August, 1870.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. p. 1.]

1872. { THE SUNDERLAND LOCAL MARINE
Dec. 6. { BOARD v. FRANKLAND,—OLIVER
AND ANOTHER, *Garnishees*.

Attachment of Debt—Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, ss. 60, 61—Garnishee Order—Judgment Creditor—Rule of Court—1 & 2 Vict. c. 110. s. 18.

After a rule has been discharged with costs, the person in whose favour the rule has been discharged cannot obtain a garnishee order under the Common Law Procedure Act, 1854, ss. 60, 61; the Act 1 & 2 Vict. c. 110. s. 18, giving to rules of the Courts of Common Law the effect of judgments for the purposes of the Act, but not actually making them judgments.

This was a rule to rescind an order at Judge's Chambers by which Master Unthank set aside an order *nisi* attaching debts under the Common Law Procedure Act, 1854, s. 61 (1).

(1) By 1 & 2 Vict. c. 110. s. 18 — "All decrees and orders of Courts of Equity, and all rules of Courts of Common Law, &c., whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the Superior Courts of Common Law, and the persons to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this Act; and all powers hereby given to the judges of the Superior Courts of Common Law with respect to matters depending in the same Courts shall and may be exercised by Courts of Equity with respect to matters therein depending; and all remedies hereby given to judgment creditors are in like manner given to persons to whom

It appeared from the affidavits that Frankland, the judgment debtor, had obtained in this Court a rule *nisi* for the Sunderland Marine Board to shew cause why a *certiorari* should not issue to bring up an order by the board cancelling Frankland's certificate as a master mariner, and that this rule after argument was discharged with costs. The costs were afterwards taxed to the board at 55l. 5s. 8d.; and they having ascertained that Messrs. Oliver and Botterill, who had previously acted as attorneys to the judgment debtor, were indebted to him for money received on his account, obtained the order *nisi* above stated, which was subsequently set aside by Master Unthank on the ground that the Board had not obtained a judgment in one of the Superior Courts within the meaning of the Common Law Procedure Act, 1854, s. 60.

Upon appeal to Lush, J., the learned Judge referred the application to the Court.

Littler (on Nov. 25th) shewed cause.

Clay supported the rule.

The arguments are fully stated in the judgment of the Court.

Cur. adv. vult.

any moneys or costs, charges or expenses are by such orders or rules respectively directed to be paid."

By the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 60 — "It shall be lawful for any creditor who has obtained a judgment in any of the Superior Courts to apply to the Court or a judge for a rule or order, that the judgment debtor should be orally examined as to any and what debts are owing to him before a Master of the Court. . . ."

By section 61 — "It shall be lawful for a Judge, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavits by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt; and that by the same or any subsequent order it may be ordered that the garnishee shall appear before the Judge or a Master of the Court as such judge shall appoint, to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt."

The judgment of the Court (2) was (on December 6) delivered by—

ARCHIBALD, J.—This is a rule, calling upon Messrs. Oliver & Botterill (the garnishees) to shew cause why an order of Master Unthank, of the 8th of November last, should not be rescinded.

It appeared that the debt from Frankland to the Sunderland Local Marine Board was due upon an allocatur on a rule of this Court (for the sum of 55*l.* 5*s.* 8*d.*), for costs on a rule by Frankland against the Board, which had been discharged with costs. By the order impugned the Master declined to attach debts due from the garnishees to Frankland, on the ground that the case was not within section 61 of the Common Law Procedure Act, 1854; and the question is whether a rule of Court for the payment of money can be considered a judgment within the meaning and for the purposes of those sections of the Common Law Procedure Act, 1854, which relate to attachment of debts.

The question depends upon the effect to be attributed to the provisions of 1 & 2 Vict. c. 110. s. 18, in connexion with those of ss. 60 and 61 of the Common Law Procedure Act, 1854.

It was contended on shewing cause that a rule of one of the superior Courts of Common Law for payment of costs was not a judgment within the meaning of ss. 60 and 61 of the Common Law Procedure Act, 1854, but had merely the effect of a judgment, for the purpose of the remedies given by 1 & 2 Vict. c. 110; and in support of this contention reference was made to a decision of the Court of Common Pleas, in the case of *The Financial Corporation (judgment creditors); Price (judgment debtor); The China Steam Ship and The Labuan Coal Company Limited (garnishees)* (more shortly described as *Re Price*) (3), in which that Court declined to treat a decree of the Court of Chancery, ordering the payment of money, as a judgment within the meaning of the Common Law Procedure Act for the purpose of a garnishment order.

On the other hand it was argued in sup-

port of the rule, that inasmuch as section 18 of 1 & 2 Vict. c. 110 provides that "all rules of Courts of Common Law, whereby any sums of money or any costs, charges, or expenses shall be payable to any person shall have the effect of *judgments* in the superior Courts of Common Law, and the persons to whom any such moneys, or costs, charges, and expenses shall be payable, shall be deemed judgment creditors within the meaning of that Act," such a rule must for the purposes of the attachment clauses of the Common Law Procedure Act, 1854, be regarded in the same light as a judgment in an action, and as answering to the description in s. 60 (embodied in the subsequent sections) of a judgment obtained by a creditor in one of the superior Courts.

In support of this contention the case of *Hartley v. Shemwell* (4), decided by this Court in Easter Term, 1861, was cited. In that case an order was made at Chambers by Bramwell, B., to attach debts due "from third parties towards payment of money directed to be paid by a Judge's order." An application for a rule to set aside that order was refused, but the point whether or not an order for payment of money is tantamount to a judgment for the purpose of a garnishment order (though involved in the decision) does not appear to have been put prominently forward, the judgment of the Court proceeding mainly on a different ground.

The facts of that case were that Hartley having obtained a judgment against Shemwell, a writ of *fi. fa.* was issued, under which the sheriff had levied on Shemwell's goods; a claim to the goods was thereupon made by one Marples, between whom and Hartley an interpleader issue was directed, in which Marples was successful. Afterwards a *ca. sa.* was sued out by Hartley on his judgment against Shemwell, under which the latter was arrested. After the verdict on the interpleader issue, Marples obtained an order for payment by Hartley of the costs of the trial, and it was in respect of this order, and whilst Shemwell was still in custody under the *ca. sa.*, that the order of Bramwell, B., was made, by

(2) Blackburn, J.; Mellor, J.; and Archibald, J.

(3) Law Rep. 4 C.P. 155.

(4) 1 B. & S. 1; s.c. 30 Law J. Rep. (N.S.) Q.B. 223.

which it was directed that the judgment debt recovered by Hartley against Shemwell, should be attached to answer the costs of the interpleader trial. In pursuance of this order the amount of the judgment debt was paid by Shemwell to Marples, and a further order was thereupon made by Bramwell, B., for the discharge of Shemwell out of custody. Under these circumstances an application was made to this Court to rescind the orders of Bramwell, B., and for leave to issue a new writ of *ca. sa.* against Shemwell, in satisfaction of the judgment debt; and the main contention was that, as Shemwell was at the date of the garnishment order under arrest on the *ca. sa.* issued on the judgment in *Hartley v. Shemwell*, so that Hartley had lost his right to issue a *fi. fa.*, no garnishment order (such an order being in the nature of a statutory execution) could be made. The Court, however, declined to adopt that view and refused a rule, considering that the arrest of the garnishee was no extinguishment of the debt, and that it still remained liable to attachment. The reasons for the judgment are not given, and but for an observation of Crompton, J., in the course of the argument, that he thought the order for payment of the costs of the interpleader issue had the effect of a judgment, it might almost be doubted whether the question to what extent such an order could be regarded as a judgment had been raised or brought to the attention of the Court. It is to be observed further that the order in that case was under the 7th section of the 1 & 2 Will. 4. c. 58, the language of which differs to some extent from that of the 1 & 2 Vict. c. 110. s. 18.

That case, therefore, can hardly be treated as a clear or positive decision with reference to the point now under consideration.

It was cited in the course of the argument in *Re Price* (3), as an authority for the proposition that a party who has obtained a rule for the payment of costs is a judgment creditor within sections 60 and 61 of the Common Law Procedure Act, 1854; but in giving judgment in that case, Byles, J., remarks that, as the remedy for the attachment of debts in

the hands of third persons, did not exist at the time of the passing of 1 & 2 Vict. c. 110, it could not have been contemplated by section 18 of that Act. The majority, however, of the Court of Common Pleas appear to have decided the case on the ground that many of the provisions of the garnishment clauses are clearly inapplicable to the decrees of the Court of Chancery; and no special reference was made to the question how far they were in other respects to be treated as judgments.

In this state of the authorities, it now becomes necessary to decide the point raised in the present case, viz., whether it was intended to include rules of the superior Courts of Common Law for the payment of money within the description of judgments given in sections 60 and 61 of the Common Law Procedure Act, 1854, and we are of opinion that it was not.

We think the observations of Byles, J., already referred to, that the remedy by attachment of debts not having existed at the time of the passing of 1 & 2 Vict. c. 110, could not have been contemplated by s. 18, are much in point; and from the language of that section, when examined, there can be little doubt that its only object was to extend to rules for payment of money the remedies given by that Act in respect of judgments, but not to constitute them judgments for any other purpose. The language of the section, so far as material, is, that such rules "shall have the effect of judgments of the superior Courts of Common Law, and that the persons to whom any such moneys shall be payable shall be deemed judgment creditors within the meaning of this Act." And the section then proceeds to give them all the remedies thereby given to judgment creditors. The words are, not that such rules shall be or be deemed to be judgments, but merely that they shall have the effect of judgments within the meaning of that Act, and for the purpose of the remedies thereby given to judgment creditors. The concluding words of sec. 18, taken in connection with the provisions of sec. 20, render it clear that the intention of the Legislature was to give a remedy in the Court of Chancery to orders and decrees of that Court,

and not to constitute them judgments of the Courts of Common Law.

This construction was, before the passing of the Common Law Procedure Act, 1854, put upon 1 & 2 Vict. c. 110, in the case of *Newton v. Boodle* (5). In that case an application to enter on the judgment roll (thus treating them as judgments) orders charging stock in execution, for the purpose of having them reviewed by a Court of Error, was refused, on the ground that they could not be considered in the light of judgments, so as to form part of the record. In giving judgment, Maule, J., states, "The statute of Victoria says that such orders shall have the effect of judgments at common law. That only means to give a remedy for disobedience of them, in addition to that which already existed by way of attachment. If the statute had been intended to introduce so great a change as has been contended for it, it would have done so by some express terms."

These observations appear strictly applicable to the present case; for, if such orders were not by the operation of 1 & 2 Vict. c. 110 put for all purposes on the same footing as judgments, then the language of ss. 60 and 61 of the Common Law Procedure Act, 1854, seems wholly insufficient to embrace them. The terms of sec. 60 (embodied by reference in sec. 61) are as follows: "It shall be lawful for any creditor who has obtained a judgment in any of the superior Courts to apply," &c.; and sec. 64 speaks of "the judgment debt and costs of suit," terms wholly inappropriate to describe a rule or order for payment of money.

We are of opinion, therefore, that the language of these sections is only fitted to describe judgments recovered in an action, and that they do not comprise either rules of the superior Courts for the payment, or [as held in the case of *Re Price* (3)] similar orders or decrees of the Court of Chancery.

It might possibly, indeed, have been advantageous if the garnishment clauses of the Act of 1854 had been expressly extended to rules for payment of money; but this, we conceive, has not been done,

(5) 6 Com. B. Rep. 532; s. c. 18 Law J. Rep. (N.S.) C.P. 72.

and we can only deal with the statute as we find it.

We think, therefore, that the Master was right in refusing an order to attach the debts owing from the garnishees, and that for the reasons given this rule must be discharged.

Rule discharged.

Attorneys—J. B. Hickin, agent for R. & T. W. Brown, Sunderland, for plaintiffs; J. and J. K. Wright, for Oliver & Botterill, Sunderland, agent for garnishees.

(In the Second Division of the Court.)

1872. } FOULGER (appellant) v. STREAD-
April 23. } MAN (respondent).

Railway Station — Premises connected therewith—Wilful Trespass—3 & 4 Vict. c. 97. s. 16—Cab-stand.

A railway company allowed a portion of the premises connected with their railway station to be occupied as a cab-stand by cabs, the drivers of which paid a weekly sum for the privilege. S., a cab-driver, placed his cab upon the stand and refused to move, although he was requested to do so by the officer of the company. He did not pay the weekly sum charged by the company, and by occupying a place upon the stand he deprived another cab-driver, who had paid the said weekly sum, from occupying a place upon the stand.

By 3 & 4 Vict. c. 97. s. 17, "if any person shall wilfully trespass upon any railway, or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer, &c., he shall forfeit," &c.:

Held, that if S. intentionally and purposely kept his cab upon the stand after being requested to move off, he did so wilfully, and was liable to the penalty imposed by the above section, although he honestly believed that he was entitled to keep it there without making any payment to the company.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. p. 3.]

1872. }
Nov. 21. } *In re* BOUVIER.

Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 27—Fugitive Criminal—Treaty with France.

B. was arrested in the island of Jersey, under a warrant issued pursuant to the Extradition Act, 1870, and was sent to prison, there to remain for fifteen days, after which he was to be surrendered to the French authorities. He had been condemned by a French Court, upon a judgment for three separate offences, one of which, "abus de confiance," was not within the existing extradition treaty between this country and France, nor within the Extradition Act, 1870, which repeals the 6 & 7 Vict. c. 75, passed for giving effect to the said treaty. By section 3, sub-section 2 of the Extradition Act, 1870, "a fugitive criminal shall not be surrendered to a foreign state, unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning, to her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded."

—Held, that under the existing law of France such a provision is made, and therefore that B. was not entitled to be discharged.

Semble, that the 27th section of the Extradition Act, 1870, has the effect of keeping in full force the said treaty, though it repeals the Act passed to give it effect.

This was a rule calling upon John le Rossignol, governor of her Majesty's prison in and for the island of Jersey, to shew cause why a writ of Habeas Corpus should not issue, to have before this Court the body of Alfred Louis Marie Bouvier, who was detained in the said prison, to undergo and receive all and singular such matters and things as the Court shall then and there consider of and concerning him in this behalf.

It appeared from the affidavits upon which the rule was granted, that Bouvier was arrested and lodged in the said prison on the 22nd of October, 1872, on a war-

rant granted under the Extradition Act, 1870, by her Majesty's principal Secretary of State for the Home Department, and endorsed by the bailiff of the said island of Jersey. On the 24th of October he was taken before the police magistrate of the said island on such warrant, and was by him ordered to be handed over to the French authorities, being in the meantime sent back to prison, there to remain for the period of fifteen days, being the time allowed by the said Extradition Act, 1870, for obtaining a writ of Habeas Corpus, or to bring other measures for an appeal from the said order. The warrant had been granted upon a judgment of *La Cour d'Assises des Côtes du Nord* in France, dated the 10th of July, 1872, on which judgment Bouvier had been condemned on three several charges of *abus de confiance*, *forgery*, and *fraudulent bankruptcy*. By the convention between her Majesty the Queen of the United Kingdom of Great Britain and Ireland and his Majesty the King of the French, signed at London, February 13th, 1843, and which is the only convention in force between England and France for the extradition of criminals, it was "agreed that the high contracting parties shall, on requisition made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons, who being accused of the crimes of murder (comprehending the crimes designated in the French Penal Code by the terms assassination, parricide, infanticide, and poisoning), or of an attempt to commit murder, or of forgery, or of fraudulent bankruptcy, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other, &c." It appeared, therefore, that *abus de confiance* was not an offence included in the above convention, and it was alleged in the affidavit of A. L. M. Bouvier, "that as a judgment is indivisible (*judicatio est tota in toto et tota in qualibet parte*), the surrendering of me to the French authorities on a judgment, one of the offences for which such judgment has been given not being comprised in the said Extradition Act, 1870, would be surrendering me to punishment for an offence not contemplated by

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the said Act, and would consequently be in violation of such Act" (1).

The order of the police magistrate for the said island of Jersey was as follows—

POLICE CORRECTIONNELLE.

Oct. 24th, 1872. Alfred Louis Marie Bouvier, faux et banqueroute frauduleux, envoyé en prison pour être remis aux autorités Françaises après quinze jours.

G. T. MARETT, St.D.

In moving for the rule it was contended that neither under the treaty or convention or under the Extradition Act, 1870, was there any power to surrender a fugitive criminal for the offence of *abus de confiance*, that only the crime of fraudulent bankruptcy was mentioned in the warrant, and that by section 3, sub-section 2 of the Extradition Act, 1872, there was no power to surrender the criminal, inasmuch as no provision or arrangement had been made as intended by that sub-section.

In shewing cause against the rule, the following affidavit was used—

I, Adolphe Moreau, of No. 5, Chancery Lane, in the county of Middlesex, esquire, make oath, and say,

1. I am the officially appointed counsel to the French Embassy in London, and I am well acquainted with the law and constitutions of France, and that part thereof which relates to legal proceedings in matters of extradition.

2. I say, speaking from such knowledge, that according to the law of France, provision is made that a fugitive criminal shall not, until he has been restored, or had an opportunity of returning to her Majesty's dominions, be detained or tried in France for any offence committed by him, prior to such surrender, other than the extradition crime proved by the facts upon which the surrender is granted, and I say, speaking from my own knowledge and experience, that this law is observed

in practice by the French tribunals and authorities.

3. The general principles and rules of the French law in matters of extradition are comprised in a circular, dated 5th of April, 1841, containing the special instructions of the minister of justice (garde des sceaux) to the law officers of the government; this circular is printed at length in a book entitled *Monographie Alphanbetique de l'Extradition par Erariste Blondel*, which is now produced and shewn to me marked (A), and which is a recognized authority and book of reference in the French Courts, and I say, speaking from my own knowledge and actual experience, that the law is correctly laid down in such circular, and is the law followed by the French Courts in such matters.

4. It is a principle of French and of international law, that the individual, whose extradition has been granted, can only be prosecuted and tried for the very crime for which his extradition has been obtained, and I say, speaking from my own knowledge and actual experience, that this is the invariable practice of the French tribunals.

5. All these principles and rules are to be found laid down by Monsieur Felix, as principles and rules of international law in his *Traité du Droit International Privé*, vol. 2 of which is now produced and shewn to me marked B, in which he specially refers to the above circular as containing a *résumé* of such principles and rules, and I say, speaking from my knowledge and actual experience, that international law is accepted as binding law by all the French tribunals, and that the said work of Monsieur Felix and the said circular are accepted by all such tribunals as binding authorities, and that the practice of such tribunals in such matters conforms to the law as laid down in the work of Monsieur Felix and the said circular.

The Attorney-General—Sir J. D. Coleridge—(Bowen with him) shewed cause against the rule.—The 6 & 7 Vict. c. 75, which was passed to give effect to the treaty of 1843, referred to in the affidavits, is repealed; the Extradition Act now in operation is the 33 & 34 Vict. c. 52

(1) On the 4th of December, 1865, notice was given by the French government to terminate the above-mentioned convention on the 4th of June, 1866, but it has been continued in force from year to year by mutual agreement, and is now declared to be in force till 1st of September, 1873. On the 28th of March, 1852, a new convention was concluded with France for the surrender of criminals, but it was not sanctioned by Parliament, and it has therefore never had any effect.

(The Extradition Act, 1870), and all that is necessary to ascertain in the present case is, whether the proceedings which have been taken are authorized by that Act. The affidavits shew that the machinery provided by it has been followed. By the twenty-second section, "this Act (except so far as relates to the execution of warrants in the Channel Islands) shall extend to the Channel Islands and Isle of Man in the same manner as if they were part of the United Kingdom, and the Royal Courts of the Channel Islands are hereby respectively authorized and required to register this Act." The order made by the police magistrate referred to in the affidavits is therefore warranted, as he had the same power as a police magistrate in England would have. Then by section 27 it is provided that the "Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act) in the case of the foreign states with which those treaties were made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act." The condition imposed by section 3, sub-section 2, is inconsistent with the treaty. If, therefore, the machinery of the Act has been followed, the case is the same as if an Order in Council had been made. If the condition in sub-section 2 of section 3 is inconsistent with the treaty, it does not apply. The matter is made more clear by the eighteenth section, which provides that, "If by any law or ordinance made before or after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect, within such possession, the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may by the Order in Council applying this Act, in the case of any foreign state, or by any subsequent order, either suspend the operation within any such British

possession of this Act, or of any part thereof, so far as it relates to such foreign state, and so long as such law or ordinance continues in force there, and no longer; or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act." The intention was to make a general Act, which should apply to all cases, except where there was anything inconsistent with the treaties referred to. The treaty of 1843 is one of such treaties, and there being something in section 3, sub-section 2, inconsistent with the treaty, the condition so imposed does not apply to that treaty. But, further, the objection which was taken to the proceedings, in moving for the rule, is answered by the affidavit of Adolphe Moreau. It is clear that Bouvier would not, until he had been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried for the offence of "*abus de confiance*," or for any offence committed by him prior to such surrender other than the extradition crime proved by the facts upon which the surrender is granted. The law of France is not as stated on behalf of Bouvier. This Court will be guided by the statement of the law by a person in the position of M. Moreau as described in his affidavit, the more so as the circular to which he refers is also referred to by an author of such repute as M. Felix. (See the passage referred to at vol. ii. p. 333.)

[He was then stopped.]

G. Brown in support of the rule.—Under section 3, sub-section 2, the Court will order the discharge of the prisoner Bouvier. It is not clear that by the law of France provision is made that he shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried for any offence other than the extradition crime proved by the facts on which the surrender is grounded. M. Moreau is not justified in his declaration of the law of France, which is contrary to that set forth in the affidavits of Bouvier. (He referred to *Clark upon the Law of Extradition*, p. 93, and the cases there collected.)

COCKBURN, C.J.—I am of opinion that this rule should be discharged. I rather hesitate to express any decided opinion as to the construction to be put upon the 27th section, although I see plainly what was the intention of the Legislature, that is to say, it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force. This has been probably effected, but is certainly not very clearly expressed. Nothing would have been more simple than to enact that, although it was expedient to repeal the statutes, yet that the treaties should still have full force and effect, instead of which this complicated and obscure language has been adopted. If it were necessary in the present case to decide the point, I should say that the language used is sufficient; but at the same time I should say that it would be better to make the matter safe by amending the Act, in case any question might hereafter arise upon it.

Upon the second ground upon which we are asked to discharge the rule, I think there can be no real doubt. By section 3, sub-section 2, the statute is to have full force, where provision is made by the law of the state demanding the extradition of the criminal, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. I consider that the requirements of this provision are satisfied. We are now clearly informed of the practical working of the French law, by the affidavit of M. Moreau referring to the circular which is binding upon the Courts of that country. It expressly provides that the criminal who is surrendered in respect of one offence will not be tried for another until he has been restored, or has had an opportunity of returning to her Majesty's dominions. This view of the French law is confirmed by M. Felix, M. Blondel, and other authors of the highest possible authority. I am satisfied that we must discharge the rule.

BLACKBURN, J.—I have no doubt that it was intended that the old treaties should still have force and effect, and that they should be enforced by the machinery provided under the Extradition Act, 1870. It was not intended to abrogate the old treaties, but I have very serious doubts whether the Legislature have effected by the 27th section what was intended. If it was necessary to decide that point, I should desire to take time to consider, but I content myself with saying that it seems desirable that there should be some further legislation upon the subject. But upon the other point, I am of opinion that the requirements of section 2, sub-section 3, are complied with. The French law does provide that the fugitive criminal shall not be tried for an offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. When we read the affidavit of M. Moreau and the textbooks, this is made clear. The criminal ought, therefore, to be surrendered.

MELLOR, J.—I am inclined to agree with the construction of sect. 27 suggested by the Attorney-General, but I feel some doubt, and it would be advisable to set all doubt at rest by further legislation.

Upon the other point I entirely agree with the judgment of my Lord.

Rule discharged.

Attorneys—The Solicitor to the Treasury, for the Crown; Saunders & Hawksford, agents for Francis Hawksford, Jersey, for defendant.

BAIL COURT. }

1872.

Nov. 25. }

WALTERS v. COGHLAN.

County Court—Appeal—Refusal to Sign Case—Memorandum of Deposit not given to Registrar or signed by the Party—13 & 14 Vict. c. 61. ss. 14, 16—19 & 20 Vict. c. 108. s. 71.

At the hearing of a plaint before a County Court Judge he nonsuited the plaintiff, who gave due notice of appeal, and

deposited the amount fixed by the registrar who gave a receipt for it to the plaintiff, stating it to be received to abide the event of the appeal. The parties could not agree on a statement of facts, and the plaintiff applied to the Judge to settle and sign the case, but the Judge refused on the ground that no memorandum of the deposit with the conditions on which it was deposited was approved by the registrar, left with him and signed by the party or his attorney in accordance with the 19 & 20 Vict. c. 208. s. 71:—Held, that the statute had been substantially complied with, and upon the authority of Griffin v. Colman (1), that the giving of such memorandum was not a condition precedent to the right to appeal.

This was a rule to the County Court Judge of Staffordshire, to shew cause why he should not settle and sign the case upon appeal from the decision of the said Judge upon a certain plaint, wherein Henry Walters was plaintiff and Edward Francis Coghlan was defendant, and cause the same to be sealed with the seal of the Court.

A plaint was entered in the County Court of Staffordshire holden at Longton, between Walters and Coghlan, wherein the plaintiff claimed 50*l.* as damages for a tort, and was heard on the 13th of August, 1872, before the County Court Judge, who directed the plaintiff to be nonsuited. On the 23rd of August, 1872, the plaintiff gave formal notice to the defendant in the plaint and the deputy registrar of the Court of his intention to appeal against the decision of the Judge, setting out the grounds of appeal, and the Court to which he should appeal. On the same day 10*l.* was deposited on behalf of the plaintiff with the deputy registrar, to abide the event of the said appeal, and he gave a receipt in writing for the same, headed with the name of the plaint, in the following terms—"I do hereby certify that the plaintiff has paid into my hands the sum of 10*l.*, to abide the event of an appeal in the above case." The deputy registrar had fixed the amount of the deposit. No other me-

morandum was asked for or accompanied such deposit, nor was any notice of such deposit having been made sent to the defendant. The parties failed to agree upon a statement of the facts of the case for appeal, and on the 7th day of October, 1872, application was made by the plaintiff to the Judge to settle and sign the case for appeal, but the Judge declined so to do, and returned the case to the plaintiff with an endorsement under his hand, stating that the above statement of the facts had been tendered to him, and that it appeared that a deposit of money in lieu of giving a bond had been made, but that no memorandum setting forth the condition on which such money was deposited had been lodged with the registrar as required by section 71 of 19 & 20 Vict. c. 108, and adding—"I therefore considered that I was not justified in signing the case presented, as I thought the memorandum a condition precedent."

T. S. Pritchard shewed cause against the rule.—The deposit is made with the registrar under the 71st section of the 19 & 20 Vict. c. 108, and is in lieu of the security for the costs of the appeal required under 13 & 14 Vict. c. 61. s. 14, and must be approved of by the registrar, and "signed by such party, his attorney or agent, setting forth the conditions on which such money is deposited, and the registrar shall give to the party paying a written acknowledgment of such payment." This section has therefore to be read as if it were part of and incorporated in the 14th section of the 13 & 14 Vict. c. 61. s. 14. Then section 16 of the last mentioned Act says, "That no judgment of a Judge of a County Court shall be removed by appeal, except in the manner, and according to the provisions hereinbefore mentioned. The giving of the memorandum is therefore a condition precedent. *Griffin v. Colman* (2) is distinguishable upon this point, inasmuch as there the objection that no memorandum had been given was not taken until the argument on the hearing of the appeal in the Court above. There was in that case, therefore, laches that amounted to waiver of the condition, here the objection was taken at the earliest possible stage.

(1) 4 Hurl. & N. 265; s. c. 28 Law J. Rep. (N.S.) Exch. 134.

[QUAIN, J.—In that case the Court does not overrule the objection on the ground of waiver. Nor do I see how this condition can be said to be introduced on behalf of the respondent and for his benefit. It is not for the benefit of the party—the memorandum is for the benefit or information of the registrar.]

In *Griffin v. Colman* (1), as reported in the *Law Journal Reports*, the Court appears to have thought there ought to have been an application to strike out the case when it was set down for hearing.

[QUAIN, J.—The Court decided that what had been done preliminary to the appeal in that case was sufficient without the memorandum. It was the duty of the registrar here to have approved of the memorandum and he should have given his approval.]

In *The Park Gate Iron Company v. Coates* (2), the respondent was held to have waived the performance of the condition as to giving notice and security within the prescribed time, and it was held that the appeal could be heard, notwithstanding such omission on the ground of the waiver, but in the present case there was no waiver.

[QUAIN, J.—I see that BOVILL, C.J., was of opinion in that case, that the 16th section of the 13 & 14 Vict. c. 61 was satisfied by referring it to the 15th sect. only of that Act as to the form of a case and mode of settling it, and that it did not extend to the provisions of the 14th section.]

In *Stone v. Dean* (3), it was held to be a condition precedent to the appeal, that the security under the 14th section of 13 & 14 Vict. c. 61 should be given within ten days.

[QUAIN, J.—But the giving of the memorandum is not for the benefit of the respondent.]

By the 184th rule of the County Court rules of 1868, "Where a party makes a deposit of money in lieu of giving a bond, he shall forthwith give notice to the opposite party, by post or otherwise, of such deposit having been made."

(2) 39 Law J. Rep. (N.S.) C.P. 317; s. c. Law Rep. 5 C.P. 634.

(3) E. B. & E. 504; s. c. 27 Law J. Rep. (N.S.) Q.B. 319.

There was here no notice of the deposit having been made given to the other party.

[QUAIN, J.—The 71st section says nothing about that notice, and moreover the County Court Judge did not refuse on that ground.]

Hacking v. Lee (4), and *Ex parte Furber* (5), were also referred to.

Holroyd, in support of the rule.—The object of the memorandum of the deposit being made under the 71st section of the 19 & 20 Vict. c. 107 is to inform the registrar of the amount paid in. It is not a right given to the other party to the cause. The respondent is not damaged in any way. If it was a condition precedent then it has been waived.

[QUAIN, J.—But not by the party.]

It was the fault of the registrar of the Court, and is not to prejudice the suitors at the Court. *Griffin v. Colman* (1) is precisely in point that this is no condition precedent.

QUAIN, J.—I think this rule must be made absolute. The case cited of *Griffin v. Colman* (1) is in point, and there was no waiver whatever in that case, upon which ground it was sought to be distinguished from the present case. But I also think that the Act has been substantially complied with. The registrar receives the money, draws up the receipt, and states that it is received to abide the event of the trial, which is the condition on which it is deposited. He approves of it clearly by his acts, he gives it to the party depositing who accepts it; by accepting it, it is as if the party had signed it. So that whether the giving of the memorandum be a condition or not, I think the statute has been sufficiently complied with.

Rule absolute.

Attorneys—F. C. Greenfield, agent for E. Young, Longton, for plaintiff; H. Tyrrell, for the County Court Judge.

(4) 29 Law J. Rep. (N.S.) Q.B. 204.

(5) 27 Law J. Rep. (N.S.) Exch. 453 *sub nom.* *Furber v. Sturmy*, 3 Hurl. & N. 521.

1872. } MOORE v. THE METROPOLITAN
Nov. 26. } RAILWAY COMPANY.

*False Imprisonment—Railway Company
—Power to Apprehend—Implied Authority
—8 & 9 Vict. c. 20. ss. 103, 104.*

The plaintiff travelled by the defendants' railway with a ticket which entitled him to leave the train at N. Before the train arrived at N. it stopped at E., whereupon the plaintiff got out of the carriage, and, upon being asked for his ticket, handed it to the collector. He was told by the collector that it was not available, and that he must pay the sum of 2d. excess fare. He refused to do so, unless a receipt was given to him, and was given into custody by the inspector of the station at E., and charged with having, on arriving at the station at E., refused to deliver up his ticket or pay his legal fare, and thereby defrauding the company of 2d. The charge was preferred before a magistrate, and dismissed. The plaintiff brought an action against the defendants for false imprisonment, but was nonsuited, upon the ground that there was no evidence that the inspector had any authority either express or implied from the defendants to give the plaintiff in charge:—Held, in accordance with Goff v. The Great Northern Railway Company, that the question was one for the jury, and that the nonsuit was wrong.

Declaration for that the defendants assaulted the plaintiff and gave him into custody to a policeman, and compelled him to go to a police station, and be kept in prison for a long time, until he could procure bail for his appearance before a police magistrate, and thereupon compelled the plaintiff to appear the next morning before the said magistrate, upon a charge by the defendants therein and theretofore made, namely, that he, the said plaintiff, being a passenger on the defendants' railway, had refused, on arriving at Edgware Road Station, to deliver up his ticket, and to pay his legal fare, and thereby had defrauded the company of 2d.; whereby, &c.

Plea—Not guilty. Issue thereon.

At the trial, which took place before Lush, J., at the sittings in Middlesex

after Michaelmas Term, 1871, it appeared that the plaintiff on the 3rd of August had taken a return ticket from Notting Hill Gate Station to the Mansion House Station on the defendants' railway. In the evening of the same day he started from the Mansion House Station, and got out of the train at the Edgware Road Station, thus stopping short of Notting Hill Gate to which station he was entitled to travel. He offered the ticket to the ticket collector, who said that it was not available, and that the plaintiff must pay 2d. as excess fare, being the fare for the journey from the Edgware Road Station to the Notting Hill Gate Station. The plaintiff refused to pay such excess fare unless a receipt was given to him, but the collector said that receipts were not given upon that railway. The inspector of the station was sent for, and having been made aware of the circumstances, sent for a policeman and gave the plaintiff into custody. At the police station the plaintiff again offered to pay the 2d. if a receipt was given, but the offer was refused. The next day he was taken before a magistrate upon a charge that having been a passenger on the Metropolitan Railway, he, on arriving at Edgware Road Station, refused to deliver up his ticket, or pay his legal fare, and thereby defrauded the company of 2d.

The charge was dismissed by the magistrate.

The learned Judge was of opinion that the act of the inspector did not, *per se*, make the defendants liable, and that there being no proof of authority either express or implied to the inspector to give the plaintiff into custody, the plaintiff could not recover in the action, and he ordered a nonsuit to be entered.

A rule *nisi* having been obtained to set the nonsuit aside, and for a new trial on the ground that the defendants were liable for the false imprisonment by their officials of the plaintiff under sections 103, 104, 108, 109, 110, and 154 of 8 & 9 Vict. c. 20, and the facts proved at the trial, cause was now shewn by

Montagu Chambers.—The nonsuit was right, there being no proof of any authority to give the plaintiff into custody. The power to detain offenders is given to

officers of railway companies by section 104 of 8 & 9 Vict. c. 20. By section 103 it is provided that, "if any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof, or if any person having paid his fare for a certain distance knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit," &c. Then section 104 provides that, "if any person be discovered either in or after committing or attempting to commit any such offence as in the preceding enactment mentioned, all officers and servants and other persons on behalf of the company, or such other company or party as aforesaid, and all constables, gaolers and peace officers, may lawfully apprehend and detain such person until he can conveniently be taken before some justice, or until he be otherwise discharged by due course of law." It appears, therefore, that the officers of the defendants had no authority to apprehend the plaintiff, for he had not committed any of the offences specified in the above-mentioned 103rd section. The act complained of by the plaintiff was the act of the officer without any authority given to him by the defendants.

[BLACKBURN, J.—There has been an assault and false imprisonment, and if the defendants have given authority to the officers they are liable.]

That is so, but there was no proof that they had given any authority—*Poulton v. The London and South Western Railway Company* (1).

[BLACKBURN, J.—That was not a case like the present. The station master in that case could not have had any authority to detain the plaintiff, but here the inspector erroneously thought that he had

authority, he being an officer stationed at that spot by the defendants for the purpose of acting for them with promptness and decision. *Goff v. The Great Northern Railway Company* (2) is the authority which has the most bearing upon the present case.]

That case was referred to in *Poulton v. The London and South Western Railway Company* (1), and Blackburn, J., said (as reported in the Law Reports), "In that case there was a power to arrest, on the assumption that the facts were as the officer arresting supposed; here there is no such power. That distinction is kept in view in the judgment in that case, and was expressly made by an alteration in the judgment suggested by Sir Hugh Hill, which certainly made the judgment more strictly accurate." But no authority could be implied in the present case any more than in *Poulton v. The London and South Western Railway Company* (1). Again *Roe v. The Birkenhead, Lancashire and Cheshire Railway Company* (3) is in favour of the defendants.

[BLACKBURN, J.—But that case was dissented from in *Goff v. The Great Northern Railway Company* (2). MELLOR, J.—May not the inspector have erroneously thought that he was acting under 8 & 9 Vict. c. 20. ss. 103, 104?]

Why should that be assumed, when it is clear that those sections did not authorise the apprehension? The 154th section mentioned in moving for the rule has no bearing upon the present case; no charge was made under that section. It is submitted that the inspector committed a tortious act, and it is not because he may have imagined that he had authority to do that act, that such authority is to be implied. To say that there was any evidence to go to the jury would be to open a very wide door for actions of this description to be brought. It is said that the defendants might have given evidence to shew that they had not given any authority to the inspector, but it is difficult to discover what evidence of that description could have been given. He also referred

(2) 3 E. & E. 672; s. c. 30 Law J. Rep. (N.S.) Q.B. 148.

(3) 7 Exch. Rep. 36; s. c. 21 Law J. Rep. (N.S.) Exch. 9.

(1) 36 Law J. Rep. (N.S.) Q.B. 294; s. c. Law Rep. 2 Q.B. 534.

to *Allen v. The South Western Railway Company* (4).

Lewis Glyn was not called upon to support the rule.

BLACKBURN, J.—This case seems to me to fall completely within the authority of *Goff v. The Great Northern Railway Company* (2), and therefore I think that my brother Lush made a mistake in nonsuiting the plaintiff. I think there was evidence that might have been and ought to have been left to the jury. I do not mean that there was a mere scintilla of evidence, but that there was evidence which would have justified the jury in finding that the person who gave the plaintiff into custody was acting with the authority of the company. The principle that was laid down in the case of *Goff v. The Great Northern Railway Company* (2) (which was much considered at the time), has, I think, never been deviated from at all, and it is this,—following the case of *Giles v. The Taff Vale Railway Company* (5) in the Exchequer Chamber, in which case the principle was first clearly expressed,—that where a railway company are carrying on business there are certain things necessary to be done for the company, and certain things which may and ought to be done for the protection of the company, and things which, if done at all, must be done at once. The company ought to have a person upon the spot to do those things, a person with common prudence and common sense, with authority to decide whether the thing shall be done or not, and if intending to exercise his authority properly, he makes a mistake, and does that which he is not justified in doing, the company are responsible, because he was their agent. The case of *Goff v. The Great Northern Railway Company* (2) goes to this, that where there is such a necessity to have a person on the spot to act in a case of emergency, and to determine whether certain things shall be done or not, the fact that there is a person there who is acting as if he had

express authority is *prima facie* evidence which the jury may take into consideration in determining the question, and the presumption that he has authority is to be rebutted by the company shewing that he had not. Now, applying that to the present case, it comes to this: The plaintiff had a return ticket, which would have authorized him to go to Notting Hill, but if he wished to get out at Edgware Road where this ticket would not authorize him to get out, he would have had to pay 2*d.* more than if he had got out at Notting Hill. Now, if he got out at Edgware Road with a view to defraud the company of that 2*d.*, it seems to me very clear that it would be a plausible thing at least for the agent of the company—I need not go a bit further than that—to determine that the act done by the plaintiff did come within the beginning of the 103rd section of the Act, that is, that he had travelled without having paid his fare, and, if that was done with the intention of preventing the company from getting the payment, it would have been a plausible thing at least for the company to say that he had violated the early part of the 103rd section. I do not say that he had, but in such a case, the company's agent on the spot would have had authority from the company to ask himself, "Do I, acting for the company, think that in this case there is what seems to me to be an infringement of the Act, and shall I exercise the authority that is given to me, and give the man into custody?" He is put there by the company for the express purpose of determining on the spot, whether or no he will exercise the power he has. He makes a mistake, but for that mistake the company are responsible. Mr. Chambers has argued that that cannot be, unless there had really been an infringement of the Act of Parliament; but if that were so, there never could be an action of this sort against a railway company at all. If the plaintiff had committed the offence with which he was charged, there would have been a defence upon the merits. It is upon the ground that the officer of the company made a mistake, that the company are responsible. The case of *Poullon v. The London*

(4) 40 Law J. Rep. (N.S.) Q.B. 55; s.c. Law Rep. 6 Q.B. 65.

(5) 2 E. & B. 822; s.c. 23 Law J. Rep. (N.S.) Q.B. 43.

and *South Western Railway Company* (1) has been cited and relied upon, but if the judgments in that case are looked at it will be found at once that no such difficulty arose there, and it will be seen that the decision was not against the judgment which we now deliver.

The station master there had taken a party into custody for not paying the fare for a horse. Now, nobody had authority to give him into custody for that. There was no occasion for the company to have an agent there to decide whether or not a person should be given into custody for that, because the company themselves had not the power to do it, and, therefore, the question as to the authority given to the servants to decide upon the exigency of the moment did not arise, because there was no such exigency at all. There was no more occasion for them to give authority to a man to consider and determine whether a party should be given into custody or not on a charge of not paying the fare for a horse, than there would have been to give him authority to consider whether, in the exigency of the moment, he should commit an assault and beat a man violently with a horse-whip. It was not a thing that could be done by the company. But in the present case, and in the case of *Goff v. The Great Northern Railway Company* (2), there was a large class of things as to which the company had to consider on the spur of the moment, whether the power should be exercised or not, and in which, if it was put into execution, it would be much for the benefit of the company. It therefore seems to me that this case falls within *Goff v. The Great Northern Railway Company* (2), and that there was evidence enough to go to the jury to shew that the inspector at the station had authority to give the plaintiff into custody if he believed him to have committed an offence, and, if he made a mistake, the company are responsible for that mistake. It is said that that is hard upon the company. That is true, but it would be a great deal harder upon individuals, if they had no remedy against the company when they have wrongfully been given into custody by the company's officials, who, although responsible men doubtless

in their way, are not very likely to be persons against whom any one would like to bring an action, because there probably would be a difficulty in getting payment from them of the damages and costs. I do not say anything about the 154th section, because the 103rd and 104th sections are enough to shew that the plaintiff should not have been nonsuited. Those sections are quite enough to shew that the act which was done here was one of those acts which in a proper case might have been done by an official for the benefit of the company.

MELLOR, J.—I am of the same opinion. When this rule was moved for, and when it was granted, I was present; and no doubt, for some time, I was under the idea that the nonsuit was right; but on our attention being called to one or two authorities, there appeared to be sufficient to induce the Court to grant a rule *nisi*, in order that the matter might be discussed. I am quite satisfied, after the discussion which has now taken place, that there was evidence fit to be submitted to the jury to shew that the company was liable for the act of the inspector. There is no doubt that the 103d section was passed with a view to protect the revenue or the traffic of railway companies from various frauds which are specifically mentioned. I agree that by that section of the statute and the 104th section, power is given to arrest and detain. I say nothing about the 154th section. I think that the 103rd and 104th sections shew that the company must have some person at the station, and they had, in this case, an inspector, whose duty may be assumed, in the absence of evidence to the contrary, to have been to protect the interests of the company, and to see that these frauds were not committed, and in case he was of opinion that an attempt had been made to commit any frauds, such as those specified in those sections of the Act, he was authorized by the company necessarily to act on an emergency when it arose, and to exercise his honest judgment at the time as to apprehending or arresting a man, as the case might require, although I think that he was mistaken, and that he entirely misunderstood the facts, when he took upon himself to order the ar-

rest of a man as to whom there was no pretence for saying he had been guilty of fraud. I cannot help thinking that the company are responsible, if their inspector did not exercise that sound discretion which the company hoped he would exercise when they appointed him to the office. It was within the scope of his authority to take the necessary steps to protect their interests, and to prevent the commission of frauds of this description. I think that the case of *Poulton v. The London and South Western Railway Company* (1) is not only distinguishable from the present case, but that the distinction is perfectly clear. In that case nobody was authorized to do the act complained of. The company themselves would not have been authorized, and therefore it was held there that the person who was supposed to be the agent of the company could not be an agent with an implied authority to do an act which the company themselves could not do. Now, in the present case, it is very clear that the company could have done it, and it is most likely that in their interest they would have a person in the nature of an inspector, to see that their interests were protected. The company might possibly have shewn that the inspector had no such duties cast upon him at all, and that he was a mere volunteer in doing what he did, and that it was not within the scope of his authority. But, in the absence of evidence to the contrary, I think that there was evidence sufficient to go to the jury to shew that he was authorized by the company to act as he did, that is to say, not that he should exercise that authority improperly, but that he should act properly within the scope of the authority conferred upon him; if he acted improperly by giving a man into custody who was not liable to be given into custody, the company are responsible for it. I entirely agree with what my brother Blackburn has said, and am clearly of opinion that the rule should be made absolute to set aside the nonsuit, and for a new trial.

LUSH, J.—I am of the same opinion. I have no doubt that the view I took at Nisi Prius of the facts was erroneous. When I come to consider the case of

Goff v. The Great Northern Railway Company (2), I cannot distinguish this case from it. According to the doctrine that is laid down there, it is to be presumed that the station inspector in this case had authority from the company to exercise for their benefit and in their interest the powers which are conferred upon them by the 103rd and 104th sections. Applying that to the facts, the inspector, I think, clearly supposed (erroneously, no doubt), that the ticket which the plaintiff had did not authorize him to get out at the Edgware Road, and therefore, inasmuch as that was a ticket which would only entitle him to travel from Moorgate Street to Notting Hill, with no power to get out at an intermediate station, he had travelled from Moorgate Street to Edgware Road without any ticket authorizing him to take that journey, so as to come within the 103rd section. The inspector thought the plaintiff was a person who had travelled on the railway without any ticket, with intent to defraud the company, and in the exercise of the power conferred by the 103rd section, he gave the plaintiff into custody; and I think, in the absence of proof to the contrary, that it must be inferred that he had authority from the company to do what he did.

Rule absolute.

Attorneys—C. F. Knox, for plaintiff;
Burchells, for defendants.

1872. } HIGGINS (appellant) v. HARDING
Nov. 13. } (respondent).

Metropolis Local Management Acts—18 & 19 Vict. c. 120. s. 105—25 & 26 Vict. c. 102. s. 77—*Provisions for Paving New Streets—Land used for purposes of Railway.*

By the Metropolis Local Management Acts, 18 & 19 Vict. c. 120. s. 105, and 25 & 26 Vict. c. 102. s. 77, the costs of paving a new street under the compulsory powers of the former Act are payable by the owners of the land and houses abutting upon and forming the street, and are to be appor-

tioned by the vestry or district board of works:—Held, that strips of land belonging to a railway company abutting upon a street, and kept and used for the sole purpose of repairing the arches of the railway viaduct, were chargeable to the costs of paving the street under the Act, as was also land used only as a buttress for the railway embankment, and to allow for slippings from it.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. p. 31.]

1872. } SIMPSON AND OTHERS v.
Nov. 26. } CRIPPIN AND OTHERS.

Contract—Sale of Goods—Delivery by Instalments—Breach as to one Instalment—Continuation of Contract.

The plaintiffs agreed to take from the defendants, "say about 6,000 to 8,000 tons of coal . . . put into our waggons at the colliery; delivery to commence from the 1st of July next, and to be taken in about equal monthly quantities over the next twelve months," &c. The defendants agreed to supply the coal, "to be delivered into your waggons at our collieries, in equal monthly quantities during the period of twelve months from the 1st of July next," &c. Up to the 1st of August the plaintiffs only supplied waggons sufficient to take away 158 tons of coal, whereupon the defendants gave them notice that they cancelled the agreement:—Held, in an action brought by the plaintiffs to recover damages in respect of the refusal by the defendants to deliver any more coal, that the defendants were not justified in cancelling the agreement in consequence of the plaintiffs' failure to send waggons in the first month sufficient to take away the quantity of coals agreed to be delivered in that month.

Hoare v. Rennie (5 Hurl. & N. 19; s. c. 29 Law J. Rep. (N.S.) Ex. 73) questioned.

Declaration, for that the defendants bargained and sold to the plaintiffs, and the plaintiffs bought from the defendants, a quantity of coal, to wit, from 6,000 to 8,000 tons, at the price of 5s. 6d.

per ton, to be delivered by the defendants to the plaintiffs in equal monthly quantities during the period of twelve months, from the 1st day of July last, strikes of workmen, accidents or other circumstances beyond control of defendants excepted, and to be paid for monthly at the above price, less 2½ per cent. discount; that all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiffs to the monthly delivery of the said goods as aforesaid, and there were no strikes of workmen, accidents or other circumstances in the said agreement excepted; yet the plaintiffs did not deliver the said goods monthly in the manner and quantity aforesaid, but have refused wholly to deliver the said goods or to perform the said contract, whereby the plaintiffs have been deprived of the profits which would have accrued to them from the delivery of the same.

Pleas.—First. That the defendants did not bargain and sell to the plaintiffs, nor the plaintiffs buy of the defendants the said coal as in that behalf alleged.

Second. That the plaintiffs were not ready and willing to accept or pay for the said coal as in that behalf alleged.

Third. The defendants deny the breaches in the declaration complained of.

Fourth. That the defendants were prevented from delivering the said goods, and performing the said agreements as in the declaration mentioned by the acts, neglects and defaults of the plaintiffs, and not otherwise.

Fifth. That before the alleged breaches or any of them, the plaintiffs exonerated and discharged the defendants from the alleged agreement and the performance thereof by the defendants.

Sixth. That there were strikes of workmen, and accidents and other circumstances beyond the control of the defendants, and that such non-delivery as in the declaration mentioned was caused and occasioned by the same, and not otherwise.

Issues thereon.

At the trial which took place before Lush, J., at the last Spring Assizes at Liverpool, it appeared that the action was brought by the plaintiffs, coal merchants at Runcorn, against the defendants, coal proprietors near Wigan, to recover the

sum of 40*l.* 1*s.* 5*d.* by way of damages for the non-delivery of coals pursuant to contract.

The contract was contained in two letters, one from plaintiffs to defendants, dated the 10th of June, 1871—"We agree to take from you, say about 6,000 to 8,000 tons of your best Wigan four-foot coal at 5*s.* 6*d.* per ton, of 21 cwt. to the ton, put into our waggons at the colliery, delivery to commence from the 1st of July next, and to be taken in about equal monthly quantities over the next twelve months. It is understood that you are not bound to supply in case of accidents or strikes. Terms, cash monthly, less 2½% discount."

The letter from the defendants to the plaintiffs was in the following terms—"We agree to supply you with from 6,000 to 8,000 tons of our best four-foot Wigan coal properly screened and free from slack, to be delivered into your waggons at our collieries, in equal monthly quantities, during the period of twelve months from the 1st of July next (strikes of our workmen, accidents or other circumstances beyond our control excepted), at 5*s.* 6*d.* per ton of 21 cwt. Terms, cash monthly, less 2½% discount.

The following letters were put in evidence—

"8th July, 1871.

"From W. & J. B. Crippin, Brynn Hill Colliery, near Wigan.

"To Messrs. Simpson, Son & Co., Runcorn.

"The first week of your contract has terminated without you sending waggons or orders for coal. We have sold the whole of the production for some long time to come of the four-foot coal, and unless you take the coal in regular weekly quantities, we shall not be able to make up for past deliveries. We thought it advisable to inform you of this.

"W. & J. B. C."

"From Messrs. Simpson & Davies, Runcorn.

"To Messrs. W. & J. B. Crippin, Liverpool.

"13th July, 1871.

"Dear Sir,—We are in receipt of yours of 8th inst., and thank you for reminding us of the contract for Wigan four-foot

coal. We will have the matter looked into. Have been from home.

"Yours truly,

"Simpson & Davies."

"Liverpool, 13th July, 1871.

"From W. & J. B. Crippin, Brynn Hill Colliery Offices.

"To Messrs. Simpson & Davies, Runcorn.

"Gentlemen,—We beg to remind you of your arrangement with us for coal commencing the 1st inst., since which date you have only taken one waggon; you must be aware that the very low price agreed to was purely upon the understanding that you withdrew the quantity regularly. Please let this have your attention, and oblige,

"Yours truly,

"T. Thompson."

Runcorn, July 14th, 1871.

Mr. Thompson,

Messrs. W. & J. B. Crippin,
Liverpool.

Dear Sirs,—Your favour of yesterday is to hand. I have been from home altogether, or nearly so, lately, and find our people have overlooked your contract, but have ordered some vessels to be taken up for it as soon as we can procure them. Will send for coal.

Yours truly,

Simpson & Davies.

The plaintiffs did not send the waggons.

1st August, 1871.

Gentlemen,—Referring to our arrangement (dated 10th June last) to supply you with from 6,000 to 8,000 tons of our four-foot coal in your waggons, during the twelve months ending the 30th June, 1872, to be taken by you in equal monthly quantities, we beg to inform you that, inasmuch as you have only taken 158 tons during the month of July, and as the sole inducement for us to entertain such an arrangement as the above was the regular and punctual withdrawal by you of the stipulated quantity during the summer months, which you have failed to perform, we beg to give you notice that we hereby cancel the arrangement, as it is impossible for us to continue to hold for your disposal such a quantity of

coal, to our serious loss and disadvantage. We are, Gentlemen,

Yours respectfully,
Per pro W. & J. B. Crippin,
T. Thompson.

1st August, 1871.

Messrs. Simpson & Davies,
Runcorn.

1871.
July 20. To coal per rail
to Runcorn... 102 16 0
„ 21. Ditto ...do..... 39 17 0
„ 28. Ditto ...do..... 15 10 0

158 3 0 5/6 £43 9 9

Runcorn, August 2nd, 1871.

Mr. Thompson,
Messrs. W. & J. B. Crippin,
Liverpool.

Sir,—In reply to yours of yesterday, the contract was only for about equal monthly quantities. If you, however, meant to try to hold us so close, you should have given us notice of your intention to break the contract.

However, we cannot consent to its being nullified, for we are under engagements to deliver. Last week we chartered *Samson*, to load 200 tons of your four-foot coal, but she was delayed, and only got into dock this morning, and we had sent instructions to put in our waggons at your colliery for her cargo.

We think it the more strange you should write as you have done, as you gave no intimation last Thursday, when Mr. Davies saw you, nor did Mr. Crippin, who Mr. Davies saw yesterday in Manchester. Just at the moment Mr. Davies was engaged with another person. We trust this explanation will be satisfactory to you, and may rely on our sending as regularly as possible or you can expect, and we hope we shall work comfortably together.

Yours truly,
Simpson & Davies.

August 3rd, 1871.

Gentlemen,—Referring to your letter, 2nd August, we beg to say that it is perfectly evident to us that you have not been able to take the coal according to the fair meaning of the proposal, and we

must therefore beg to adhere to our letter of yesterday, cancelling the arrangement. You had notice early in the month from the colliery that you were not withdrawing the coal in accordance therewith, and you cannot expect we should allow you to suit your own convenience in summer to our prejudice in winter.

At the same time, as you appear to have dispatched your waggons to the colliery for the 200 tons per *Samson*, we are willing to supply that quantity at 5s. 6d. per ton, without prejudice to the notice cancelling the contract dated the 1st instant.

And remain,

Yours faithfully,
Per pro W. & J. B. Crippin,
T. Thompson.

There were a number of other letters, and on the 21st of August, 1871, Mr. Thompson wrote as follows—

“I am instructed to inform you that my firm adhere to their notice of the 1st instant, cancelling the arrangement entered into with you, and dated 10th June last. They also instruct me to inform you of their intention to claim for the loss they have sustained in consequence of your having failed to withdraw the quantity of coal agreed for by you during the month of July last.

“Yours truly,
“Per pro W. & J. B. Crippin,
“T. Thompson.”

It was alleged on behalf of the plaintiffs that the contract was a beneficial contract, that they tried to effect another with other firms, but had failed to do so. There was conflicting evidence upon this point.

The learned Judge told the jury that as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that that did not justify the defendants in point of law in cancelling the whole contract. That the plaintiffs could not complain of not getting coals in the month of July, because they did not provide the waggons for taking it away, but assuming that the plaintiffs could not have got another contract, they were entitled to recover from the defendants in respect of the six months from the 1st of August to the time of action brought on the 5th of February,

1872. He told the jury to assess the damages for those six months, and also for the remaining five months. The jury assessed such damages for the first six months at 225*l.*, and for the remaining five months at 250*l.*, total 475*l.*

The learned Judge ordered the verdict to be entered for the sum of 475*l.*, giving the defendants leave to move to enter the verdict for them. Subsequently,

Holker moved and obtained a rule calling upon the plaintiffs to shew cause why the verdict obtained in this cause should not be set aside, and a verdict entered for the defendants instead thereof, pursuant to leave reserved by the learned Judge, on the ground that, under the circumstances, the plaintiffs had disentitled themselves to sue for breach of the contract, and that the defendants were, under the circumstances, entitled to cancel such contract, and refuse to deliver the residue of the coal.

Commis (*Butt* with him) shewed cause against the rule.—The defendants seek to defend themselves from liability in this action by shewing that the plaintiffs did not withdraw from the colliery so large a quantity of coal as they were bound to do. But that is not any defence to the action. If the plaintiffs have broken their contract in that respect, the defendants might obtain compensation by bringing an action against them. If a breach of the plaintiffs' contract in the first month would have justified the defendants in cancelling their contract, so would a breach in the fifth month, although in each of the previous months the plaintiffs had withdrawn the quantity which they had agreed to withdraw. Clearly in such a case the breach by the plaintiffs might be compensated for in damages. The plaintiffs had not bound themselves by their letter of the 10th of June to an exact performance. The contract is to take, "say about six to eight thousand tons," &c., and "to be taken in about equal monthly quantities over the next twelve months." The letter of the defendants omits the word "about" in both places. It could not have been in the contemplation of the parties that the plaintiffs must withdraw exactly equal quantities of coal. In fact the contract resolves itself into

twelve distinct independent contracts, for twelve distinct independent quantities. A wide latitude was intended, between six thousand and eight thousand tons. The breach by the plaintiffs does not justify the defendants in cancelling their contract — *Withers v. Reynolds* (1), *Weaver v. Sessions* (2). The defendants in moving for the rule relied upon the case of *Hoare v. Rennie* (3), but even supposing that case was rightly decided, which is doubtful, it is distinguishable from the present case. It came before the Court of Exchequer upon demurrer to a plea to a declaration which set out a contract by the plaintiffs to sell to the defendants about 667 tons of hammered Swede bar iron, "the said iron to be shipped from Sweden in the months of June, July, August and September next, and in about equal portions each month, at 5*l.* 10*s.* per ton." By the contract the sellers were to have the option of commencing shipments in the month of May, and also of completing the whole by the end of July. The defendants in their plea alleged that the plaintiffs did not avail themselves of the option of commencing shipments in the month of May, and that in the month of June they only shipped 21 tons 6 cwt. 1 qr., and that they were never ready and willing to deliver to the defendants such a quantity of iron shipped from Sweden in June as was specified in the said contract. The Court of Exchequer gave judgment for the defendants. The decision was simply upon the question raised by the plea. But in the contract now before the Court there is no such strictness as in *Hoare v. Rennie* (3), nor is there anything to shew that the parties intended that there should be a rigid adherence to the quantity to be withdrawn by the plaintiffs. They in fact did in part perform their contract, the defendants receiving a benefit by such part performance. There is a broad distinction between the two contracts. Here it is only intended that the coal should be taken in reasonably equal monthly quantities, but there the Court of Exchequer considered that time was of

(1) 2 B. & Ad. 882.

(2) 6 Taunt. 154.

(3) 5 Hurl. & N. 19; s. c. 29 Law J. Rep. (n.s.) Exch. 73.

the essence of the contract. It is clear that the present plaintiffs did not intend to break off the contract, they pushed the defendants to go on providing coal. In *Hoare v. Rennie* (3) there was no part performance by the plaintiffs, as it was considered that the shipment of the quantity of 21 tons 6 cwt. 1 qr. was not such a quantity as was specified in the contract; the plaintiffs therefore commenced the action with a breach on their parts. They might have crowded the whole of the shipments of iron into two months, but here the takings of coal were to extend over twelve months. Further, *Hoare v. Rennie* (3) was observed upon in *Jonassohn v. Young* (4). Crompton, J., said, "That case belongs to the class in which the breach alleged in the plea is an entire frustration of the contract. . . . We must take it that time was of the essence of the contract. . . . We must consider that the breaches alleged in the pleas in that case went to the root of the matter."

Holker and Baylis in support of the rule. —The stipulation that the coal was to be taken in equal monthly quantities goes to the root of the whole contract. The question which arises may first be treated as a matter of common sense, and secondly as being concluded by authority. First, then, this is a species of contract which is often made by colliery owners, and it is obvious that the parties intended that the plaintiffs should provide waggons for about a twelfth part of the whole quantity, which might be from 6,000 to 8,000 tons; the letters of the defendants shew the inconvenience of not adhering to the terms of the contract. In the notes to *Pordage v. Cole* (5) it is said, 320c., "Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration." That is no doubt correct, but it does not apply here,

for the plaintiffs' breach of the present contract could not be paid for in damages.

[BLACKBURN, J.—I think that it could, and the defendants' letter of the 21st of August shews that they intended to claim in respect of it.]

The stipulation which the plaintiffs were to perform was that they should be ready substantially to take equal quantities of coal in each month. The mere fact of the defendants being able to obtain compensation in damages is not enough to shew that the present action is maintainable. The coals were to be taken from the particular colliery, and in the quantities agreed on. The plaintiffs would prevent the defendants from entering into other contracts, although they themselves neglect to perform this one.

Next the question is determined by *Hoare v. Rennie* (3), which although the position of the parties is reversed, is undistinguishable, and was decided upon the principle that the contract of the defendant to deliver a certain quantity of iron, went to the whole root and was of the essence of the contract.

[BLACKBURN, J.—The contract in the present case is not exactly the same as in *Hoare v. Rennie* (3). I gather from the *Law Journal Report* that the reasons given by Pollock, C.B., and Watson, B., were not very satisfactory to Channell, B. It is difficult to discover what was the principle of the decision.]

It was recognised in *Bradford v. Williams* (6), and decides the present question. They cited *Codrington v. Paleologo* (7).

BLACKBURN, J.—I think that this rule must be discharged. The question arises upon a contract by which it is agreed between the plaintiffs and the defendants that the defendants should supply coals. [His Lordship read the letters and then continued.] There can be no question but that the plaintiffs were bound to send their waggons to the colliery so that there might be delivered into them within the first month of the twelve, that which

(4) 4 B. & S. 296; s. c. 32 Law J. Rep. (N.S.) Q.B. 385.

(5) 1 Wms. Saund. 319.

(6) 41 Law J. Rep. (N.S.) Exch. 164; s. c. Law Rep. 7 Exch. 269.

(7) 36 Law J. Rep. (N.S.) Exch. 73; s. c. Law Rep. 2 Exch. 193.

would be the minimum quantity of coals, viz. 500 tons, and there would be a breach of the plaintiffs' contract if they did not send waggons within the first month to take 500 tons. They did in fact only send waggons sufficient to take 158 tons. The question then arises whether this breach of the plaintiffs' contract in not sending waggons sufficient to take at any rate 500 tons in the first month justified the defendants in breaking off the contract altogether and declining to deliver the rest of the coals. The defendants themselves give their reasons for doing so in the letter of the 1st of August, 1871 [his Lordship read the letter and then continued], they therefore on the 1st of August claim a right to cancel their agreement. It is to be observed in the first place that it is not in any way shewn that the plaintiffs had informed the defendants that they intended to persevere in only sending an insufficient number of waggons, or that they had committed a breach of the agreement in only sending waggons sufficient to take 158 tons. There can be no doubt that the defendants might have sued the plaintiffs for not sending waggons sufficient to take 500 tons, nor can there be any doubt that in such an action they might have recovered such damages as they had sustained by reason of 342 tons not having been taken. I apprehend also that it is pretty clear, supposing that no damage had resulted, that the plaintiffs could not have required the defendants to deliver the remaining 342 tons in the next month; they lost the opportunity of getting the whole 500 tons and must be content with the quantity which they had got. But why should not the plaintiffs' breach of contract be compensated for in damages, and why is it to be said that the contract was put an end to? It is said on behalf of the defendants that *Hoare v. Rennie* (3) is in point and determines this case, having been decided by a Court of co-ordinate jurisdiction. It is very true that we should not go counter to the decision of a Court of co-ordinate jurisdiction, unless there were authorities against that decision; the proper course would be to leave the plaintiffs to proceed in a Court of Error. But when we look into the case of *Hoare v. Rennie* (3), we find that the

contract was very different from the one now before us. In *Hoare v. Rennie* (3) the great complaint was that the plaintiffs had failed to deliver the proper quantity of iron in the first month, and it was held by the Court of Exchequer that this set the defendants free from accepting any further iron. If I could see any reason for the Court so holding, I should feel myself bound to take the principle and apply it to the present case, and leave a Court of Error to set it right if it was wrong. But I am not able to see the principle upon which the Court proceeded. That may be my fault. If the principle be that whenever a plaintiff has broken his contract, and the first breach is his, he cannot afterwards sue upon the contract, the principle would, it is true, be intelligible but would be contrary to many decided cases. I cannot doubt that upon such a question I should follow *Pordage v. Cole* (5) and that class of cases. It seems to me in the present case, looking at the whole contract, that there is no reason why the defendants should not, in the course of the next eleven months, have delivered the 5,500 tons beyond the 500 which were to be delivered in the first month. If the plaintiffs were proceeding to do their duty in sending their waggons, why should not that duty be equally well performed, although the waggons were not properly sent in the first month? I see no reason why the defendants should not be entitled to recover compensation in respect of the breach in not sending the waggons in that month. *Hoare v. Rennie* (3) was much observed upon in *Jonassohn v. Young* (4). I cannot say that it was overruled because this Court assumed that the Court of Exchequer considered that time was of the essence of the contract. It is difficult to see how they could have done so, and I do not think that I am bound by their decision in *Hoare v. Rennie* (3). We must give that judgment which we think right, which is that the rule must be discharged. If we have misunderstood the case of *Hoare v. Rennie* (3) our judgment may be corrected by a Court of Error.

MELLOR, J.—I agree with my brother Blackburn that it is difficult to reconcile *Hoare v. Rennie* (3) with the numerous

older authorities. But the contract in that case is identical in principle with the present contract, though not identical in terms. I cannot see any possible mode of distinguishing the judgment which ought to be given in the one case from that which ought to be given in the other. That being so, although I agree with what has been said by my brother Blackburn, as to not being able to discover any principle by which to justify the decision in *Hoare v. Rennie* (3), I should have thought, if left to myself, that we were bound by that decision and that the rule should be made absolute, in which case the plaintiffs might go to a Court of Error if they were disposed to question *Hoare v. Rennie* (3).

LUSH, J.—I cannot understand *Hoare v. Rennie* (3) as laying down the proposition that whenever parties contract to deliver and accept goods by instalments, there is an implied condition that a breach as to one instalment shall entitle the other party to put an end to the contract. If it does lay down that proposition, it would come into conflict with other authorities. I feel the same difficulty as my brother Blackburn in collecting the precise terms of the judgment. In order to arrive at that conclusion the Court must have interpreted the contract as if it made the punctual performance a condition of the continuance of the contract. I cannot discover the precise grounds for coming to such a conclusion. However, there are no words in the present contract which import such a condition into it, and I cannot infer from the terms of the contract that there must have been such an intention. Therefore I cannot give effect to any argument based upon the assumption that such a condition is implied. I think that if the parties intended in a case of this kind that a breach by one should enable the other party to put an end to the contract they ought to have stipulated for it.

Rule discharged.

Attorneys—I. & R. Gole, agents for Lawrence & Dixon, Liverpool, for plaintiff; I. E. Fox, agent for Earle, Son, Orford, Earle & Milne, Manchester, for defendant.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

1872. { DUNN AND OTHERS v. THE BIRMINGHAM CANAL COMPANY.
Nov. 26. {

Canal—Colliery held as a separate Tenement—Right of Owner—Coal Mines under Canal—Liability of Canal Company.

An action was brought by the plaintiffs, as owners of mines lying beneath a canal of the defendants, for so negligently managing the canal as to allow water to escape from it, and flood the mines. The canal was constructed by the defendants, a company, under the provisions of a local Act, by which it was enacted that if any proprietor of mines under the canal or within twelve yards of either side of it, should be desirous of working them, he should give three months' notice to the company, who, if they failed to inspect the mines within thirty days, should be considered as permitting them to be worked, and if on inspection they refused permission, they should be compelled to purchase the same. There was a proviso that in working the mines "no injury be done to the navigation, anything therein contained to the contrary notwithstanding." By the compensation clauses of the Act, the company, in making the canal, are to do as little damage as possible, and to make satisfaction for damage sustained by the owners of lands, tenements or hereditaments taken, used or prejudiced by the execution of the powers of the Act, and compensation is made payable for damage which should be at any time or times whatsoever sustained by the owners of lands, &c., by reason of making, repairing or maintaining the canal, or by the flowing, leaking or oozing of the water over or through the banks of the canal (if complaint be made within six months of the injury).

The plaintiffs gave notice of their intention to work the mines within the prescribed distance of the canal. The defendants did not inspect the mines, and refused to purchase them. The plaintiffs proceeded to work the mines, the canal being then in good order and water-tight. They worked the mines in the usual manner, without which they could not have had the full benefit of the coal, and the effect of such working was to let down and crack the bed of the canal,

and to allow the water to flow into and cause damage to the mines. The defendants, during the working of the mines, took all proper precautions to keep the canal water-tight.

The Court of Queen's Bench (HANNEN, J., dissenting), having held that the defendants were not responsible for the damage to the mines, as there was no proof of any negligence on their part, or of anything done in excess of their statutory powers, — Held, by the Exchequer Chamber, affirming that decision, that the action, for the above reasons, was not maintainable.

Semble, per KELLY, C.B., and PIGOTT, B., that the plaintiffs were entitled to relief under the compensation clauses of the Canal Acts.

Error from the decision of the Queen's Bench reported 41 Law J. Rep. (N.S.) Q.B. 121. The judgments in the previous report of the case enter so fully into the facts, that it is not considered necessary to add anything to the statement contained in the above head-note.

Huddleston (J. O. Griffiths with him), for the plaintiffs.

H. Matthews (Henry James and Jelf with him), for the defendants.

KELLY, C.B.—I am of opinion that the judgment of the Court below should be affirmed. The cause of action upon which the declaration is founded is that the defendants introduced a large quantity of water into their canal, and so carelessly managed this water that it escaped into the plaintiffs' colliery. Now, putting aside the charge of negligence, we have nothing but the statement that the defendants introduced a large quantity of water into their canal. The company, under their Special Acts, have of course full power to pour water into their canal, and it is therefore quite clear that to sustain the action negligence must be proved. Now upon referring to the special Acts of the company, we find that in the case of mines it is necessary, where the owner wishes to work his mine, for him to give notice to the company, who may then inspect the workings, and, if they think proper, purchase the mine. They may, however, decline to purchase it, and take

the risk of any damage happening to the canal. If in the management of the canal damage should be inflicted on the plaintiffs, the company may be compelled to make compensation, either under the compensation clauses, or by action at law. The defendants, the company, determined not to avail themselves of the power of purchasing the mine, and the plaintiffs proceeded to work it, and to make excavations under the bed of the canal; and it appears that the foundations were so weakened that water penetrated through the bed of the canal, and made its way into the mine. It has been contended that the plaintiffs were entitled in the event of the defendants declining to purchase the mine, to work it in exactly the same way as if the Special Acts had never been passed. I agree with this proposition; but the question is not whether the plaintiffs are to blame, and have worked the mine in a manner in which they are not entitled to work it, but whether they are in a position to maintain this action. The defence of the canal company is that the action can only be maintained on the score of negligence, and such negligence is distinctly and expressly negatived by the case, inasmuch as what they are charged with doing is the bringing of water into the canal, and this they are by the Special Act empowered to do. If the Legislature has granted power to construct and manage the canal, and the company have done no more than they are authorized to do, no action will lie, though, speaking for myself, I entertain no doubt that the plaintiffs, under the compensation clauses in the Special Act, would be entitled to compensation for injury caused by a lawful exercise of the powers of the company: Under the Special Act the defendants are to execute their powers, doing as little damage as may be, and making satisfaction for all damage to be sustained by the owners or proprietors of lands, tenements or hereditaments which should be taken, used, removed, diverted or prejudiced by the execution of the powers of the Act. I think that the mine in question, which was a hereditament, was prejudiced, within the meaning of those words, in the exercise

of the powers of the Act. But I can find nothing in the case to shew any negligence on the part of the company to support this action. It has been urged, first, that they might have purchased the mine, as to which it is only necessary to say that the Act which gives them the necessary powers does not bind them to purchase it; secondly, that they could have prevented the damage by draining off the water and emptying the canal. But under the Special Act they are empowered to keep the canal filled with water; and it appears that short of keeping the canal empty, they took every reasonable precaution to prevent the damage. [The Chief Baron referred at length to the facts.] I think, therefore, that they have done no more than they were authorized to do, and that consequently the action cannot be maintained.

BRAMWELL, B.—I am also of opinion that the judgment of the Court below should be affirmed. The action, as was said by my brother Mellor in the Court below, cannot be maintained without a legal injury and resulting damage; and the question arises, what is the legal injury here? Is there any implied duty or obligation which the company have not fulfilled? Now the injury is certainly not in making the canal and maintaining it, for this the company are entitled to do. My brother Hannen seems to think that there are two possible cases against the company, for that the drowning of the mines was not the necessary consequence of the execution of the powers of the Act, but might have been prevented by the defendants in one of two ways, either by purchasing the mines (as to which there can be no doubt that they were under no obligation to purchase them), or by draining off the water, which is equivalent to relinquishing the canal. I cannot think they were bound to adopt either course. Whether or no the plaintiffs are entitled to compensation we need not inquire, though if they are, it certainly makes our construction of the Act more probable. If, as I remarked during the argument, there was any wrongful act on the part of the defendants, or any wrongful omission, they might have been restrained by injunction, and I cannot

see that an injunction could be granted to compel the defendants to do anything which they have not done, or undo anything which they have done.

CHANNELL, B.—I think that the action is not maintainable, but I pronounce no opinion upon the other question which has been adverted to.

KEATING, J.—I also think that the judgment of the Court below should be affirmed. The only possible view in which the action could be maintained is, that the refusal to purchase the plaintiffs' mine imposed on the defendants a parliamentary obligation to prevent water from escaping into the mine. If there were such an obligation, the case might have been brought within the authority of *Fletcher v. Rylands* (1), but I cannot see that any such duty results from the Act of Parliament. It is necessary, therefore, to give proof of negligence, or improper management of the canal. Both are distinctly negatived by the case. With regard to the question upon the compensation clauses, I agree that it is not necessary to decide the point. When I say this, I must not be supposed to cast any doubt upon the opinion expressed by the Lord Chief Baron; indeed I would say that if compensation cannot be given, gross injustice will be perpetrated.

PIGOTT, B.—I agree that the judgment of the Court below should be affirmed, upon the ground that the defendants, under the Act of Parliament, have only done what they were entitled to do. I think the plaintiffs are entitled to compensation under the clauses of the Special Acts, but I feel sure that they have no remedy by action.

GROVE, J.—I am of the same opinion. I abstain from expressing any opinion on the question of compensation. In one part of the Special Act it is stated that the making of the canal will be of particular advantage to the owners and proprietors of collieries. I do not say that this was the reason, but there may have been reasons in the minds of the Legislature why the mine-owners should take some slight contingent risk upon themselves. I do not see that injustice

(1) 4 Hurl & C. 263; s. c. 35 Law J. Rep. (N.S.) Exch. 154.

will necessarily be done by refusing compensation to the plaintiffs, for it may be that the Legislature thought that they would receive compensation by the making of the canal. It is, however, unnecessary to express any opinion upon this subject, as I am clearly of opinion that this action is not maintainable.

DENMAN, J., concurred in the judgment.

Judgment affirmed.

Attorneys—G. S. Warmington, for plaintiffs;
Tucker & Lake, for defendants.

1872. { THE QUEEN v. ALLEN, THE VICAR,
Nov. 13. { AND OTHERS, CHURCHWARDENS,
 { OF SHOULDHAM ALL SAINTS.

Perpetual Curate—Election of Churchwardens—Canon 89.

A perpetual curate is a "minister" within the general custom founded on Canon 89, by which churchwardens in every parish are to be chosen by the joint consent of the minister and the parishioners, and if they cannot agree, one by the minister, and another by the parishioners.

Mandamus against the Rev. W. M. Allen, vicar of Shouldham All Saints, C. J. Selby, Josiah Bird, and T. Brown, churchwardens, or alleged churchwardens, of the parish, stating that the parish of Shouldham All Saints, Norfolk, is an ancient parish whereof for the time being the Rev. W. M. Allen, clerk, was the minister, having the cure of souls therein, that there ought of right to be two churchwardens in the parish to be chosen in Easter week in each year, by the joint consent of the minister and parishioners of the parish, but if the minister and parishioners could not agree upon such a choice, then the minister, of right, ought to choose one of such churchwardens, and the parishioners the other, the minister and parishioners being at the time of the choice in vestry duly assembled. That on Monday in Easter week, 1871, the churchwardens, who

during the year then last past had served in the parish, went out of office, and that at a meeting then duly holden in the vestry of the parish the Rev. W. M. Allen, then being the minister of the parish, and the parishioners there and then assembled in such vestry, could not agree upon the choice of two fit and proper persons to be churchwardens of the parish, and thereupon the Rev. W. M. Allen in due manner chose one Charles Selby, a fit and proper person to be one of the churchwardens of the parish for the year then next ensuing, but the parishioners present at the meeting did not, although required, choose another churchwarden. The mandamus commanded the defendants to convene a meeting of the parishioners for the election of a churchwarden.

Return by J. Bird and T. Brown, that the church of Shouldham All Saints was heretofore appropriated to the priory of Shouldham in Norfolk, and so remained appropriated until the thirtieth year of the reign of Henry the Eighth, when the priory was surrendered into the hands of the king with all the tithes both great and small from the parish and so remained in the Crown until the seventh year of the reign of Edward the Sixth when the same were granted by the King to one Thomas Mildmay, and by him to Francis Gawdy, serjeant-at-law, and afterwards by certain trustees, in whom the same were vested, to Sir John Hare, Knt., from whom they have descended to and become vested in Sir Thomas Hare, Bart., now owner, and that at the time of the surrender of the priory to the Crown there was not any rector, vicar, or other minister of the parish, and that the Rev. W. M. Allen was not by reason of the matters thereinbefore returned the minister of the parish who of right ought to choose or appoint one of the churchwardens, and that by the Act 31 & 32 Vict. c. 117. s. 2, the Rev. W. M. Allen is only deemed and styled the vicar of the parish for the purpose of style and designation but not for any other purpose, and further that every year in the parish from time immemorial, and while the church was so appropriated until the issuing of the writ two fit and proper persons have been of right in every

year chosen and appointed churchwardens at vestries held for such purpose.

Demurrer to the return and joinder in demurrer.

A. Charles, for the prosecutor.—By canon 89, 1 *Burn's Ecclesiastical Law*, 9th ed. 401, "All churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and the parishioners if it may be; but if they cannot agree upon such a choice, then the minister shall choose one and the parishioners another, and without such a joint or several choice, none shall take upon them to be churchwardens." It is admitted upon the record that the general ecclesiastical law, founded on custom, is in accordance with this canon, and it is well established by authority that a vicar is minister within the meaning of the canon, for the purpose of joining in the election of churchwardens. Now the office of vicar was first made perpetual by 4 Henry 4. c. 12. No objection can therefore be made to the application of the canon in the present case, on the ground that a perpetual curate is not an immemorial officer. There is no case where the minister was a perpetual curate, in which the custom has been upheld; but in *Hubbard v. Penrice* (1), Lee, C.J., expressed his opinion that a curate stood in the place of the parson for the purpose of nominating a churchwarden.

Mereuether, for the defendants.—The only authority for the argument of the prosecution is the opinion of Lee, C.J., which is founded upon *Grove v. Elliott* (2). But upon reference to the latter case, it will be found to contain not the slightest authority for the statement that a curate may nominate a churchwarden.

[QUAIN, J.—In *Blackstone*, vol. i. p. 386, the origin of vicars is explained, and it appears to be the opinion of the author that a vicar and a perpetual curate equally come under the description of minister.]

The question has now to be decided for the first time.

Charles was not heard in reply.

COCKBURN, C.J.—I am of opinion that that which is admitted to be by general custom the ecclesiastical law throughout the realm, applies in a case of this kind, where there was a monastery, and the monastery has been dissolved, and a perpetual curate appointed as the minister of the parish. There must have been in the time of the monastery some mode in which the ecclesiastical offices of the parish, such as that of joining in the appointment of churchwardens, were maintained and executed, and the ecclesiastical body, or the representatives of that body, in administering the spiritual concerns of the parish, must be taken, in the absence of any custom to the contrary, to have taken that part which, according to the general law of the land, would be applicable to the case. No doubt could have arisen if the monastery had appointed a vicar, as was done in the case of most of the monasteries. Some of them, however, on account of poverty or from some other cause, did not appoint vicars, but sent one of their own body to administer the ecclesiastical concerns of the parish. I presume (there being no evidence to the contrary) that that person took such part in the spiritual administration of the parish as was required by the general law, and that the ordinary law applied wherever the ecclesiastical concerns of the parish recognised the existence of churchwardens. That being the general law, I conceive that whenever for the old monastery there was substituted the perpetual curate, as custodian of the ecclesiastical concerns of the parish, that this general ecclesiastical law would at once attach to the new state of things. The perpetual curate is a minister at all events, and the minister of the parish. He performs exactly the same functions as the rector, parson or vicar of a parish would do, and he is not the representative of a rector or vicar in the sense that an ordinary curate would be, but he is the man who has the spiritual government of the parish, and he is the minister of the parish. It is quite unnecessary to say how far that would appear to have been the view of Chief Justice Lee in the case of *Hubbard v. Penrice* (1). There the point really was, how far the sti-

(1) 2 Str. 1246.

(2) 2 Vent. 41.

pendiary of the rector or vicar could be said to represent him in such a matter as the election of churchwardens. It is not necessary to decide that here, because we are not dealing with any person of that character, but with the functions of the minister of the district. I think the general law obtains in the absence of any custom in such a case. And as here there is no custom contrary to that which is stated to be the ecclesiastical custom of the realm in the 89th Canon, I think the right of election and appointment of churchwardens was as stated in the writ.

BLACKBURN, J.—I am of the same opinion. I take it that the law as to the effect of the canons is accurately stated by Lord Hardwicke in the celebrated case of *Middleton v. Crofts* (3), and the effect of it is that the canons ecclesiastical of 1603, not having been confirmed by Parliament, do not *proprio vigore* bind the laity, but all such canons ecclesiastical as have been received and allowed by general usage do bind the laity. The canon requires that the churchwardens shall be elected by the minister and inhabitants, if they can agree upon them, and when they cannot agree, the minister shall appoint one, and the parishioners shall appoint another. That is said generally, without any reference to custom. I believe it is perfectly well established that, in the absence of a custom to the contrary, this is the general law. The first question is, has that canon been from early times adopted into the English law so as to have become part of the great ecclesiastical system of the country? I think it is hardly disputed that it has been so. Mr. Merewether denied that the perpetual curate was a minister within that canon. I am puzzled to conceive why he should not be. The word "minister" is general, and may apply to any person who has the cure of souls in the district. The rector is from time immemorial the parish minister, which vicars are not, for most of them have been appointed since time immemorial. There is nothing in the statute which made vicars perpetual, to say that the vicar shall appoint a churchwarden, yet

it is not contended that he cannot appoint one. If he can, that can only be because he is the person who has the cure of souls, because he is the person who is the minister within the meaning of the ecclesiastical law, and would *prima facie* be the person to nominate the churchwarden. Mr. Merewether contends that where an abbey or other religious house did not appoint a minister either on account of poverty or neglect of duty, but discharged the duty by sending a monk there, he could not appoint a churchwarden. It seems to me that there would be no difficulty in saying that the monk sent from time to time to do the ecclesiastical duty, and to represent the cure of souls in the parish, was the minister within the meaning of the canon and the meaning of the ecclesiastical law, and when the surrendered monastery came into other hands and it was necessary to appoint a curate, I can see no reason why such curate should not be the minister within the meaning of the canon and the ecclesiastical law. It is not impossible that a custom might arise, or that there might be evidence of a constant usage during a long time, that the parishioners should appoint both churchwardens, and that case is more likely where the living has fallen into the hands of an ecclesiastical house and consequently it has come to a perpetual curacy. It is more likely, perhaps, that there might be such a custom in such a parish, but upon this record there is nothing approaching any such custom. The question here is simply this, does the gentleman now called a vicar come within the ecclesiastical law so as to be a minister, so that *prima facie* he is to appoint the churchwarden? It seems to me clear that he does.

QUAIN, J.—I am of the same opinion, that in the absence of special custom the perpetual curate is the minister within the meaning of the canon. No case has been cited deciding that he is not, and considering the position he holds, that he is practically the incumbent of the parish, it would be a very strange thing indeed if he were not the minister within the meaning of the canon. There is some little evidence, indeed, that he is such a minister in the Vestry Act, 58 Geo. 3. c. 69, which

assumes that the minister has the right to preside at all vestry meetings of the parish. Therefore the minister is the person to preside at the vestry meeting. Then I find that the 58 Geo. 3. c. 69. s. 2, provides that in case the vicar or perpetual curate is absent, then the parishioners are to choose a chairman, evidently meaning that if at any time the perpetual curate were absent they might do it, but if he were there the minister would preside, and he would be a minister within the meaning of the clause. If that is so, I do not see why the same rule should not apply here, and for these reasons I agree with the other members of the Court, that the perpetual curate is such a minister, and that he has a right to choose as stated in the writ.

Judgment for the Crown.

Attorneys—Brooks & Co., for the Crown; Field, Roscoe & Co., for defendants.

1872. } THE QUEEN v. THE GUARDIANS
Nov. 11. } OF THE CHORLTON UNION.

Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), ss. 17, 21—Deposit of Amended Valuation List.

The valuation list for a parish under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), must, when altered by the committee, be deposited for inspection under ss. 17 & 21, and if not so deposited, it is invalid, together with any contribution order based upon it.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. p. 34.]

1872. } DENNIS (appellant) v. TOVELL
Nov. 13. } (respondent).

Harbours, Docks and Piers, Clauses Act (10 Vict. c. 27. s. 74)—Damage to Pier—Inevitable Accident—Liability of Owner of Vessel.

By the Harbours, Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), s. 74, "the owner of every vessel shall be answerable to the undertakers for any damage done by such vessel, or by any person employed about the same, to the harbour, dock or pier; and the master, or person having the charge of such vessel, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same, &c., provided always that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ, and put his vessel in charge of."

A vessel, by inevitable accident, struck against a pier and thereby damaged it:—Held, that the owner of the vessel was answerable for damages under the section, the proviso making an exception where the vessel is in charge of a pilot, but no exception in case of damage done by inevitable accident.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. p. 33.]

CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF QUEEN'S BENCH.

HILARY TERM, 36 VICTORIÆ.

1873. }
Jan. 17. } MILES v. FURBER AND OTHERS.

*Distress for Rent—Privilege—Furniture
Depository—Estoppel.*

Goods warehoused in the ordinary course of business at a furniture depository are privileged from distress for rent.

The plaintiff warehoused furniture at a depository in London, and obtained a receipt purporting to be signed on behalf of "The London Depository Company, Limited." The business of the depository had some years previously been carried on in the same premises by the company, but previously to the deposit they had, under the powers of their articles of association, assigned the good will of their business to B., with liberty to carry on the business in their name, and granted him a lease of the premises. At the time of the deposit the name of the company was painted over the premises, and the plaintiff believed that the business was carried on by them, and did not know that B. was their tenant. The company having distrained the plaintiff's furniture for rent due from B.,—Held,

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first, that the furniture was privileged from distress for rent; secondly, that even if it had not been so privileged, the company having caused the plaintiff to believe that the business was carried on by them could not, in another character, distrain upon his goods.

Action to recover 500*l.* damages for conversion of the plaintiff's goods by the defendants.

The defendants pleaded "Not guilty," by statute 11 Geo. 2. c. 19. ss. 19, 21.

At the trial a verdict was found for the defendants, subject to the opinion of the Court upon the following

CASE.

1. The plaintiff on the 20th of October, 1869, deposited the goods and chattels in respect of which this action is brought, consisting of various articles of household furniture, at a certain depository for furniture situate at 277, Gray's Inn Road, London, and at the time of the deposit received the following receipt—

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"London Depository Company, Limited,
"Gray's Inn Road, King's Cross,
"October 20th, 1869.

"Received from Mr. Miles furniture and goods as per inventory, No. 134. Terms 30s. per year. To be warehoused subject to the conditions endorsed hereon.

"For the London Depository Company, Limited.

"No. 134. "J. L. Foster,
"for Manager.

"Division C. R. Room 42."

A copy of the conditions formed part of the Case. They provided that if at any time the charge for warehousing was for two years in arrear, the company should be at liberty to sell the goods for the payment of the arrears with interest.

2. Before the month of May, 1863, one Stuckley was the occupier of the premises 277, Gray's Inn Road, and used them as a depository for furniture, under the name of the North London Depository.

3. In May, 1863, a joint-stock company was formed for the purpose of purchasing and did afterwards purchase Stuckley's interest in the premises 277, Gray's Inn Road, and the goodwill of his business, and the company was incorporated under the name of the London General Depository Company, Limited. The registered office of the Company was at 277, Gray's Inn Road, and the name of the company was painted conspicuously on the premises. The company carried on the business until July, 1866.

4. In the year 1865 a Mr. Beeston, who had previously acted as secretary of the company, entered into negotiations for a lease of the premises 277, Gray's Inn Road from the company, and a transfer of their business, and his proposal was submitted to the shareholders.

5. It was found upon examining the articles of association that the company had no power to transfer the premises or the business, and in order to get over the difficulty, it was agreed among the shareholders that the company should be dissolved, and a new company, to be called "The London Depository Company, Limited," should be formed, with articles of association containing the necessary powers.

6. The new company was incorporated in July, 1866, and the old company was

shortly afterwards dissolved. The new company carried on the business until the arrangements with Beeston were completed in April, 1867. Their name was painted conspicuously upon the premises 277, Gray's Inn Road, where the name of the old company previously appeared. In April, 1867, the arrangements with Beeston were carried out by two deeds, which were both dated the 8th of April, 1867.

7. By one deed the company granted an underlease of the premises 277, Gray's Inn Road to Beeston for sixty-one years, wanting one day, to be computed from the 29th of September, 1863 (the sixty-one years being the residue of the company's term in the premises), at the yearly rent of 1,120*l.*, payable quarterly.

8. By the other deed the company assigned to Beeston all their goodwill in the business, with full power and liberty to Beeston to carry on the business in the name of the company; and further transferred to him all their book debts and all their subsisting contracts, and all other the property in and about the premises, and used by them in carrying on their business. The deed contained a covenant from Beeston to indemnify the company from all claims and demands arising from the business being carried on in the company's name.

9. After the 8th of April, 1867, the London Depository Company, Limited, ceased to carry on the business, and the same was carried on for his own benefit by Beeston. The company, however, had their registered office at 277, Gray's Inn Road, and their name continued upon the premises down to about the month of July, 1869. Meetings of the directors were from time to time held at their registered office.

10. In July, 1869, Beeston went into partnership with a man named Robinson, a coach builder, and that business was carried on upon part of the premises 277, Gray's Inn Road. A large number of carriages was placed on the premises for sale. The business of a furniture depository continued to be carried on as before. When this new partnership was formed, Beeston took down the board on which the name of the company had been painted, and painted on the front of the

building, the name, "The London Carriage Bazaar."

11. Shortly after, the directors of the company discovered that the name of the company had been removed, and being afraid of incurring penalties if their title did not appear at their registered office, required Beeston to replace it. Beeston had the name of the company painted over one of the doorways, where it was clearly visible though it was not conspicuous.

12. When the plaintiff deposited his goods at 277, Gray's Inn Road, in October, 1869, and obtained the receipt mentioned in paragraph 1, he was not aware either that a new company had been formed or that Beeston was their tenant, or that the business was being carried on by Beeston. He believed that he was dealing with the company which had been formed in 1863, with which he had had previous transactions, and his attention was not called to the alteration in the name by the omission of the word "general." Foster, who signed the deposit receipt, was a servant of Beeston's, and was not in the employ of the company. The company at the time when the receipt was given had no manager.

13. The goods deposited by the plaintiff were placed in a separate room or compartment, on which was fixed a label bearing the plaintiff's name, and so remained until they were removed and sold by the defendants under the distress for rent hereinafter mentioned.

14. On the 7th of January, 1870, the sum of 1,100*l.* for rent was due from Beeston to the company, and at a meeting of the directors of the company held on the 8th of February, 1870, it was resolved that a distress should be levied upon the goods on the premises for the arrears, and accordingly a distress warrant was issued signed by two of the directors.

15. The warrant was placed in the hands of the defendants, who accordingly distrained upon all the goods on the premises, and afterwards sold the plaintiff's goods.

The Court shall be at liberty to draw any inferences or find any facts which, in the opinion of the Court, a jury ought to have drawn or found.

The question for the opinion of the

Court is, whether the defendants are liable in this action.

Joyce, for the plaintiff.—The defendants, as representing the London Depository Company, had no right to distrain the plaintiff's goods. It is true that when these goods were brought to the depository the company had assigned the goodwill of their business to Beeston, but they had authorised and required him to carry on the business in their name, and thereby induced the plaintiff to believe that they were the occupiers of the warehouse, and that the receipt which he took was given and signed by them. It would be unreasonable to allow them, after they have acted as bailees, to shew that they were in fact nothing but the landlords of the bailee, and entitled to seize goods entrusted to him. Secondly, the goods at common law were privileged from distress. The business carried on at a furniture depository is well known and recognised, and goods placed in such a depository are delivered to a person exercising a public trade, to be managed in the way of his trade. A recent case on the subject is *Swire v. Leach* (1), where goods pledged with a pawnbroker were held to be exempt from distress, upon the ground that the trade of a pawnbroker was a public one, and that the goods were held by him in the way of his trade. In *Adams v. Grane* (2), goods sent to an auctioneer to be sold on his premises were also held to be privileged, on the ground that such a privilege was necessary for the convenience and benefit of trade.

Henry James and Francis, for the defendants.—First, there is no ground for saying that the goods were exempt from distress. A leading case upon the exemption of certain goods from distress is *Parsons v. Gingell* (3), where it was held that horses and carriages placed with a livery and bait stable keeper might be distrained, *Wilde, C.J.*, saying, "The question in all these cases is, whether the

(1) 18 Com. B. Rep. N.S. 479; s. c. 34 Law J. Rep. (N.S.) C.P. 150.

(2) 1 Cr. & M. 380; s. c. 2 Law J. Rep. (N.S.) Exch. 105.

(3) 4 Com. B. Rep. 545; s. c. 16 Law J. Rep. (N.S.) C.P. 227.

goods are placed in the hands of the tenant merely with the intent that they shall remain upon the premises, or with a view of having labour and skill bestowed upon them, which is the principal object, and which is incidental? If the goods are sent to the premises for the purpose of being dealt with in the way of the party's trade, and are to remain upon the premises until that purpose is answered, and no longer, the case falls within one class, but if they are sent for the purpose of remaining there merely at the will of the owner, there being no work to be done upon them, it falls within a totally distinct consideration." In *Swire v. Leach* (1), the goods delivered to the pawnbroker were to be dealt with in the way of his trade.

[COCKBURN, C.J.—So here, they were to be dealt with by the company.]

If the Court are against the defendants on this point it is unnecessary to discuss the second.

COCKBURN, C.J.—I think that our judgment must be for the defendants, as the case is clearly within the principle adopted in *Swire v. Leach* (1). The premises used as a depository acquired an additional value from being used as a storehouse for furniture and other property, and we must assume that people would not deposit their goods there unless they believed that they were exempt from distress. The business is one which necessarily involves the deposit of goods, and it would be fatal to such a business to suppose that such goods were liable to a distress. The case of *Swire v. Leach* (1), which is later than that of *Parsons v. Gingell* (3) in the same Court, is ample authority for the exemption in this case. But I am also of opinion that the company, after holding themselves out as proprietors of the business, are estopped with regard to the plaintiff from exercising the rights of strangers.

MELLOR, J.—I am of the same opinion. The true principle is that where goods are delivered to a man carrying on a public trade, to be managed in the way of his trade, they are privileged. I think the present case is distinguishable from that of the livery stable keeper in *Parsons v.*

Gingell (3), because there it appeared that the horses and carriages were only placed there for a casual purpose, and might be removed at any time. With regard to cases like those of agisters of cattle, it may be that in rural districts where there is nothing to distinguish the cattle from those of the occupier, there may be no privilege; but I should be disposed to think that it might apply in the case of fields near a large town, which are notoriously let out for grazing purposes.

ARCHIBALD, J.—I am of the same opinion. I think that the true principle is that unless the exemption prevailed in the present case the trade of a furniture warehouseman could not be carried on. The same principle has been applied to goods delivered to an auctioneer. The power of seizing one man's goods to pay another man's debt should not be carried further, unless the case is perfectly clear, and I think we may give effect to the case of *Swire v. Leach* (1) without pausing to consider the distinction between this case and that of *Parsons v. Gingell* (3).

Judgment for the plaintiff.

Attorneys—J. Jones, for plaintiff; Monckton & Co., for defendants.

1873. }
Jan. 20. }

NOLAN v. COPEMAN.

Costs, Taxation of—Arbitration—Accountant appointed by Arbitrator—Witness qualifying himself.

On the reference of a cause involving an enquiry into a mass of accounts, an order was made by a judge, on the application of the plaintiff, that an accountant, to be named by the arbitrator, should inspect the defendant's books and take copies or extracts from them relating to the matters in question in them. This was done, and the charges of the accountant were paid by the plaintiff. The result of the investigation and the report of the accountant to the arbitrator was that much expense in the enquiry was saved:—Held, that the plaintiff, in whose

favour the award was made, was not entitled to have the costs of the accountant taxed against the defendant.

Rule calling upon the defendant to shew cause why one of the Masters of this Court should not be at liberty to review his taxation of costs.

The action was brought to recover the difference between the actual proceeds of sales of butter consigned by the plaintiff from Tralee, in Ireland, to defendant for sale on commission in Manchester, Liverpool and London, and the amounts at which such sales were returned, as sold, in the accounts rendered by the defendant to the plaintiff. The transactions were very numerous, and extended over a period of six years. The defendant pleaded to the action, and then took out a summons to refer the cause pursuant to the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and ultimately it was agreed that the cause should be referred to an accountant. The plaintiff had applied for an order to inspect on his behalf by an accountant, and take extracts from the defendant's books of account. The defendant opposed such inspection, but Hannen, J., made an order that an accountant to be named by the arbitrator should inspect the defendant's books, and take copies or extracts from them, relating to the matters in question in the cause. The order was silent as to costs. Under the powers so conferred, the arbitrator appointed an accountant who looked into the books, and made a report thereon. The arbitrator made an affidavit, in which he swore that the professional services of the accountant "in the examination of the defendant's books and accounts, and his reports thereon, and in the assistance rendered by him at the hearing before me, most materially abridged the time of enquiry, and saved very considerable expense much beyond the amount of his account, and which might otherwise have necessarily been incurred on the reference to me." The arbitrator made his award in favour of the plaintiff for 297l. 9s. 7d., with the costs of the reference and award. The charges made by the accountant were paid by the plaintiff, but were disallowed

by Master Manley Smith on taxation of costs.

Waddy shewed cause against the rule.—The Master was right. This is the ordinary case of a witness who incurs expense to qualify himself to be a witness. Such expenses are not allowed on taxation. [He was then stopped.]

Ambrose in support of the rule.—The distinction between such expenses and the expenses incurred in putting things in a proper form for the purpose of being presented to a jury, is pointed out in the *Duke of Beaufort v. Lord Ashburnham* (1). In that case the Master had allowed 68l. 8s. 5d. for searches for and translations of ancient documents in the Record office and elsewhere by Mr. Hewlett, the antiquarian. Erle, C.J., said, in the course of the argument, "The searches, I am informed, were not made for the purpose of ascertaining whether such evidence existed. But the documents were known to exist, and the services of the expert were required to trace them out and put them in a form to be presented before a jury." Master Gordon informed the Court that similar charges had been allowed in the Exchequer. And in delivering the considered judgment of the Court, Erle, C.J., said, "The next complaint was that a sum of 68l. 8s. 5d. has been allowed for the expenses of searches for and translations of ancient records and documents in the Record-office and elsewhere by Mr. Hewlett. This, it is said, was searching forevidence of the plaintiff's case, and ought not to be allowed against the defendant upon a taxation of costs as between party and party. If this had been, as suggested, a charge for searches made to discover evidence to support the plaintiff's case, it would not have been allowed; but it appears that the documents in question were records relating to the manor, the existence of which was well known, and which were necessary and pertinent to the issue to be tried. It was, therefore, an expense that was necessarily and properly incurred, and the Master was right in allowing it." In the present case the arbitrator himself

(1) 13 Com. B. Rep. N.S. 598; s. c. 32 Law J. Rep. (N.S.) C.P. 97.

was an accountant and might have investigated the books and accounts for himself and charged accordingly. See also *Daniel v. Wilkin* (2). It is clear that the employment of the accountant resulted in the saving of much expense, and on that ground the costs ought to be allowed. In *Hawkins v. Rigby* (3) a rule was made absolute to review a taxation under somewhat similar circumstances.

[BLACKBURN, J.—In that case the arbitrator exercised the power given him by the order of reference to employ an accountant, and afterwards, when on the Bench, said that the costs were properly incurred.]

If the order had been an ordinary order for inspection, the costs of the inspection would be in the discretion of Judge making the order—*Smith v. The Great Western Railway Company* (4).

[BLACKBURN, J.—That case approaches the present case. It might have been better if the order of Hannen, J., had decided the question of costs, but it is silent upon that subject. MELLOR, J.—The investigation here was for the benefit of the plaintiff, not of the defendant.]

But the result is to put the case in a proper form for the decision of the arbitrator, and so the case falls within the principle of *The Duke of Beaufort v. Lord Ashburnham* (1).

[BLACKBURN, J.—It is difficult to distinguish *May v. Selby* (5), where the charges and expenses of witnesses employed in surveying goods in order to qualify them to give evidence at the trial were not allowed.]

No doubt if what was done by the accountant can be said to be done merely for the purpose of qualifying himself to give evidence, that case is against the view presented on behalf of the plaintiff.

He also referred to 2 *Lush's Practice*, 895.

(2) 8 Exch. Rep. 156; s. c. 22 Law J. Rep. (N.S.) Exch. 73.

(3) 8 Com. B. Rep. N.S. 271; s. c. 29 Law J. Rep. (N.S.) C.P. 228.

(4) 6 E. & B. 405; s. c. 26 Law J. Rep. (N.S.) Q.B. 279.

(5) 4 Man. & G. 142; s. c. 11 Law Rep. (N.S.) C.P. 223.

COCKBURN, C.J.—I think that this rule must be discharged. If this were the case of an ordinary order for an inspection of documents, the costs of inspection would not be allowed unless provided for in the order, and the present case does not differ from the ordinary case except in one matter, which is immaterial to the question, whether or not the costs should be allowed. It seems that an application was made for inspection of the defendant's books; that was objected to, and a compromise was effected, the defendant agreeing that an investigation might be made; but in order to secure that his books should not be examined by the plaintiff, the investigation was to be made by an accountant to be appointed by the arbitrator. That does not constitute such a different state of things as would prevent the ordinary rule from prevailing. The plaintiff gets the advantage of the investigation, but the costs do not fall upon the defendant. The Master was right, and the rule must be discharged.

BLACKBURN, J.—I am of the same opinion. I do not say that it would not have been more satisfactory if it had been provided for in the order that the plaintiff, if he succeeded, should have these costs, but that has not been done, and it comes to this: that an accountant, appointed by the arbitrator, was employed by the plaintiff to investigate the state of the accounts. Having been employed, he was paid by the plaintiff for his work. That is a matter which comes within the general rule, that the expenses incurred in qualifying a witness to give evidence shall not be allowed upon a taxation of costs. Mr. Ambrose is not able to cite a single case which is at all in his favour except *The Duke of Beaufort v. Lord Ashburnham* (1). I have some difficulty in making that case out, and the circumstances were different from those of the present case.

MELLOR, J., and LUSH, J., concurred.

Rule discharged without costs.

Attorneys—E. Worthington, agent for Sale & Co., Manchester, for plaintiff; James Crowdy, for defendant.

1873. }
Feb. 5. }

MORAN v. PITT.

Trover—Horse—Sale of Property in Market overt—2 & 3 Ph. & M. c. 7; 31 Eliz. c. 12.

The defendant's mare, which he had turned out in a public park, was found out of the park, and was sold at public auction by the "pinner." After an intermediate sale she was sold in market overt to the plaintiff, and was subsequently taken possession of by the defendant. There was no proof that the formalities which the stat. 31 Eliz. c. 12 requires upon the sale of horses at fairs and markets had been observed.—Held, that in the absence of such proof the Court would not infer that such formalities had been observed, and that the plaintiff could not maintain an action for the mare against the defendant, the true owner.

Trover for a mare.

Pleas, first not guilty. Second, that the mare was not the mare of the plaintiff, as alleged.

At the trial which took place before Quain, J., at the Shropshire Summer Assizes, 1872, it appeared that the defendant had turned out a mare in the park at Sutton Coldfield, in the early part of the year 1870. It did not appear whether the mare strayed or was stolen from the park but she was missing in April, and on the 8th of November in the same year some boys brought her to the "pinner" of the park, who not being able to find an owner for her, had her sold by auction in the public market for the sum of 2*l.* 15*s.* to Mr. Barlow, who sold her again to a Mr. Groves. On the 13th of June, 1872, the plaintiff bought her in Birmingham market for 12*l.* After he had so bought her, the defendant claimed her as the mare which he had turned out in the park, and took her into his own possession. This action was then brought. It was contended, on behalf of the plaintiff, that he was entitled to recover, inasmuch as he had bought the mare in market overt. The learned Judge directed the jury to find a verdict for the plaintiff, giving leave to the defendant to move to enter a verdict or

nonsuit if the Court should be of opinion that the fact that the mare was in Sutton Park, before the boys brought her to the "pinner," and was missed in April, was some evidence that she was stolen, and that such evidence had not been displaced by the evidence for the plaintiff, in case the onus of her not being stolen rests on him, and that neither of the sales conferred a title on the plaintiff as against the defendant the true owner, or that proof of the compliance with the statute 2 & 3 Ph. & M. c. 7 lay wholly on the plaintiff. A rule nisi in accordance with the above, leave having been obtained, cause was now shewn against the rule by

J. J. Powell and Gates.—The plaintiff is entitled to retain his verdict. He bought the mare in market overt. The stat. 2 & 3 Ph. & M. c. 7, does not affect the sale of any but stolen horses, and there is no evidence that the mare was stolen. It appears, no doubt, that she was found out of the park, but that does not shew that she was stolen.

[BLACKBURN, J.—When the rule was moved for, it was said that although the stat. 2 & 3 Ph. & M. applied to stolen horses, the stat. 31 Eliz. c. 12 was more general, and applied to the sale of all houses sold in fairs or markets. QUAIN, J.—In a note to 2 & 3 Ph. & M. c. 7. Chit. Stat. 702, it is stated, "These statutes extend to horses wrongfully taken, though not stolen," and the following authorities are cited—2 Inst. 717; *Barker v. Reading* (1), Com. Dig. Market, E.]

Next the Court is to be at liberty to draw inferences of fact, and it will draw the inference that the sale was properly conducted according to the mode pointed out by the statutes. And, even if that inference be not drawn, the defendant is bound to prove that the formalities required were not observed, so as to entitle himself to retain the mare against the plaintiff who has the possession. It should be remembered that the sale to the plaintiff is not the only one which has taken place since the mare was put into the park. No case can be found

(1) Jon. W. 163; s. c. Palm. 485; 2 Ch. Com. L. 151.

in which it has been decided that such a sale is void absolutely. See *North v. Jackson* (2).

[BLACKBURN, J.—The expression in the 31 Eliz. c. 12, "shall be void," means that the sale may be avoided if the required formalities are not observed. The words apply to sellers rather than to buyers.]

Bosanquet in support of the rule was not heard.

BLACKBURN, J.—The *onus* of shewing that the formalities required by the 31 Eliz. c. 12. s. 2 have been observed at the sale of this mare lies upon the plaintiff. I shall not draw the inference that those formalities have been observed; it would be most unusual, if the fact were so, and the effect of the statute is that unless those formalities have been observed, the sale confers no more title on the plaintiff against the defendant the true owner than if the sale had taken place out of market overt.

MELLOR, J., and QUAIN, J., concurred.

Rule absolute.

Attorneys—Deere & Browne, for plaintiff; Neal & Philpot, for defendant.

(In the Second Division of the Court.)

1873. }
Jan. 30. } JONES v. WILLIAMS (1).

Costs—New Trial; Costs to abide the Event.

By a rule for a new trial the costs were to abide the event. On the first trial the plaintiff had obtained a verdict for 66*l.* odd; as to 5*l.* there was no dispute, and the defendant had leave to move for a new trial, on the ground that the verdict was against the weight of evidence and the

damages excessive, unless the plaintiff would consent to reduce the damages to 5*l.* The defendant obtained a rule nisi for a new trial on such grounds, which was subsequently made absolute, the costs to abide the event, and afterwards, and before the second trial, the defendant paid into Court 5*l.* 2*s.* 10*d.* under an order by consent. At the second trial the defendant had a verdict:—Held, that the plaintiff was not entitled to the costs of the first trial, and that the "event" referred to in the rule meant the dispute as to the balance between the 66*l.* 19*s.* 6*d.* and the 5*l.*

This was a rule calling upon the defendant to shew cause why one of the Masters of this Court should not be at liberty to review his taxation of costs herein by giving the plaintiff his costs down to and including payment into Court.

The action was brought to recover 61*l.* 19*s.* 6*d.* for work done, and 5*l.* for money lent.

On the 11th of July, 1871, the action was tried at the Hampshire Assizes, and the plaintiff recovered a verdict for 66*l.* 19*s.* 6*d.* The defendant had leave to move for a new trial, unless the plaintiff consented to the damages being reduced to 5*l.*, on the ground that the verdict was against the weight of evidence, and the damages excessive. A rule nisi for a new trial was obtained, and made absolute on the 1st of May, 1872; the costs to abide the event. The venue was changed to Middlesex. The cause was set down for trial for the Middlesex sittings, on the 24th of May. On the 16th of May the defendant obtained an order by consent to amend his pleas by adding a plea of payment into Court of 5*l.* 2*s.* 10*d.*, the costs of, and incidental to, the amendment, and of that application to be the plaintiff's in any event. The second trial took place on the 28th of May, and the jury being of opinion that the 5*l.* 2*s.* 10*d.* was the amount for which the defendant was liable, a verdict was entered for the defendant. The Master gave the defendant an allocatur for his costs of the second trial.

MacIntyre shewed cause.—The plaintiff is not entitled to the costs of the first

(2) 2 Fost. & F. 119.

(1) Coram Blackburn, J., and Archibald, J.

trial. The costs were, by the rule for the new trial, ordered to abide the event; that means the substantial recovery in the action. It cannot be said that if a plaintiff in an action for libel were to recover a verdict with substantial damages, and a new trial were ordered with a like order as to costs, and at the second trial he obtained a verdict for a farthing, and no certificate was made by the Judge, or if he got the verdict on a by-point of law,—that the event was in his favour, so as to entitle him to the costs.

[BLACKBURN, J.—In *Dawson v. Harrison* (2) the plaintiff recovered on the first trial under a special count for wrongful dismissal, no claim being made on the common counts; then upon a new trial, the defendant succeeded on the special count, but the plaintiff obtained a verdict for a small sum on the common counts in respect of a slight under-payment for his services, and it was held that the “event” was the event of the dispute before the Court, when the rule for the new trial was made, and as at that time there was no dispute as to the common count, the event was deemed to be in favour of the defendant.]

Here the verdict on the second trial, even taken together with the payment into Court, is a practical reversal of the verdict in the first. He failed to recover on that claim on which the new trial was granted. The event shews that the plaintiff improperly recovered the amount of the verdict on the first trial, and if he had then recovered the amount paid into Court he would not have got his costs.

C. Bowen, in support of the rule.—It must be admitted that the real question between the parties was as to the difference between the amount paid into Court and the amount of the verdict on the first trial, but the event means the event of the cause—*Meule v. Goddard* (3).

[BLACKBURN, J.—That case neither helps nor hinders you. I take it that on the argument for the new trial the Court

thought that as to 61*l.* odd the verdict was against the evidence; but as to the 5*l.* 2*s.* 10*d.*, it did not appear to be so, and then the result of the second trial seems to be that the 61*l.* odd was not recoverable.]

Suppose that a verdict had been obtained for 1,000*l.*, and on the argument for a new trial the Court thought the verdict proper as to 800*l.*, and ordered a new trial with a similar provision for costs, and at the second trial the plaintiff recovered 805*l.*, would he not be entitled to the costs?

[BLACKBURN, J.—I should say not; the contest is as to the 200*l.*]

Dawson v. Harrison (2) is distinguishable on this point: In that case the ultimate event on which the cause was determined was not in contemplation of the parties until the second trial; but here the amount subsequently paid into Court was claimed from the commencement of the suit until paid into Court.

BLACKBURN, J.—I think this rule must be discharged. It was made part of the rule for the new trial that the costs should abide the event; that means the event of the same dispute as existed at the time of the original trial and the argument on the rule; but if the event turns upon what is not the same dispute, the costs of the first trial are thrown away. Then what was the event here? The intention and meaning of the Court is that when a verdict is complained of as against the weight of evidence, and the Court is satisfied that on some ground it is so, and grant a new trial, the costs to abide the event, then the event is the event of that ground on which the Court disturbed the first verdict. Then if this Court was satisfied that the verdict was wrong in respect of 61*l.* odd, but it turned out that it was right, then on the second trial, having established his right, the plaintiff ought to have had the costs of both trials; but if, instead of that, he recovers on the second trial a sum not the subject of the decision of the Court he ought not on that account to recover such costs. In *Dawson v. Harrison* (2) that is put forward as the very ground

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(2) 31 *LAW J. Rep.* (N.S.) C.P. 168; *s. c. Sub nom. Dawson v. Harris*, 11 *Com. B. Rep.* N.S. 801.

(3) 5 *B. & Ald.* 766.

NEW SERIES, 42.—Q.B.

the decision. In the report of that case in the *Common Bench Reports*, Erle, C.J., is reported to have added words which are not to be found in the report of the same case in the *Law Journal Reports*, and which, if used, certainly seem to be unnecessary and inconsistent with the ground of the decision. And I prefer reading his judgment as confined to the ground of the decision. Then if there ought not to have been a rule for a new trial, the plaintiff ought to recover the costs of both trials; but if the Court was right in granting a new trial, then he ought not. Mr. Bowen argues that upon this view the Masters cannot tell what is the event, inasmuch as they would probably have no knowledge of the ground upon which the new trial was granted; but I think in such a case they must ascertain the ground upon which the Court granted a new trial. If the Masters should make a mistake, the Court can be applied to, as it is from time to time, to control the exercise of the Master's discretion. Take a case of a verdict for the plaintiff in an action of negligence for 1,000*l.* damages, and the Court ordered a new trial on the ground that the plaintiff ought not to recover, there the event would be a verdict establishing or negating the negligence; then if, at the second trial, the plaintiff had a verdict for 50*l.*, then the verdict being the same as to the negligence, that would be the same event, and the difference in amount, in that case, would not affect the event. A difference in amount could be provided for in the rule for the new trial, otherwise the Common Law Procedure Act, 1852, and rules made under it step in. I think, therefore, the event in the rule for the new trial meant that event upon which the new trial was granted, which was in this case the sum of 61*l.* odd, being the difference between the amount of the verdict on the first trial and the amount subsequently paid into Court. *Dawson v. Harrison* (2) appears to me to be directly in point.

ARCHIBALD, J.—I am of the same opinion. The rule for the new trial was granted on the ground that the verdict

was against the weight of the evidence; and the question was as to the sum of 61*l.* odd. The event as to that amount was in favour of the defendant. I think, therefore, the Taxing Master was right.

Rule discharged.

Attorneys—Richd. Jones, for plaintiff; T. H. Williams, for defendant.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

1873. { THE GAS LIGHT AND COKE COM-
Feb. 1. { PANY v. THE VESTRY OF ST.
GEORGE, HANOVER SQUARE.

Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 25—*Gas Light and Coke Company's Act*, 1868 (31 & 32 Vict. c. cvi.), ss. 8, 104, 110—*City Gas Act*, 1868, 31 & 32 Vict. c. cxxv.—*Quality of Gas*.

By the *Metropolis Gas Act*, 1860 (23 & 24 Vict. c. 125), s. 4: The words "common gas" shall mean gas of an illuminating power hereinafter defined of not less than twelve candles. The words "cannel gas" shall mean gas of an illuminating power hereinafter defined of not less than twenty candles. By s. 25, The quality of the common gas supplied by any gas company shall be, with respect to its illuminating power, at a distance as near as may be of 1,000 yards from the works, such as to produce from an Argand burner, having fifteen holes, and a 7 in. chimney, consuming 5 cubic feet of gas an hour, a light equal in intensity to the light produced by not less than twelve sperm candles of six to the pound, each burning 120 grains an hour; and the quality of cannel gas supplied by any gas company shall, with respect to its illuminating power at the distance aforesaid, be such as to produce from a batwing or fishtail burner, consuming five feet of gas per hour, a light equal in intensity to twenty such sperm candles; and each such gas shall, with respect to its purity, be so far free from ammonia and sulphuretted hydrogen that, upon certain specified tests, there shall not be more than twenty grains of

sulphur in any form in 100 cubic feet of gas.

By the *Gas Light and Coke Company's Act*, 1868 (31 & 32 Vict. c. cvi.), s. 8, *The company shall be and continue subject to the powers and provisions of the Metropolis Gas Act, 1860, and of any Act passed, or hereafter to be passed, for amending the same, and entitled to the powers and privileges of those Acts, as if this Act were not passed, so far as the same are not varied by this Act. By s. 109, If the Bill, the short title of which, when passed, is intended to be "The City of London Gas Act" (in this Act referred to as the City Gas Act), now pending, pass into a law in the present session, then the company and their undertaking shall be subject to the provisions of the City Gas Act without, as well as within, the City of London and the liberties thereof, and such Act shall extend to the whole undertaking of the company. By s. 110, Nothing in this Act contained shall exempt the company or their gasworks from the provisions of the Metropolis Gas Act, 1860, or the Act for regulating measures used in sales of gas as amended by subsequent Acts, or any other general Act already or hereafter passed, in the present or any future session of Parliament, for regulating gas companies in the metropolis, or for regulating the supply or sale of gas in the metropolis, &c.*

By the *City of London Gas Act*, 1868 (31 & 32 Vict. c. cxv.), s. 3, *such parts of the Act of 1860 as are described in the first schedule to the Act, and any part of any special Act of any company inconsistent with the Act are, so far as they respectively relate to the companies and the City, are repealed. By ss. 53 and 54, the gas (except canal gas) supplied by each company, shall be of an illuminating power of not less than sixteen candles. The Act also contains provisions as to the purity and quality of the gas, and provides means for testing it:—*

Held (affirming the decision below), that the Acts of 1868 did not repeal the provisions in the Act of 1860 as to the purity, quality and mode of testing of the gas, and that the company remained subject to these provisions as well as to those contained in the *City of London Gas Act*.

In this Case, error was brought by the plaintiffs on a judgment of the Court of Queen's Bench, in favour of the defendants on a Special Case, stated to determine the question whether the provisions of the *Metropolis Gas Act*, 1860, as to the purity and quality of the gas and the process of testing the same, are repealed by the operation of the *Gas Light and Coke Company's Act*, 1868, and the *City of London Gas Act*, 1868.

The special case and the arguments and judgment of the Court below are fully set out, 41 Law J. Rep. (N.S.) Q.B. 360. The above statement of the sections, in the head-note, will be sufficient for this report.

Besley, for the plaintiffs, urged the arguments used in the Court below, and also that effect must be given to the words in section 110 of the plaintiff Company's Act, 1868, "as amended by subsequent Acts," which he contended controlled the previous words of that section, and made it applicable only to such provisions of the *Metropolis Gas Act*, 1860, as were not repealed by the *City of London Gas Act*.

F. T. Streeten (J. J. Powell with him), was not called upon.

KELLY, C.B.—It seems to me impossible to read the 8th and 110th sections of the earlier Act of 1868—(I say earlier because though both Acts were passed the same day, the plaintiff's Act is chapter 106, and the *City of London Act* is chapter 125)—and not hold that all the provisions of the *Metropolis Gas Act*, 1860, though repealed as to the *City of London*, continue in force, and are operative, as regards the plaintiff's undertaking, everywhere else.

MARTIN, B.—I am quite satisfied that there is nothing whatever to relieve this company from the obligations imposed by the Act of 1860, such as that gas, when tested in the manner prescribed, shall not contain more than twenty grains of sulphur in any form in one hundred cubic feet of gas.

KEATING, J., BRETT, J., and CLEASBY, B., concurred.

(In the Second Division of the Court.)

1873. }
Jan. 21. }

HUTLEY v. HUTLEY.

Champerty—Common Interest in Subject-matter of Dispute—Relationship.

Declaration that H., a brother of defendant and a cousin of plaintiff, had died leaving landed estates and personal property, and the defendant was the heir-at-law of the deceased and one of his next of kin, and the deceased died leaving a will whereby his property, real and personal, was left to persons other than plaintiff and defendant, and the plaintiff believed that such will revoked a former will by which the testator had bequeathed certain property to plaintiff, and in consideration that plaintiff would take the necessary steps to contest the validity of the said will and would advance certain moneys and obtain evidence for such purpose, and instruct an attorney in that behalf, defendant promised that he would pay to plaintiff one half of any personal property and convey to him a moiety of any landed estates he might recover or which might come to him, the defendant, by reason of the taking of such proceedings for the setting aside of such will; and plaintiff took such steps as aforesaid and advanced certain moneys and instructed an attorney, and a large sum of money was thereby recovered by defendant, and the said will was declared invalid, and defendant became entitled to and obtained possession of large landed estates of the deceased. Breach, that defendant had not paid to the plaintiff half the personal property, or conveyed to him one-half of the real estates:—Held, on demurrer, that the declaration was bad, for the agreement being to advance money and procure evidence for the purpose of a suit in consideration of a share in what was recovered by it, was prima facie invalid on the ground of champerty, and that the relationship of the parties, and the other circumstances stated in the declaration, did not give the plaintiff such an interest in the suit as to alter the nature of the transaction.

Declaration—That John Hutley, a brother of the defendant and a cousin of the plaintiff, had died leaving extensive landed

estates and a large sum of personal property, and the defendant was the heir-at-law of the deceased and one of his next of kin, and the deceased died leaving a will whereby the property, real and personal, of the deceased was left to persons other than the plaintiff and defendant, and the plaintiff believed that such will revoked a former will by which the testator had bequeathed certain property to the plaintiff, and in consideration that the plaintiff would take the necessary steps to contest the validity of the said will and would advance certain moneys and obtain evidence for such purpose, and instruct an attorney in that behalf, the defendant promised that he would pay to the plaintiff one-half part or share of any personal property and convey to him a moiety of any landed estates he might recover or which might come to him, the defendant, by reason of the taking of such proceedings for the setting aside such will; and the plaintiff took such steps as aforesaid and advanced certain moneys and instructed an attorney, and a large sum of money was thereby recovered by the defendant, and the will of the deceased was declared invalid, and the defendant became entitled to and obtained the possession of large landed estates of the deceased. And all conditions were fulfilled and all times elapsed and all things were done necessary to entitle the plaintiff to a performance by the defendant of his said promise. Yet the defendant has not paid to the plaintiff half the personal property, or conveyed to him one-half of the real estates.

Demurrer and joinder in demurrer.

Philbrick (Pearce with him), in support of the demurrer.—The agreement declared upon is invalid. In one of the latest cases on this subject, Earle v. Hopwood (1), it is laid down that a contract to advance money for the prosecution of a suit in consideration of a portion of the property to be recovered is void on the ground of maintenance. The offence of champerty, which is a species of maintenance, is explained in 2 Inst. 207,

(1) 9 Com. B. Rep. N.S. 566; s. c. 30 Law J. Rep. (N.S.) C.P. 217.

where it is described as a bargain with the demandant or tenant, plaintiff or defendant, to have part of the thing in suit, if he prevail therein, for maintenance of him in that suit. Every champerty is maintenance, but every maintenance is not champerty, for champerty is but a species of maintenance which is the *genus*. Champerty is described in similar terms in *Steph. Blackst.* 5th. ed., vol. iv., 317. But the leading case is *Sprye v. Porter* (2), which may be considered to have settled the law, and to have decided against the maintenance of a suit unless the person maintaining it has an interest common with the parties. But no such interest is disclosed on the face of the declaration. The mere *bona fide* belief of the plaintiff that he had an interest is not sufficient, and even if he had an interest, that would not justify him in bargaining for a share in the proceeds of the suit. He also referred to *Hawkins's Pleas of the Crown*, Book I. c. 83. ss. 1, 18, *Hunter v. Daniel* (3), and *Bainbrigge v. Moss* (4).

Day (*Anderson* with him), in support of the declaration. The declaration does not disclose an illegal agreement. The cases upon maintenance and champerty proceed upon the same footing, and it must be taken that to constitute maintenance the *mens rea* must be proved, and that the person maintaining the suit did so from some improper motive. In *Findon v. Parker* (5), where the definition of maintenance in *Co. Litt.* 368b, was referred to: "when one maintaineth the one without having any part of the thing in plea or suit," Rolfe, B., said, "surely in a matter which is considered as criminal that must mean without having or believing himself to have an interest." In the present case the plaintiff and defendant had a common interest in the proceedings

which were contemplated. The setting aside of the second will was a benefit to both of them, though it might be necessary for the plaintiff to take subsequent proceedings.

[BLACKBURN, J.—But there is no reason why the plaintiff should stipulate for a proportionate share of what the defendant receives.]

In *Sprye v. Porter* (2) it was not shewn that the plaintiff had any interest in the proceedings. The old authorities shew that where in actions concerning the realty, the party is a blood relation, it is not maintainable—2 *Rolle's Abridg.* "Maintenance," pl. G. and H.; *Stanley v. Jones* (6).

BLACKBURN, J.—We need not trouble the counsel for the defendant to reply. I think that the agreement cannot be enforced against him. The declaration states that a brother of the defendant and cousin of the plaintiff had died, leaving real and personal estate; that the defendant was heir at law of the deceased, and one of the next of kin; that the deceased had died leaving a will by which the property was left away from the plaintiff and the defendant, that the plaintiff believed that the will revoked a former will by which the testator had bequeathed him property, and that (here we have the agreement) in consideration that the plaintiff would take the necessary steps to contest the validity of the second will and advance money, obtain evidence for the purpose and instruct an attorney, the defendant promised the plaintiff a half of the property which might be recovered by the defendant by reason of the proceedings. Now let us pause here and see whether an agreement like this is champertous and void. There can be no doubt that to agree to procure evidence and advance money for the prosecution of a suit in consideration of a share in the property to be recovered by it, is champerty. The case of *Sprye v. Porter* (2), which I see no reason to quarrel with, is upon this subject directly in point. Lord Campbell there states the

(2) 7 E. & B. 58; s. c. 26 Law J. Rep. (N.S.) Q.B. 64.

(3) 4 Hare 420; s. c. 14 Law J. Rep. (N.S.) Chanc. 194.

(4) 3 Jurist, N.S. 58.

(5) 11 Moo. & W. 675; s. c. 12 Law J. Rep. (N.S.) Exch. 444.

(6) 7 Bing. 369; s. c. 9 Law J. Rep. (N.S.) C.P. 51.

substance of the seventh plea, which stated that there was an agreement that the plaintiff should give information and evidence for the purpose of proceedings for the recovery of property by the defendant, and that if by means of such information and evidence property was recovered, the plaintiff should have one-fifth of it. Lord Campbell proceeds, "The plea goes on to allege that for the purpose of carrying this illegal agreement into effect, the parties entered into the agreement, and shews that it was under the illegal agreement that the property actually was recovered. Here we have *maintenance* in its worst aspect. . .

They are not to employ the attorney (in the case before us the plaintiff undertakes to employ an attorney) or to advance money to carry on the litigation, but they are to supply that upon which the event of the suit must depend, *evidence*, and they are to supply it of such a nature and in such quality as to ensure success. The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury, and to a perversion of justice. Upon principle such an agreement is clearly illegal, and *Stanley v. Jones* (6) is an express authority to that effect."

Now the present case goes further than *Sprye v. Porter* (2). The agreement is in consideration that the plaintiff would take steps to contest the will, advance money and obtain evidence, and instruct an attorney, the defendant promised that he should have one-half of the property which the defendant might recover by these proceedings. The plaintiff gets nothing unless property is recovered, and although he does not in terms say that he *will* procure evidence, I think that makes no difference, because it is one of the services for which he is to have his share in the property. Then Mr. Day tried to take the case out of the law of champerty by urging that the plaintiff is cousin of the defendant, and that, according to the old authorities, it is not maintenance for one who is a relation of one of the parties to an action, or is otherwise in-

terested in it, to advance money towards the expenses of the litigation. This is true enough, and I agree with what was said by Lord Abinger in *Findon v. Parker* (3), that the old law as to maintenance would not in these days be enforced, and that if a relative of the party to the suit were to guarantee the bill of costs, there would be nothing illegal in it. But when the case is nothing more than a bargain for evidence in exchange for a share in the proceeds of the suit, I cannot see why the fact that the parties are blood relations can make any difference. There is no authority that it does, and upon principle it ought not. Then we have a rather obscure allegation in the declaration that the plaintiff believed that the will in question revoked a former will, under which property was bequeathed to him, and the inference sought to be drawn is, that he had an interest in the proceedings. But this interest was not his only motive for assisting the defendant. He stipulates for one-half of the property to be recovered, and the case is therefore within the mischief of champerty, although the plaintiff may have some small collateral interest in the proceedings. I agree with the words of Lord Cranworth in *Findon v. Parker* (5), that interest must mean having, or *believing* himself to have, an interest, and that if it turned out that the person making the agreement had by mistake and *bona fide* believed that he had an interest, this would not be maintenance. Here I think the agreement illegal, and our judgment must be for the defendant.

LUSH, J.—I am of the same opinion. It seems conceded by the plaintiff's counsel that if it were not for the allegation as to his interest in the proceedings, the declaration would disclose no cause of action. But the mere fact that he was cousin of the defendant (the heir-at-law who was seeking to set aside the will) gave him no interest in the realty. The relationship by itself gave him no interest in the proceedings. Then the declaration goes on to say that he believed that the will revoked a former will, by which the testator had bequeathed certain property to him; but supposing that he did, he

could have no share or interest in what the defendant, as heir-at-law, would acquire by upsetting the second will. I cannot think that the mere collateral interest which he had in any proceedings which might upset the second will is sufficient. He ought not to be allowed to buy up an interest in a suit on the terms that he shall furnish evidence and advance money towards it. As to the old cases with regard to the interest of relations, I can find no authority to shew that a relative may advance money and procure evidence for a suit on condition of acquiring part of the property which it is intended to recover.

ARCHIBALD, J. — I am of the same opinion. I do not think the declaration brings the case within the exceptions in the law of champerty, either on the ground of interest or relationship. I therefore think that the case comes within the principle laid down in *Sprye v. Porter* (2), and that it is one of illegal partition of the proceeds of a suit.

Judgment for the defendant.

Attorneys—Ditton, for plaintiff; Paterson, Snow & Burney, agents for A. M. White, Colchester, for defendant.

1872. }
Jan. 24. } FLETCHER v. KRELL.

Master and Servant—Governess—Non-Disclosure of material Fact—Absence of Fraud.

In an action by a governess for breach of an agreement in writing, in which she was described as "M. K. F. spinster," and by which the defendant undertook that she should be employed for a term of three years, it was pleaded that the plaintiff intending to induce the defendant to enter into the contract, concealed from him a fact material to her qualifications as such governess, and material to be known by

the defendant in engaging her as such governess, namely, that she had previously been married, and that the marriage had been dissolved by decree of the Divorce Court:—Held on demurrer, that the plea was bad, as there was no allegation of fraud, and the mere non-disclosure of a material fact was, except in the case of policies of insurance, no answer to an action upon a contract.

Declaration for breach of an agreement in writing between the defendant, described as acting as agent for M. Clitondo, of Buenos Ayres, and the plaintiff described as "Margaret Fletcher, spinster," whereby the plaintiff agreed to leave London for Buenos Ayres, and after her arrival there to serve Clitondo as governess for the term of three years, at a salary of 100*l.* a year, and the defendant undertook to be personally liable for the due performance by Clitondo of his part of the contract.

Second plea, that the plaintiff intending thereby to induce the defendant to enter into the contract, concealed from the defendant a fact then known to the plaintiff and not known to the defendant, and material to the qualifications of the plaintiff as such governess, and material to be known by the defendant in engaging the plaintiff as such governess and entering into such contract, that is to say that the plaintiff had been previously to the said time married to one Bennett, and that the marriage had been dissolved by a decree of her Majesty's Court for Probate and Matrimonial Causes in England, and that the plaintiff had thereby been divorced from her husband, and the plaintiff thereby induced the defendant to enter into the contract.

Demurrer and joinder in demurrer.

Philbrick, in support of the demurrer.—The plea is bad. There was no obligation on the part of the plaintiff to disclose the fact of her marriage. (He was then stopped.)

Watkin Williams, in support of the plea.—The misdescription of the plaintiff in the contract is material. The fact of her previous marriage and divorce ought

to have been communicated to the defendant.

[BLACKBURN, J.—It is not alleged that there was any fraudulent concealment. Are the parties to a contract, except in cases of policies of assurance which are *uberrimæ fidei*, bound to disclose material facts?]

The position which the plaintiff was about to occupy made it imperative that the circumstances of her past life should be known to her employer.

BLACKBURN, J.—There can be no doubt that the plea is bad. There is no allegation of fraud, and short of that the mere concealment of a material fact, except in cases of policies of insurance, does not avoid a contract. The cases of *The North British Insurance Company v. Lloyd* (1) and *Lee v. Jones* (2) are sufficient authorities for this proposition. If a servant turns out to be unfit for his duties he may be discharged, but if he is able and willing to perform his duties he may enforce the contract of service, except where he has been guilty of moral fraud. This is an attempt to apply the law of insurance to that of master and servant, for which there is no authority. *Baker v. Cartwright* (3),—where, in an action for breach of promise of marriage, it was held that the fact that the defendant at the time of the promise, was unaware that the plaintiff had at one time been insane, was no answer to the action,—goes even further than the present case.

LUSH, J., and ARCHIBALD, J., concurred.

Judgment for the plaintiff.

Attorneys—Park & W. B. Nelson, for plaintiff
Thomas & Hollams, for defendant.

1873. } THE QUEEN v. JUSTICES OF
Jan. 11. } EXETER.

The Licensing Act, 1872 (35 & 36 Vict. c. 94. ss. 45 and 46)—Alehouse License—Annual Value—Improvement of Premises—Illegal Condition in License—Quashing—Certiorari—9 Geo. 4. c. 61—"The Review of Justices Decisions Act, 1872" (35 & 36 Vict. c. 26).

At a general annual licensing meeting, M., the occupier of a house licensed as a public house, under 9 Geo. 4. c. 61, applied for a renewal of the license. The justices renewed the license, but with the following notice upon it—"This license is renewed on condition that the licensed premises shall, before the next general annual licensing meeting, be improved and made of the annual value of 30l., in default of which this license will not be renewed":—Held (MELLOR, J., hæsitante), that the justices had no power to impose such a condition upon M.; that the provision in section 46 of the Licensing Act, 1872, as to improving the premises does not apply to a house already licensed under 9 Geo. 4. c. 61, and that the condition was null and void.

Semle, that part of a license cannot be quashed upon certiorari without quashing the whole.

Observations on the requisites of the affidavit under "The Review of Justices Decisions Act, 1872."

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. p. 35.]

(1) 10 Exch. Rep. 523; s. c. 24 Law J. Rep. (N.S.) Exch. 14.

(2) 17 Com. B. Rep. N.S. 482; s. c. 34 Law J. Rep. (N.S.) C.P. 131.

(3) 10 Com. B. Rep. N.S. 124; s. c. 30 Law J. Rep. (N.S.) C.P. 364.

1873. }
Jan. 24. }

WAUGH v. MORRIS.

Shipping—Charter-party—Voyage—Illegality—The Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 78—Order in Council.

A charter-party was made in France, by which it was stipulated that the ship should proceed to Trouville, a port in France, and should there load a cargo of hay, and proceed therewith direct to London; all cargo to be brought and taken from the ship alongside. The agent of the defendant, the charterer, told the master that the consignors would require the hay to be delivered at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, which he promised to do. On arriving in the Thames, he was informed that by an order in council made under "The Contagious Diseases (Animals) Act, 1869," it was illegal to land in Great Britain hay brought from France. The order in council was in existence when the charter-party was entered into, but neither of the parties knew of it, nor did the shipowner contemplate any violation of the law. The defendant after a time exported the hay, and the shipowner brought an action against him to recover damages in respect of the detention of the ship:—Held, that under these circumstances the defendant could not set up as a defence that the voyage was an illegal voyage.

Declaration—That the plaintiff was the owner of a certain ship called *The Castor* lying at Trouville, whereof one W. Chappell was master, and thereupon a charter-party was made and entered into by and between the said W. Chappell and one W. Jacques, whereby it was, among other things, provided that the said W. Chappell should let to the said W. Jacques, who accepted the same, the said ship (except the cabin, the lodgings of the crew and the room necessary for the provisions and spare store) in good and due condition, staunch and supplied with all the things necessary to navigate in safety, to load at Trouville (without exceeding what she could reasonably stow and carry), a full and complete cargo of pressed bales of hay, and that ten working

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days were to be allowed in full, for loading and unloading, and the days on demurrage were to be paid day by day at 50s. per day, and that the lay days should begin on a certain day, to wit, on the 7th day of October, 1871. And the plaintiff says that the said W. Jacques shipped on board the said ship, under the said charter-party, a certain cargo to be carried on board the said ship from Trouville aforesaid to London, and there delivered upon and according to the terms of a certain bill of lading which was in the words and figures following, that is to say, "Shipped in good order and well conditioned by W. Jacques in and upon the good ship or vessel called *The Castor*, whereof is master for this voyage W. Chappell, and now riding at anchor in Trouville and bound for London. About seventeen tons of hay in bundles; eleven cases and hamper of wine and spirits; three boxes of clothes, being marked and Six days employed numbered as in the for loading the margin, and are to be ship in Trouville. delivered in the like

W. Jacques. good order and well
Received on account 2*l.* 1*s.* conditioned at the afore-

W. Chappell. said port of London, the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature or kind soever excepted, unto order or to assigns paying freight for the said goods, all conditions as per charter and disbursements with prime and average accustomed. In witness whereof the master of the said vessel hath affirmed to three bills of lading all of this tenor and date, one of which bills being accomplished, the others to stand void.

"Dated in Trouville the 13th of October, 1871. Weight and conditions unknown; ship not accountable for condition of hay.

"William Chappell."

And the plaintiff says that after the said cargo had been so received on board the said ship, the said W. Jacques indorsed the said bill of lading to the defendant, and upon and by reason of such indorsement the property in the said cargo passed to the defendant, and the plaintiff says that divers, to wit, six of the said ten lay days, were employed in

loading the said ship at Trouville aforesaid, and the said cargo was carried on board the said ship from Trouville to London aforesaid in accordance with the said charter-party and bill of lading, and all conditions were fulfilled, and all things done and happened and all times elapsed necessary to entitle the plaintiff to have the said ship loaded and discharged within the said ten working days according to the said bill of lading and charter-party, and to sue the defendant for the breaches hereinafter-mentioned. Yet the said ship was not loaded and discharged within the said ten working days, but was kept and detained for divers, to wit, eighteen days beyond the said ten days, contrary to the said charter-party, whereby the plaintiff lost the use of his said ship, and was put to great expense in providing food and wages for the crew thereof. And the plaintiff says that though the said ship was kept and detained for divers, to wit, for eighteen days beyond the said ten days, whereby a large sum, to wit, the sum of 45*l.*, became due and payable by the defendant to the plaintiff for and in respect of the demurrage of the said ship; yet the defendant did not pay the said sum, to wit, the sum of 45*l.*, nor any part thereof, contrary to the said charter-party and bill of lading.

2. And for a second count, the plaintiff sues the defendant for that, before the making of the promise hereinafter-mentioned, a certain cargo had been carried in a certain ship of the plaintiff, called *The Castor*, whereof one W. Chappell was master, from Trouville to London, to be delivered according to the terms of the bill of lading and charter-party in the first count mentioned, and at the time of the making of the promise hereinafter mentioned, the said ship with the said cargo on board was lying in the port of London, and thereupon in consideration that the plaintiff, at the request of the defendant, would deliver to the defendant the said cargo, and would suffer the defendant to receive the same according to the terms of the said bill of lading and charter-party, the defendant promised the plaintiff that he would discharge the said cargo from the said ship, and receive the same within the time by the said bill of lading and charter-party provided, and the plaintiff says that

he did deliver the said cargo to the defendant, and allowed him to receive the same, and all conditions were fulfilled, and all things done and happened, and all times elapsed, necessary to entitle the plaintiff to have the defendant perform his said promise and discharge the said cargo from the said ship, within the said time, and to sue for the breach hereinafter mentioned; yet the defendant did not discharge the said cargo from the said ship within the said time, but the said ship was detained for divers, to wit, eighteen days, beyond the said time, whereby the plaintiff lost the use of the said ship, and a large sum, to wit, the sum of 45*l.*, became and is due and owing to the plaintiff for the demurrage thereof. There were also the usual common counts.

The defendant pleaded with other pleas:

Seventh. As to so much of the first count of the declaration, as concerns the hay, parcel of the cargo in the said count mentioned, that Trouville, in the said charter-party and bill of lading in that count mentioned, is a place in the territory of the French Republic, and that the hay agreed on under and by virtue of the aforesaid charter-party and bill of lading to be loaded on board the said vessel of the plaintiff, was hay to be loaded at Trouville aforesaid, and that, in and by the said charter-party and bill of lading, the plaintiff agreed to bring the hay so loaded at Trouville aforesaid, into a port or place in Great Britain, to wit, into the port of London, and to deliver the same there in accordance with the usage and custom of the said port, that is to say to land the said hay at a proper landing-place within the port of London, and to deliver the same when so landed there, and the defendant says that the hay, in respect of which the claim of the plaintiff in the said count for demurrage and for damages for the detention of his said ship is made, was the hay so agreed on by the said charter-party and bill of lading to be loaded at Trouville aforesaid, and to be brought as aforesaid for the purposes aforesaid into a port or place of Great Britain, to wit, into the port of London, and the defendant says that, before and at the time of the making of the said charter-party

and bill of lading in the said count mentioned, and during all the time the said ship, with the said hay on board, was detained in the said port of London, as in the said count is alleged, there was, in full force and unrepealed, a certain Act of Parliament entitled the Contagious Diseases (Animals) Act, 1869, and under and by virtue of the said Act, a certain Order of Council made by the Lords of Her Majesty's most Honourable Privy Council, bearing date the 9th day of March, 1871, and being in the words and figures following, that is to say,

"Order of Council.

"(321).

"At the Council Chamber, Whitehall, the 9th day of March, 1871.

"By the Lords of Her Majesty's Most Honourable Privy Council.

"Present.

"Lord Privy Seal, Mr. Secretary Bruce, Mr. Forster.

"The Lords and others of Her Majesty's Most Honourable Privy Council, by virtue and in exercise of the powers in them vested under the Contagious Diseases (Animals) Act, 1869 (in this order referred to as the Act of 1869) and of every other power enabling them in this behalf, do order, and it is hereby ordered as follows—

"1. This order shall take effect from and immediately after the 13th of March, 1871, and words in this order to have the same meaning as in the Act of 1869.

"2. Cattle, brought from any place in the territory of the French Republic, or from any place in Belgium, shall not be landed at any port or place in Great Britain.

"3. Cattle, sheep or goods being or having been on board any vessel at the same time with any cattle brought from any such place, as aforesaid, shall not be landed at any port or place in Great Britain.

"4. The following articles brought from any such place, as aforesaid, shall not be landed at any port or place in Great Britain.

"Fresh meat, fresh hides, unmelted fat, hoofs, horns, manure or hay.

"(Signed) Arthur Helps."

And the defendant says that, at the

time of making the said charter-party, and during the performance thereof, by loading at Trouville aforesaid, the said hay, and bringing the same in the plaintiff's ship into the said port of London, for the purpose of landing the same within the said port according to the said custom and usage of the said port, the plaintiff was a British subject owing allegiance to Her Majesty Queen Victoria, and was bound by the provisions of the said Act of Parliament and of the aforesaid Order of Council.

Eighth. The defendant as to so much of the first count of the declaration as concerns the hay, parcel of the cargo in the said count mentioned, repeats the seventh plea leaving out all averments as to the usage and custom of the port of London, and instead thereof avers that the plaintiff by the said charter-party and bill of lading in the said sixth plea mentioned, undertook and agreed in respect of a certain place in Great Britain, to wit, of the port of London, to bring the hay loaded, as in that plea is averred, into the said port, and to deliver the same there, which, in respect of the port of London, is an agreement to land the said cargo in the said port, and to deliver it when so landed there.

Issues were joined on the pleas.

At the trial which took place before Cockburn, C.J., at Guildhall, at the sittings after Michaelmas Term, 1871, it appeared that the charter-party referred to in the declaration was made in France, and stipulated that the cargo should be brought and taken from the ship alongside. Jacques told the master that the consignees would require the hay to be delivered to them at the "Tramway Wharf" in Deptford Creek, and that he should proceed there on his arrival in London. The master promised to do so. Both parties were ignorant at the time of making the charter-party that the Order in Council set out in the seventh plea had been made, and when the ship arrived the captain heard, for the first time, that it had been so made. Having heard of it he did not proceed to the Tramway Wharf, and the ship was detained in the river for eighteen days, until the defendant took the hay from alongside, and exported it to Belgium. The verdict was entered for the plaintiff, leave being

reserved to move to set that verdict aside and enter a verdict for the defendant, if the facts proved established the defence of illegality raised by the pleas. A rule *nisi* having been obtained—

Butt and Webster (on November 18 and 21, 1872), shewed cause. Neither party was aware at the time the charter-party was entered into that the order in council had been made, or that the landing the hay in this country was illegal. It is impossible to contend that the contract was necessarily illegal. If a contract is capable of performance without committing an illegal act, it is a valid contract. In the present case, the contract of the plaintiff has been performed. The order in council assumes that hay might be brought from France, but prohibits the landing thereof in England. That being so, there is nothing in the contract to shew illegality; in fact the hay has been taken by the defendant from on board the ship, and has been transhipped to Belgium. The defendant will rely upon the promise of the master that he would proceed to a particular wharf at Deptford Creek, so that the hay might be delivered there, but the master was not aware that it would be illegal to do so, nor has such a promise anything to do with the contract. The defendant was bound to find means for transshipping the hay, and in fact he did obtain the license to do so, though probably the license was not necessary as the order in council only prohibited the landing of the hay. The following passage in the judgment of Lord Abinger, C.B., in *Lewis v. Davison* (1), exactly applies to the present case: "I fully assent to the general proposition which has been urged that an agreement to do an unlawful act cannot be supported in law. But it does not appear to me that this is necessarily the effect of the agreement in the present case, and when the act which is the subject of the contract, may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act; the contrary is

the proper inference." Again, the decision of the Privy Council in *The Teutonia* (2) is very strongly in favour of the plaintiff, although that case differs in this respect, that, in the present case, the order in council was made before the charter-party was entered into. But it must be remembered that both parties were ignorant that the order had been made. It was held in *Haines v. Bush* (3), that it was no answer to an action by a broker for commission for procuring freight, that the charter-party procured was such, that if the charterer failed to obtain licenses the voyage would be illegal. So here, if in order to make the performance of the contract legal, it was necessary to procure a license, it was the duty of the defendant to obtain it. Even assuming that the contract could not be carried out, *Hill v. Idle* (4) shews that the plaintiff has a right of action against the defendant.

Milward and MacLachlan (on Nov. 21 and 22), supported the rule.—The verdict ought to be entered for the defendant, on the ground that the contract was illegal, and in order to shew that it was illegal, it may be looked at *aliunde*. What was it? It was that the ship should proceed direct to London, and land the hay there, the master agreeing, according to a direction given to him at Trouville, to proceed to a named wharf at Deptford Creek. The order in council, prohibiting the landing of hay, had been made before the charter-party was entered into so that the contract was altogether illegal.

[BLACKBURN, J.—But there was no intention to break the law of England, nor was there any enforceable contract to land the hay in Deptford Creek. COCKBURN, C.J.—Which of the two innocent parties is to suffer? Surely not the shipowner who has performed his part of the contract.]

The contract was to bring the hay to London, and it must be implied that it was intended for use in England, not to

(1) 4 Mee. & W. 654; s. c. 8 Law J. Rep. (N.S.) Exch. 78.

(2) 41 Law J. Rep. (N.S.) Adm. 57; s. c. Law Rep. 4 P.C. Ap. 172.

(3) 5 Taunt. 521.

(4) 4 Campb. 327.

be exported from England to another country. In the notes to *Collins v. Blantern* (5), the learned author writes: "The principle established in *Collins v. Blantern*, viz., that illegality may be pleaded as a defence to an action on a deed, has been so often recognised and is so well settled as law, that it would be useless to enter upon any long discussion respecting it," and then the cases are collected. See also *Cunard v. Hyde* (6). In *Collins v. Blantern* (5), the contract was good upon the face of it, and valid if looked at by itself, but when the illegality was imported into it *aliunde*, it was held to be bad.

[BLACKBURN, J.—There there was a wicked intention to frustrate the law, but here there was no such intention.]

It is contended there was an intention to break the law, for both the parties intended that the hay should be landed which was, in fact, contrary to the law; "*ignorantia legis excusat neminem*." Taking the charter-party along with the direction to the master to take the ship to the wharf, and the assent of the master, it is clear that there was an intention to land a cargo which, according to the order in council, must be regarded at that time as cargo calculated to produce rinderpest. The master was bound to obey the direction given to him, which may be looked upon as being part of the charter-party — *The Felix* (7). But further, on the face of it the contract was illegal, because contrary to the order in council. Under that order made in pursuance of "The Contagious Diseases (Animals) Act, 1869" (32 & 33 Vict. c. 70. s. 78), if any person landed or attempted to land the hay it would have been forfeited, and this contract was for breaking bulk and putting the hay over the ship's side in the river. That would include the putting it into lighters.

[BLACKBURN, J.—The agreement to deliver into lighters would not shew that the plaintiff knew what would be done with the hay afterwards. I do not see anything illegal in transhipping the hay, so long as it was not landed.]

(5) 1 Smith L.C. 278, 4th edition.

(6) 29 Law J. Rep. (N.S.) Q.B. 6.

(7) 37 Law J. Rep. (N.S.) Adm. 48.

In construing the Act of Parliament the purpose which the legislature had in view, namely, the prevention of the importation of infected matter, must not be lost sight of. — *Elliott v. Richardson* (8).

They also referred to *Forster v. Taylor* (9), *Brereton v. Chapman* (10), *Muller v. Gernon* (11) and *Stevens v. Gourley* (12).
Cur. adv. vult.

The judgment of the Court (13) was now (Jan. 24) delivered by

BLACKBURN, J.—This was an action brought by the owner of a ship against the charterers, for detaining the ship, in which the plaintiff has obtained a verdict, subject to leave to move to enter the verdict for the defendant, if the facts proved establish a plea of illegality.

On the trial before the Lord Chief Justice, the material facts appeared to be, that the charter-party was made in France between the agent of the defendant and the master of the ship.

By this charter-party it was stipulated that the ship should proceed to Trouville, a port in France, and there load a cargo of pressed hay, and proceed therewith direct to London, and a term in the charter-party was to the effect that all cargo should be brought and taken from the ship alongside.

The defendant's agent eventually told the master that the consignees would require the hay to be delivered at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, and this the master promised to do.

On arriving in the Thames the master prepared to proceed to the wharf, but then for the first time learned that, by an order in council made under the authority of the Cattle Diseases Acts, France was declared to be an infected country, and it was made illegal to land in Great Britain

(8) 39 Law J. Rep. (N.S.) C.P. 340; s. c. Law Rep. 5 C.P. 744.

(9) 5 B. & Ad. 887.

(10) 7 Bing. 559.

(11) 3 Taunt. 394.

(12) 7 Com. B. Rep. N.S. 99; s. c. 29 Law J. Rep. (N.S.) C.P. 1.

(13) Cockburn, C.J.; Blackburn, J.; Mellor, J.

any hay brought from that country. He could not therefore proceed to the wharf and there deliver the cargo, for that would have been landing the hay and illegal. After some delay, the defendant received the cargo from alongside the ship in the river into another vessel and exported it. There was no legal objection to this being done, but during the interval eighteen days elapsed, and it was for this detention that the plaintiff recovered. It appeared that the order in council had been made and published before the charter-party was entered into, but that in fact neither the master of the ship nor the defendant's agents were aware that it had been made.

A rule was obtained which was argued in Michaelmas Term, before the Lord Chief Justice, my brother Mellor and myself, when we took time to consider. We are of opinion that the rule should be discharged. The charter-party provides, that the cargo was to be taken from alongside, and that being so, the consignee might select any legal and reasonable place within the port, at which to take it from alongside. He by his agent in France named this wharf which he supposed erroneously to be a legal place, and the master under the same mistake assented to this, as indeed he would have had no right to refuse, if it had really been a legal place. But when it turned out that the defendant had named a place for the performance of the contract, where the performance was impossible because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable.

In the present case the performance by receiving the cargo alongside in the river without landing it at all was both legal and practicable. See *The Teutonia* (2), a case which would have been precisely in point if the order in council rendering the landing illegal had come into operation after the contract was made, instead of before. It was on the fact that the order in council existed at the time the contract was made, that the argument for the defendant was mainly grounded. It was said that the intention of both parties was, that the hay was to be landed, that therefore they intended to violate the law,

and that it may be shewn by extraneous evidence that a contract on the face of it, perfectly legal, is void because made with intent to violate the law, and that ignorance of the law makes no difference.

But we think, in the first place, that it is a mistake to say that the plaintiff intended that the hay should be landed. He, no doubt, contemplated and expected that the hay would be landed, for, except under very unusual circumstances, hay is not brought into the Thames for any other object; but all that the shipowner bargained for, and all that he can properly be said to have intended was, that on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship. If unexpectedly there had arisen a great demand for hay abroad, like that which existed when an army was in the Crimea, the consignee might have transhipped the hay, and exported it, without the shipowner having the slightest ground for complaining that his intention was frustrated. We agree that a contract lawful in itself is illegal, if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce v. Brookes* (13), it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *M'Kinnell v. Robinson* (14), "for the express purpose of the violation of the law."

But in the present case, the shipowner never did contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods, which he thought was lawful; but if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law; and he would have been right in fact in that expectation, for the defendant did not attempt to land the goods.

We quite agree that where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties know the law or not. But we think that, in order to

(13) 35 Law J. Rep. (N.S.) Exch. 134; s. c. 4 M.C. 358; s. c. Law Rep. 1 Exch. 213.

(14) 3 Mee. & W. 434; s. c. 7 Law J. Rep. (N.S.) Exch. 149.

avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance.

No one could for a moment contend that if everything happening in France had happened within the jurisdiction of our country, the plaintiff and defendant's agent could have been successfully indicted for a conspiracy to violate the law by landing their goods, for there would have been a want of *mens rea*. And it seems to us that the *mens rea* is as necessary to avoid a contract which can be legally performed, because when it was made it was with the object of satisfying an illegal purpose, as it is to render the parties criminally responsible.

Rule discharged.

Attorneys—Ingledew & Ince, for plaintiff;
Ashurst, Morris & Co., for defendant.

[IN THE EXCHEQUER CHAMBER.]

1873. }
Feb. 1. } DAWKINS v. LORD ROKEBY.

Defamation—Libel—Slander—Army—Soldier—Court of Enquiry—Evidence.

It having been reported that the plaintiff, an officer in the army, had made charges against his brother officers, the Commander-in-Chief directed that a Court of Enquiry should be assembled, who should enquire into the matter and report thereon to the Commander-in-Chief. A Court was held at which the defendant, an officer in the army, was required to attend as a witness. Being examined as a witness, he gave viva voce evidence, and then handed in a paper containing, in substance, a repetition of his evidence, with some additions upon the subject, and this paper was received by the Court. A report was made by the Court to the Commander-in-Chief. The plaintiff applied for a Court-

Martial upon the defendant for such his conduct towards the plaintiff. The application was not acceded to, and the plaintiff brought an action against the defendant, in respect of the written paper as a libel, and in respect of the viva voce evidence as slander.

The Judge at the trial ruled that the action would not lie if the verbal and written statements complained of were made by the defendant, being a military officer, in the course of a military enquiry in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of the enquiry, although the defendant had acted mala fide, and with actual malice, and without any reasonable and probable cause, and with a knowledge that the statement made and handed in by him as aforesaid was false.

A Bill of Exceptions having been tendered,—Held, that this ruling as to the law was correct.

Held also, that the evidence of the defendant was but a parcel of the minutes of the proceedings of the Court, which when reported and delivered to the Commander-in-Chief was received and held by him on behalf of the Sovereign, and as such was inadmissible in evidence.

This was a Bill of Exceptions to the ruling of Blackburn, J., at the trial of this cause.

The Bill of Exceptions set out the declaration as follows—For that before and at the time of the committing of the grievances hereinafter in the several counts of this declaration alleged, the plaintiff was an officer and lieutenant-colonel in the army, and held Her Majesty's commission in Her Majesty's regiment of Coldstream Guards, and was entitled to certain emoluments in respect thereof; and the defendant falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning him as such officer and captain as aforesaid, amongst other things, the words following, that is to say—"On every occasion that I have seen him (meaning the plaintiff) in the presence of his commanding officers, his manner has betrayed a total want of defer-

ence, not to use a stronger term, and all reports had represented him as habitually insubordinate;" and also the words following, that is to say—"I (meaning the defendant) also certainly told him (meaning the plaintiff) that unless he gained more self-command and behaved with more respect to those under whose orders he served, I must consider him unfit for command as I did for his present position (meaning the position of the plaintiff as such officer and captain as aforesaid). I am still of that opinion, and I cannot think that I overstepped my duty in expressing it clearly to him;" and also the words following, that is to say—"He (meaning Her Majesty's then adjutant-general) then asked whether I (meaning the defendant) wished the lieutenant-colonel (meaning the plaintiff) to be tried for insubordination. I (meaning the defendant) answered, I had only placed him under arrest because I could not permit an officer to treat me with marked disrespect in the presence of a great many junior officers, but that as I scarcely believed him to be responsible for his actions (meaning thereby that the plaintiff was not in his right mind), I should prefer his being admonished and released;" and also the words following, that is to say—"I (meaning the defendant) told the former Court that which I again repeat, viz., that after a long and earnest consideration of all that has passed, I reported to his Royal Highness my conviction that the lieutenant-colonel was unfit to command" (meaning that the plaintiff was unfit for command, and unfit for his position as such officer and captain as aforesaid). And the plaintiff also sues the defendant for that the defendant falsely and maliciously spoke and published of and concerning the plaintiff and of and concerning him as such officer and captain as aforesaid the words following, that is to say—"I (meaning the defendant) have seen him (meaning the plaintiff) in the presence of his superior officers, and on every occasion he shewed in his manner a total want of deference to their opinions, not to use a stronger term" (meaning that the plaintiff was in the habit of treating his superior officers in an insubordinate manner and with a want

of proper respect); and also the words following, that is to say—"He (meaning the plaintiff) is not in my (meaning the defendant's) opinion always responsible for his actions, and he is unfit to command others because he cannot command himself" (meaning that the plaintiff was not always in his right mind, and that he was unfit for his position as such officer and captain as aforesaid); and also the words following, that is to say—"I (meaning the defendant) have never found one of the superior officers of Colonel Dawkins' (meaning the plaintiff's) regiment, who did not state to me that during his (meaning the plaintiff's) whole service, he had been constantly taking offence where none was meant, and that he was habitually disrespectful to his commanding-officers. His (meaning the plaintiff's) manner on every occasion on which I (meaning the defendant) saw him confirmed that opinion" (meaning that the plaintiff was insubordinate and unfit for his position as such officer and captain as aforesaid); and also the words following, that is to say—"My (meaning the defendant's) enquiry led me to conclude that Colonel Dawkins (meaning the plaintiff) was of so captious a disposition that he was at times not responsible for his actions."

Plea—The defendant says that he is not guilty.

Replication—The plaintiff joins issue upon the defendant's plea.

The Bill of Exceptions then stated that the said issue came on to be tried before BLACKBURN, J., and thereupon to maintain and prove the said issue above joined, it was stated to the jury aforesaid by counsel on the part of the plaintiff, and admitted by counsel on the part of the defendant, as follows:

1. That at the time of the writing and publishing of the words set forth in the first and second counts respectively, that is to say, on the fourteenth day of February, in the year of our Lord one thousand eight hundred and sixty-five, the plaintiff was an officer in her Majesty's army, holding the commission of captain and lieutenant-colonel in the first battalion of the Coldstream regiment of foot guards, and the defendant was an officer

in the said army holding the commission of lieutenant-general.

2. That on the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and sixty, the defendant had been and was an officer in the said army, holding her Majesty's commission as lieutenant-general, and in command of a brigade of the said army, including the said regiment of foot guards, and the defendant continued to be the commanding officer of such brigade up to and until the second day of July in the year of our Lord one thousand eight hundred and sixty inclusive.

3. That plaintiff, on the twenty-fifth day of May, and up to and until the said second day of July inclusive, held her Majesty's commission of captain and lieutenant-colonel in the said regiment of foot guards, and was during all that period of time under the command of and subject to the orders of the defendant as and being his commanding officer.

4. That during the said period of time certain regulations and orders made by her Majesty relating to the discipline and government of the army, and known as "The Queen's Regulations and Orders for the army," were and still are in force, among others a Regulation or order in words and figures as follows, that is to say:

"A Court of Enquiry may be assembled by any officer in command to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object in view such Court may be directed to investigate and report upon any matters that may be brought before it, but it has no power (except when convened to record the illegal absence of soldiers, as provided for in the articles of war) to administer an oath, nor to compel the attendance of witnesses not military." And a further regulation or order in words and figures as follows, that is to say:

"A Court of Enquiry is not to be considered in any light as a judicial body. It may be employed at the discretion of the convening officer to collect and record information only, or it may be required to give an opinion also on any proposed question, or as to the origin or cause of certain existing facts or circum-

stances. Specific instructions on these points are, however, always to be given to the Court. The proceedings are to be recorded in writing as far as practicable in the form prescribed for Courts Martial, signed by each member, and forwarded to the convening authority by the president."

5. That on the 3rd day of February, 1865, it was directed by Field-Marshal his Royal Highness George, Duke of Cambridge, Commanding in Chief, that a Court of Enquiry should be held for the purpose of making such enquiries and affording such information as hereinafter mentioned and referred to.

6. That a letter summoning such Court of Enquiry was on the 4th day of February, in the year of our Lord one thousand eight hundred and sixty-five, by command of his Royal Highness the Field-Marshal Commanding in Chief, written and sent by the said Sir James Yorke Scarlett, as and then being the adjutant-general of Her Majesty's army, to Major-General Lord Frederick Paulet, C.B., then holding Her Majesty's commission of major-general in Her Majesty's said army, and the fit and proper person to be charged with the duty hereinafter set forth in the said letter, which said letter was in the words and figures as follows, that is to say—

"February 4th, 1865.

"My Lord,—I have the honour to express the Field-Marshal Commanding in Chief's desire that your Lordship will be pleased to cause

"Colonel De Bathe, C.B., Scotch Fusilier Guards;

"Colonel H.S.H. Prince Edward of Saxe-Weimar, C.B., Grenadier Guards;

"Colonel Stephenson, C.B., Scotch Fusilier Guards;

"Colonel Wynyard, Grenadier Guards; to be detailed as members of a Court of Enquiry, to be assembled under the presidency of General Sir Alexander Woodford, G.C.B., to whom they should severally report themselves for further instructions as to the time and place of meeting.

"I have, &c.

"(Signed) J. Yorke Scarlett,
"Adjutant-General."

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7. That on the 4th day of February a letter was, by the command of his Royal Highness the Field-Marshal Commanding-in-Chief, addressed and sent by the said Sir James Yorke Scarlett, as such Adjutant-General as aforesaid, to General Sir Alexander Woodford, G.C.B., then holding Her Majesty's commission of General in Her Majesty's said army, as President of the said Court of Enquiry, which letter was in words and figures as follows, that is to say—

“ February 4th, 1865.

“ Sir,—I have the honour to inform you that his Royal Highness the Field-Marshal Commanding-in-Chief has been pleased to appoint you to be President of a Court of Enquiry, constituted as in the margin (1).

“ The subject which will be submitted for your investigation arises out of an assertion, frequently repeated and insisted on by Lieutenant-Colonel Dawkins, that certain officers under whose command at various times he has been placed have made false statements of facts to his injury.

“ Repudiating the interpretation which his Royal Highness was willing to place on these words, viz., ‘ That Lieutenant-Colonel Dawkins alluded to opinions and conclusions on the part of these officers with which being unfavourable to himself he did not coincide,’ this officer has insisted on giving the more offensive interpretation to his words, as will be seen by the correspondence submitted to the Court.

“ Under these circumstances, it has become necessary in justice to the officers, who in exercise of their command have from time to time found fault with Lieutenant-Colonel Dawkins, to ascertain whether Lieutenant-Colonel Dawkins can substantiate his charges against them.

“ The Court, therefore, under your direction, will give, after due investigation, their opinion as to the validity of the charges in the sense in which Lieutenant-Colonel Dawkins presses them against his superior officers, and also will give their opinion upon Lieutenant-Colonel Dawkins' conduct generally, as evinced by the correspondence submitted, and

(1) The four officers named in the last letter.

state how far they consider the service will be benefited, or the contrary, by placing Lieutenant-Colonel Dawkins in command of a battalion of Guards, when the occasion presents itself.

“ I have, &c.,

“ (Signed) J. Yorke Scarlett,
“ Adjutant-General.”

8. That the said Court of Enquiry, so appointed as aforesaid, met on the tenth day of February, in the year of our Lord one thousand eight hundred and sixty-five, and proceeded to investigate and to enquire into the several matters, so referred and submitted to them as aforesaid, on that day and by due adjournment on fifteen several days subsequently, between the said tenth day of February, and the twenty-ninth day of March, in the year of our Lord, one thousand eight hundred and sixty-five, inclusive.

9. That the plaintiff, as such officer as aforesaid, appeared before such Court at such sittings, and made statements and produced and read documents in reference to the said charges and to the matters so referred and submitted, as aforesaid, to the said Court of Enquiry.

10. That the defendant then being and having been such officer as aforesaid, was required to and on the fourteenth day of February, one thousand eight hundred and sixty-five, did appear before the said Court of Enquiry, to be examined before the said Court, touching the matters so referred and submitted to the said Court as aforesaid, and was examined by the said plaintiff and by the said Court respectively, touching the said matters so referred and submitted as aforesaid.

11. That on the said fourteenth day of February aforesaid, the defendant amongst other statements made by him in the course of his said examination before the said Court, made to the said Court the several statements set forth in the second count of the declaration. And afterwards and after the close of his examination before the said Court, and without any request by the said Court, or by the plaintiff, or by any other person to him so to do, handed in to the said Court a written paper containing the words set forth in the said first count, which was received by the Court.

12. That the plaintiff applied to the proper military authority in that behalf, for a Court-Martial on the defendant for such his conduct towards the plaintiff, and such military authority having power to grant or refuse the said Court-Martial, did refuse to summon or allow the same to be held, whereupon the plaintiff brought the present action.

13. That the aforesaid statements and admissions having been made as aforesaid, upon the trial of this cause, thereupon the counsel for the plaintiff proposed and offered further to give in evidence and prove, that the defendant in making and handing in the said statements set forth in the said first and second counts respectively, was acting *mala fide* and with actual malice, and that the said statements were respectively made without any reasonable or probable cause for the same, and with a knowledge on the part of the defendant that they were respectively false.

14. Whereupon the counsel for the defendant interposed, and insisted that even if the said evidence proposed and offered to be given by the plaintiff were given, and it was proved that the defendant, in making the said statements, had acted *mala fide* and with actual malice, and that the said statements were respectively made without any reasonable or probable cause, and with a knowledge on the part of the defendant that they were respectively false, still the action would not lie.

15. And the said Judge declared his opinion that the said evidence so offered to be given by the plaintiff as aforesaid, was immaterial and irrelevant, and that, as a matter of law, the action would not lie, if the verbal and written statements were made by the defendant, being a military man, in the course of a military enquiry in relation to the conduct of the plaintiff, being a military man, and with reference to the subject of that enquiry, even though the plaintiff should prove that the defendant had acted *mala fide* and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him as aforesaid were false, and then directed the said jury that, under

the circumstances so stated and admitted as above set forth, as a matter of law the action would not lie, even though the plaintiff should prove that the defendant had acted *mala fide* and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him as aforesaid were false. And the jurors, by and under the direction of the said Judge, then gave their verdict for the defendant upon the said issue.

16. And the counsel for the plaintiff, upon the direction of the said Judge, conceiving that by law the said action would, under the said circumstances, lie if the plaintiff proved that the defendant had, in making and handing in the said statements in the said first and second counts set forth, acted *mala fide* and with actual malice, and without any reasonable or probable cause, and with a knowledge that the said statements were false, made their exceptions to the said directions of the said Judge.

17. And inasmuch as the matters aforesaid do not appear by the record of the verdict aforesaid, the said counsel for the plaintiff did then and there, and before the giving of the said verdict, propose his aforesaid exceptions to the said directions of the said Judge, and requested him to put his seal to this bill of exceptions, containing the several matters so stated on the part of the plaintiff, and admitted on the part of the defendant as aforesaid, and the several matters so offered to be given in evidence on the part of the plaintiff as aforesaid, and the said directions of the said Judge thereon, according to the statute on that behalf, and thereupon the said Judge did put his seal hereto, according to the said statute.

Matthews (Holl with him) argued the case for the plaintiff (on Feb. 13, 14, 1872), and *Sir John Karslake* (*Archibald* with him) for the defendant.

[The arguments need not be reported as the questions are so fully set forth in the Bill of Exceptions and the judgment of the Court.]

The following cases and authorities were referred to in the course of the

arguments — *Warden v. Bailey* (2); *Grant v. Shard* (3); *Reynolds v. Kennedy* (4); *Moore v. Bastard* (5); *Wall v. McNamara* (6); *Fry v. Ogle* (7); *Swin-ton v. Molloy* (8); *Dixon v. Lord Wilton* (9); *Hodgson v. Scarlett* (10); *Floyd v. Barker* (11); *Keighly v. Bell* (12); *Sutton v. Johnstone* (13); *Grant v. Gould* (14); *Dawkins v. Lord Paulett* (15); *Home v. Bentinck* (16); *Revis v. Smith* (17); *Henderson v. Broomhead* (18); *Simmonds on Courts Martial*, cap. 9; *Fray v. Blackburn* (19); *Scott v. Stansfield* (20); *Dawkins v. Lord Rokeby* (21); the Articles of War, 146, 147, 148; 28 & 29 Vict. c. 11, ss. 6-13.

[At the conclusion of the arguments, Kelly, C.B., stated that the Court was of opinion that the ruling of the learned Judge was correct, but that time would be taken in order that a judgment might be prepared.]

(2) 4 Taunt. 67; in error, 4 M. & S. 400.

(3) B. R. Hilary Term 24 G. 3, cited in *Warden v. Bailey*, 4 Taunt. at p. 85.

(4) 1 Wils. 232.

(5) 2 *Macarthur on Courts Martial*, 4th ed. 195.

(6) Cited in *Johnstone v. Sutton*, 1 Term Rep. 536.

(7) 1 *Macarthur on Courts Martial*, 4th ed. 269.

(8) Cited in *Johnstone v. Sutton*, 1 Term Rep. 537.

(9) 1 Fost. & F. 419.

(10) 1 B. & Ald. 232.

(11) 12 Rep. 23.

(12) 4 Fost. & F. 763.

(13) 1 Term Rep. 493; in error 510.

(14) 2 H. Bl. 69.

(15) 9 B. & S. 708; s. c. 39 Law J. Rep. (N.S.) Q.B. 53.

(16) 2 B. & B. 130.

(17) 18 Com. B. Rep. 126; s. c. 25 Law J. Rep. (N.S.) C.P. 195.

(18) 4 Hurl. & N. 569; s. c. 28 Law J. Rep. (N.S.) Exch. 360.

(19) 3 B. & S. 576.

(20) 37 Law J. Rep. (N.S.) Exch. 155; s. c. Law Rep. 3 Exch. 220.

(21) 4 Fost. & F. 806.

The following judgment of the Court (22) was now delivered by

KELLY, C.B.—In the case of *Dawkins v. Lord Rokeby*, I am about to deliver the judgment of this Court on the bill of exceptions in that case, and I have only to observe, that although the whole of the Judges agree and are quite unanimous in affirming the judgment of the Court below, some of the reasons and some of the observations made in this judgment are not entirely participated in by one or two of the Judges. With that qualification this is the unanimous judgment of the Court of Exchequer Chamber.

The plaintiff, a colonel in the army, having been reported to have exhibited on several occasions a want of deference to some of his superior officers and to have been guilty of other un-officer-like conduct, and also to have made certain charges against several of his brother officers, his Royal Highness the Commander-in-Chief was pleased to direct that a Court of Enquiry should be assembled and that these matters should be enquired into and reported to his Royal Highness. A Court of Enquiry was held, and the defendant, Lord Rokeby, also an officer of rank in the army, was required to attend, and did accordingly attend as a witness before that Court. Being examined as a witness, he gave certain *viva voce* evidence, and when the examination was closed handed in to the Court a written paper, containing in substance a repetition of the evidence which he had given by word of mouth, with some additions upon the subject, and this paper was received by the Court, and it must be presumed formed part of the minutes of the proceedings.

A report was duly made to the Commander-in-Chief, and certain consequences followed, but which do not appear in evidence on this record.

It is, however, stated that the plaintiff applied to the proper military authority for a Court-Martial on the defendant and that such military authority having power to

(22) Kelly, C.B.; Martin, B.; Bramwell, B.; Byles, J.; Keating, J.; Pigott, B.; Brett, J.; Cleasby, B.; and Grove, J.

grant or to refuse the said Court-Martial, did refuse to summons or allow the same to be held. Thereupon, the plaintiff brought the present action. In the first count he charges that the written paper above referred to is a libel, and in the second count that the *viva voce* evidence is slander.

The above facts appear to have been admitted at the trial, and the counsel for the plaintiff further offered to prove that the defendant in delivering in the written statement and giving the *viva voce* evidence acted *mala fide* and with actual malice, and that these statements were made without any reasonable or probable cause, and with the knowledge on the part of the defendant that they were false. The defendant's counsel upon this insisted, that the action was not maintainable, and the learned judge who tried the cause declared his opinion that the evidence so offered on the part of the plaintiff was immaterial and irrelevant, and that, as a matter of law, the action would not lie, if the verbal and written statements complained of were made by the defendant, being a military officer, in the course of a military inquiry, in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of the inquiry, and this, even though the plaintiff should prove that the defendant had acted *mala fide* and with actual malice and without any reasonable and probable cause and with a knowledge that the statements made and handed in by him as aforesaid, were false. Thereupon, the counsel for the plaintiff excepted to the said ruling of the learned Judge, and this Court is now called upon to decide whether such exception shall be allowed.

We are all of opinion that the ruling of the learned Judge at the trial was right, and that the exception must be disallowed. The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, or witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognized by law.

The principle which pervades and governs the numberless decisions to that

effect is established by the case of *Floyd v. Barker* (11), and many earlier reports from the 27th Edward 3rd, placitum 15, 9th Henry 4th, placitum 9, and the 9th Edward 4th, placitum 10, down to the time of Coke, and which are found to be collected in *Gates v. Laneing* (23), and in *Revis v. Smith* (17). These two decisions, *Gates v. Laneing* and *Revis v. Smith* are themselves direct authorities that no action lies against parties or witnesses for anything said or done, although falsely and maliciously, and without any reasonable or probable cause, in the ordinary course of any proceedings in a Court of justice. Then Lord Mansfield, in *The King v. Skynner* (24), observes, "Neither party, witness, counsel nor judge can be put to answer civilly or criminally for words spoken in office." Again, *Astley v. Younge* (25) is an authority directly in point, that no action lies upon a false affidavit sworn in a proceeding before justices of the peace, or upon a calumnious statement made in answer to such affidavit, Lord Mansfield there observing, "Shew that a matter given in evidence in a Court of justice may be prosecuted in a civil action as a libel. The Court, indeed, before which such evidence is given may censure it;" and further on, "and as to the reason of the thing, there can be no scandal if the allegation is material, and if it is not, the Court before whom the indignity is committed by immaterial scandal, may order satisfaction and expunge it out of the record, if it lie upon the record." It has been argued, however, that if the matter deposed to be false to the knowledge of the deponent, an action may be maintained, and the arguments are founded upon a note of Holroyd, J., in *Hodgson v. Scarlett* (10). But the whole question is set at rest by a decision of the Exchequer Chamber in *Henderson v. Bromhead* (18). There, as here, the plaintiff offered to prove that the matter sworn to was not only malicious and irrelevant, but false to the knowledge of the witness, but Erle, C.J., and the whole Court were unanimous that no

(23) 9 Johnson's American Rep. 424.

(24) Lofft. 55.

(25) 2 Burr. 807.

action was maintainable. Crompton, J., expressly held "that no action lies for words spoken or written in the course of any judicial proceeding," and that "the rule is inflexible that no action will lie for words spoken or written in the course of giving evidence." And Crowder, J., referring to *Revis v. Smith* (17), held that it was a matter of public policy that no such action should be maintained." Finally, in *Dawkins v. Lord Rokeby* (21), an action between the present parties tried before the late Mr. Justice Willes, that most learned and lamented Judge, in alluding to the very evidence given by the defendant before the Court of Enquiry, which is the subject of this action, observed, "What he stated before the Court he stated in the capacity of a witness, and assuming, apart from the reasons which I have already given, that no action would lie against him for what he did, there is the further overwhelming reason that witnesses are protected from actions for what they may have stated in evidence in a Court of justice; otherwise everybody in the witness box would speak in fear of litigation, and no man who is called on to give evidence would be safe from some trouble—some action being brought against him." Upon all these authorities it may be now taken to be settled law that no action lies against a witness upon evidence given before any Court or tribunal constituted according to law.

But it is insisted, on the part of the plaintiff, that a Court of Enquiry is not a Court of law or a Court of justice; and that witnesses before such a Court are not within the protection of the law. On the other hand, it is contended, on the part of the defendant, that the evidence given by an officer in the army before a Court of Enquiry, is a privileged communication, and cannot, by law, be made the subject of an action for defamation. It is further objected that any such evidence is but a parcel of the minutes of the proceedings of the Court, which when reported and delivered to the Commander-in-Chief, are received and held by him on behalf of the Sovereign, and, as such, ought not, except by Her Majesty's commands or permission, to be produced, and are, therefore,

wholly inadmissible in evidence, and we are all of that opinion, and hold that on that ground also the exception must be disallowed.

It may be convenient to consider this point at once, for if it appear that the whole matter upon which the action is founded were the written statement handed into the Court or the oral testimony of the defendant, together with all secondary evidence, and the one or the other is inadmissible by law, and ought not to have been received or permitted to be read at the trial, it is difficult to see how the action can be maintained. A Court of Enquiry, though not a Court of record, nor a Court of law, nor coming within the ordinary definition of a Court of justice, is, nevertheless, a Court duly and legally constituted and recognised in the Articles of War, and in Acts of Parliament.

The 12th section of the Articles of War provides "That if any officer shall have been himself wronged by his commanding officer, and shall, upon due application made to him, not receive the redress to which he may consider himself to be entitled, he may complain to the General Commanding in Chief of our forces, in order to obtain justice, who is hereby required to examine into such complaint, and either by himself or by our Secretary of State for War, to make his report to us thereupon, in order to receive our further directions."

Now, the mode in which the Commander-in-Chief examines into any such complaint is by instituting a Court of Enquiry. A Court, therefore, so called into existence, has all the qualities and incidents of a Court of justice. It is convened in pursuance of this permission, and so under the express authority of Parliament and of the Queen's regulations which, as set forth upon this record, provide as follows—"A Court of Enquiry may be assembled by any officer in command, to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object in view, such Court may be directed to investigate and report on any matter that may be brought before it, but it has no

power to administer an oath, nor to compel the attendance of witnesses not military." From this it follows that a military witness is compellable to attend and to give evidence. The regulations proceed—"A Court of Enquiry is not to be considered in any light as a judicial body. It may be employed at the discretion of the commanding officer to collect and to record information only, or it may be required to give an opinion also on any proposed question. The proceedings are to be recorded in writing, as far as practicable in the form prescribed for Courts-Martial, signed by each member, and forwarded to the convening authority" (in this case the Commander-in-Chief) "by the president." Under these regulations officers in the army, if required by competent military authority to act, are compellable to attend and give evidence, not indeed by any known legal process, or under any penalty imposed by law, but in obedience to the duty they owe to the Sovereign, and under peril of dismissal at the pleasure of the Sovereign in case of disobedience. The evidence so given is, in truth, a communication made at the command of the Sovereign through the Commander-in-Chief, by a military officer, to an assembly consisting of other military officers, upon a military subject, to be reported to the Commander-in-Chief, and by him to the Sovereign, and all this in strict conformity to the Queen's regulations. There is, therefore, no sound reason or principle, upon which such a witness, called upon to give evidence in such a Court, should not be entitled to the same protection and immunity as any other witness in any of the Courts of law or equity at Westminster Hall. He is equally compellable to appear and give evidence, and punishable in case of refusal. And it would be unreasonable and unjust to hold him liable to a heavy punishment if he refuse to answer the questions put to him, and liable to an action at law for damages if he answers them and his answers happen to reflect upon the character of another. It may be said that if the evidence given in a Court of law be false the witness is indictable for perjury, and that if he go out of his way to slander another by uttering irrelevant

and defamatory matter, he may be fined and imprisoned for a contempt of Court. But besides that, no punishment inflicted on a false witness affords compensation or redress to the party injured. A witness before a Court of Enquiry, if he defames the character of another by false and malicious statements, whether relevant or not to the matter inquired into, is equally subject to punishment with a witness in a Court of law, and may be put upon his trial before a Court-Martial, and if found guilty may be dismissed the service or otherwise dealt with as justice may require. And in this very case the plaintiff sought redress by demanding a Court-Martial upon the defendant, though we must presume that his complaint was shewn to be groundless, inasmuch as the Court-Martial was refused, and it was upon this refusal, as it should seem, that he brings this action in a Court of law.

But another ground on which this action must fail,—and which embraces a great variety of cases in which statements made, whether orally or in writing, are privileged or protected,—is that by reason of the occasion on which the statements were made, the making of them is not such a publication as will support an action for libel or slander. On this ground it is that, however false or injurious to the character or interests of another it may be, a complaint by judges upon the Bench, whether in superior Courts of law or equity, or in County Courts, or Sessions of the peace, by counsel at the Bar in pleading causes, or by witnesses in giving evidence, or by members of the Legislature in either House of Parliament, or by ministers of the Crown in advising the Sovereign, is absolutely privileged, and cannot be inquired into in an action at law for defamation.

The case of *Home v. Bentinck* (16), when carefully considered, although decided upon a bill of exceptions to the rejection of evidence, is really an authority that the present action cannot be maintained, and being a decision of the Exchequer Chamber, may be taken to have settled the law upon this important subject. In that case, as in this, a Court of Enquiry had been held touching the conduct of the plaintiff, convened by the

Duke of York, then Commander-in-Chief, and a report had been made and delivered personally by the president to his Royal Highness, and an action was brought by the plaintiff against the president, the declaration charging the report as a libel. The notes, consisting of the evidence and the report, were produced at the trial by a military secretary of the Commander-in-Chief, and it was objected that these minutes ought not to be admitted, and could not be read in evidence on behalf of the plaintiff. Abbott, C.J., held the evidence inadmissible, and it was rejected accordingly. The plaintiff then offered, as secondary evidence, a copy of the minutes, but this was also held inadmissible and rejected by the Lord Chief Justice. Upon a bill of exception to the rejection of this evidence, the case came before the Exchequer Chamber and was very deliberately argued, and all the authorities bearing on the points in question were brought before the Court by the late Mr. Joshua Evans. The Court, however, disallowed the exception, and this judgment clearly shews that the entire proceeding before a Court of Enquiry is privileged, and cannot be produced or read in evidence upon any trial at law. The Court of Enquiry was held to be an official proceeding directed by the Commander-in-Chief for the purpose of obtaining information which he was bound to obtain as to the conduct of an officer holding a commission in the army, and in furtherance of the exercise of his public duty, whatever it might be, upon the result of such enquiry. The duty of the then defendant, as the presiding officer, was held to be imperative upon him, and the report which he had made an act of duty imposed upon him as a military man by his superior officer, the Commander-in-Chief, and whose order he was bound to obey. It is impossible to deny that it was equally a duty imposed upon the defendant in the present case to attend as a witness, and to give evidence upon the Court of Enquiry, as called upon to do by the president himself acting under the orders of the Commander-in-Chief, and which orders the president and the defendant were alike bound by their duty to the Sovereign to obey.

And it was observed by Dallas, C.J., in delivering the judgment of the Court in *Home v. Bentinck* (16), that—"It was impossible not to see that the plaintiff in that case, when he became an officer in the army, in point of fact voluntarily subjected himself to that Court of Enquiry, to which he must have known that officers in other instances had been made amenable." After remarking that the evidence had been returned and deposited with the Commander-in-Chief, the Chief Justice proceeds—"The question, then, is whether, I will not say, Sir Henry Torrens would have been compellable to produce the result of this enquiry, but whether if he, under a mistake, had been disposed to do it, it would not have been the bounden duty of the learned Judge before whom the cause was tried, considering that this document was a secret, not a privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence." And, further—"This is an enquiry directed to be made by the Commander-in-Chief, with a view to ascertain what the conduct of the party suspected might have been; in the course of which, a number of persons may be called before the Court, and may give information as witnesses, which they would not choose to have disclosed; but if the minutes of the Court of Enquiry are to be produced in this way, or an action brought by the party, they reveal the name of every witness and the evidence given by each. It seems, therefore, that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed; and, therefore, independently of the character of the Court, I should say, on the broad rule of public policy and convenience, that these matters, secret in their natures, and involving delicate inquiry, and the names of persons, stand protected;" and finally, "It seems, therefore, to us, upon the broad principle of state policy and public convenience and upon the principle of all the cases cited, that the Chief Justice of the Court of King's Bench was perfectly right in not suffering these minutes to be brought forward at the trial." Surely this case, the decision of a Court of Error,

is a conclusive authority that a Court of Enquiry is a tribunal authorised, recognised and sanctioned by law, and that the proceedings and the minutes of the proceedings of such a Court are privileged against publication, and are inadmissible in evidence upon the trial of an action like this. We cannot doubt, therefore, that if the attention of the Judge who tried this case had been called to this decision, although the parties had admitted the evidence in question, as given before the Court of Enquiry, he would have felt it, to use the language of the Chief Justice Dallas, "his bounden duty to have interposed and prevented the admission of such evidence." If, then, in the present case the evidence of the proceedings before the Court of Enquiry was inadmissible by law, and ought not to have been permitted to have been produced in Court, how is it possible that this action can be maintained?

But there is another and a higher ground, upon which we are of opinion that the defendant is entitled to the judgment of the Court. The whole question involved in this cause is a military question, to be determined as we think by a military tribunal, and not cognizable in a Court of law. The attendance of the defendant as a witness, the duty to give evidence when called upon, the validity of the order to hold a Court of Enquiry, the effect of the evidence upon the military character, and upon the military rights and liabilities of the plaintiff, and indeed the defendant likewise, are purely questions of a military nature. The evidence itself was given by the defendant, a military officer, in his military capacity, upon a military subject, at the command of his military superior, and concerned the military conduct of another military officer. It may well be that the truth or falsehood of the evidence given is also a military question, although apparently in terms a question of fact; and that which the plaintiff might allege, and a Court of law or a jury might hold to be false, a military tribunal might hold, and rightly hold, to be true. As if the defendant had deposed that he had given an order to the plaintiff which it was his duty to have obeyed, but which he had

disobeyed. The order might have been to seize a battery, and the plaintiff might have alleged that he had done all that could be done, and that it was impracticable, and that the defendant knew that it was so, and a jury might find all this to be true. But an assembly of military officers might hold, and justly and truly, that the order might have been and could have been obeyed. With reference therefore to such questions, which are purely of a military character, the authority of Lord Mansfield and the other Judges in *Sutton v. Johnstone* (13), and the cases *Re Mansergh* (26), *Grant v. Gould* (14), *Barwis v. Keppel* (27), *Keighly v. Bell* (12), *Dawkins v. Lord Rokeby* (21), and *Dawkins v. Lord Frederick Paulet* (15), are all authorities to shew that a case involving questions of military duty alone are cognizable only by a military tribunal, and not by a Court of law.

On the other hand the case for the plaintiff when attentively considered is really destitute of all authority to support the action. No one decision is to be found that an action for libel or slander is maintainable upon evidence given before any tribunal constituted, sanctioned, and recognized by or according to law. There is indeed in the eloquent and powerful reasoning of Lord Chief Justice Cockburn in *Dawkins v. Lord Frederick Paulet* (15), much which is opposed to the view we take of the incompetency of a Court of law to deal with purely military questions arising before a military tribunal. But the opinion thus delivered, though bearing upon the question before us, does not govern it; and it is satisfactory to us to feel that the general question of privilege as applied to communications between military authorities, upon a military subject, and whether before a military tribunal or otherwise, though governed, and as we think for the present, decided by the decisions referred to in the Exchequer Chamber, is yet open to final consideration before a Court of the last resort.

(26) 1 B. & S. 400; s. c. 30 Law J. Rep. (N.S.) Q.B. 296.

(27) 2 Wil. 314.

It remains to us only to consider the two cases which the plaintiff has relied on as authorities in his favour. The first is *Warden v. Bailey* (2), which however merely shews that the adjutant of a regiment of militia has no authority to order a private to attend a school and pay 8*l.* a month for instruction, and that trespass lies for causing him to be imprisoned in a common gaol for disobedience to such an order. This was not an act done which, though in excess, was in the exercise of military authority or in the discharge of military duty, but was simply a wrongful and illegal act, without any colour of law, as if an officer had ordered a soldier to be imprisoned in a debtor's prison for non-payment of an acknowledged debt. *Dixon v. Earl Wilton* (9), also relied upon by the counsel for the plaintiff, is distinguishable in this, that the libel there charged was a communication made by the defendant to a higher military authority not in any proceeding before a military tribunal, or in obedience to the order of a superior officer, but though, as is alleged, in the discharge of his duty, was contended by the plaintiff to have been made, and was in fact made voluntarily and of his own accord. But were the facts of the two cases identical? We think with the majority of the Judges in *Dawkins v. Lord Frederick Paulet* (15) that the motives as well as the duty of a military officer, acting in a military capacity, are questions for a military tribunal alone, and not for a Court of law to determine.

It may also be observed that the case of *Dixon v. Earl Wilton* (9) was a mere *Nisi Prius* decision, and not reviewed upon any motion for a new trial, and that the ruling of Lord Campbell, that the communication charged as a libel, so held by the Secretary for War on behalf of the Crown, should be produced from his office and read in evidence, was directly at variance with the judgment of the Exchequer Chamber in *Home v. Bentinck* (16), as a decision that the communication itself was for the consideration of the jury, upon the question of malice, and was inconsistent with the great mass of authorities above referred to.

On these grounds we are of opinion that

the exception in this case should be overruled, and that the defendant is entitled to the judgment of the Court.

Judgment for the defendant.

Attorneys—Guscotte, Wadham & Daw, for plaintiff; Frere, Cholmeley & Co., for defendant.

1873. } THE QUEEN v. SMITH AND OTHERS,
Jan. 27. } JUSTICES OF LANCASHIRE.

Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75. schedule 2—*Repeal of Sections giving Appeal to Quarter Sessions—Wine and Beerhouse Act, 1869* (32 & 33 Vict. c. 27), s. 8—*Alehouse Act, 9 Geo. 4. c. 61. s. 27.*

By "*The Wine and Beerhouse Act, 1869*" (32 & 33 Vict. c. 27), s. 8, all the provisions of the Act, 9 Geo. 4. c. 61, as to appeal from any act of the justices at the general annual licensing meeting, shall, so far as may be, have effect with regard to grants of certificates under this Act, &c. . . . By the *Licensing Act, 1872* (35 & 36 Vict. c. 94), s. 75, and schedule 2, the provisions of the Act, 9 Geo. 4. c. 61, as to appeal (ss. 27, 28, 29), are repealed, "except in so far as these sections relate to the renewal of licenses or the transfer of licenses:"—Held, that in the absence of any express repeal of s. 8 of the *Wine and Beerhouse Act, 1869*, the appeal given by that section was not taken away by the repeal of the appeal sections in the original Act, 9 Geo. 4. c. 61.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. p. 46.]

1872. }
 Nov. 23. } *In re* THE STEAM-SHIP
 1873. } CHARKIEH.
 Jan. 23. }

Prohibition—Admiralty Court—Cause of Damage—Collision—Foreign Ship—Sovereign Potentate.

The ship C. ran down the ship B. in the River Thames. The C. was arrested under a warrant of the Court of Admiralty issued in a cause of damage instituted in the said Court on behalf of the owners of the B. A rule nisi was granted for a prohibition on the ground that the C. was the property of the Khedive of Egypt. In shewing cause against the rule, affidavits were used alleging that the C. was, at the time of the collision, in reality used for carrying cargo and passengers.

This Court declined to issue the prohibition; the question whether or not the C. was the property of a sovereign potentate, so as by the law of nations to be exempt from liability being one which might properly be decided in the Court of Admiralty.

This was a rule calling upon the Judge of the High Court of Admiralty and the owners and others interested in the steam-ship *Batavier* to shew cause why a writ of prohibition should not issue to the said Judge of the High Court of Admiralty to prohibit the said Court from further proceeding with a cause of damage instituted in the said Court by or on behalf of the owners of the said steam-ship *Batavier* against the Egyptian Government steam-ship *Charkieh*.

The rule was obtained on an affidavit of Frederico Maria Fredrigo Pacha, which, so far as is material, was as follows—

1. I hold a commission as Rear Admiral in the Imperial Ottoman Navy. I was nominated for the said commission by his Highness Ismail Pacha, the Khedive of Egypt, and I am in the naval service of his Highness the Khedive. I am at present in this country for the purpose of superintending, on behalf of the government of the Khedive, the repairs of the steam-ship *Charkieh*, and several other steam-ships which are the property of his Highness the said Khedive in his capacity of Sovereign of the state of

Egypt, and are public vessels of the government and state of Egypt.

2. On or about the 19th day of October the said steam-ship *Charkieh*, while returning from a trial trip of her machinery, came into collision in the River Thames with the Dutch steam-ship *Batavier*.

3. On or about the 21st day of October a warrant of arrest, issued by the High Court of Admiralty of England, was served by the marshal of the said Court upon the steam-ship *Charkieh*, which was then lying in the Millwall Docks, in the port of London.

(The warrant was set out at length, but need not be set out here.)

4. The said marshal of the said High Court of Admiralty has from the said 21st of October until the present time continued in possession of the said steam-ship *Charkieh*, under the said warrant of the said Court.

5. The said steam-ship *Charkieh* is the property of his Highness the Khedive of Egypt, as sovereign of that state, and is a ship of the Egyptian branch of the Imperial Ottoman Navy, and is a public ship of the state of Egypt, and an Egyptian vessel. The *Charkieh* is entitled to and, as a fact, does carry and use the Ottoman naval pendant and the Ottoman naval ensign, as distinguished from the flags which are used by Egyptian merchant vessels. All the ships of the Egyptian navy carry the Ottoman naval colour.

6. The said steam-ship *Charkieh* is manned by a crew of about ninety men. With the exceptions hereinafter mentioned, all her officers are Egyptians, and hold commissions from his said Highness the Khedive, and are in the naval service of the Egyptian Government. The acting commander of the *Charkieh*, the sailing master and the engineers are Europeans, and are not commissioned, but are respectively under contracts to serve the said government of Egypt.

7. The officers and crew of the said steam-ship *Charkieh* are appointed by and under the control of the Egyptian Minister of the Marine, who, at the present time, is Admiral Latif Pasha, and the said steam-ship is ordinarily under the orders and control of the said Minister of the

Marine. For some time, however, prior to the *Charkieh* leaving Egypt for England, she was under the control and at the orders of Ismail Sadik Pasha, the Egyptian Minister of the Interior, and was by him employed as a government packet carrying the mails and passengers and cargo between Alexandria and Constantinople.

8. All freights and passage money whatever earned by the said steam-ship *Charkieh* are ultimately received and accounted for to the said Minister of the Interior, and form part of the public revenue of Egypt. Certain cargo was brought by the said steam-ship *Charkieh* from Alexandria to England for the purpose of lessening the expense occasioned to the Egyptian Government by sending the said steam-ship to this country.

9. The *Charkieh* has since her arrival in this country been recognised by the Lords Commissioners of the Admiralty of Her Majesty as an Egyptian Government vessel, and has since been repaired under the supervision of a surveyor appointed by the said Lords Commissioners to whom I applied for such appointment on behalf of his said Highness the Khedive.

In shewing cause against the rule, affidavits were produced alleging that *The Charkieh* had brought cargo from Alexandria to London on a previous voyage; that she had paid the ordinary dues the same as any merchant vessel. If she had been a public ship belonging to a foreign state, and in the public employment of such state, she would not have been liable to pay any dues whatsoever. It was also alleged that she had paid lights, pilotage and tonnage dues. On her outward voyage bonded and other goods were cleared for shipment on board, in respect of her voyage outwards. If she had belonged to any foreign government or been in the national service of any foreign state she would not have been liable for the aforesaid dues, nor would any have been demanded of her. No objection was made to payment of the said dues by the master or any one on his behalf. On her arrival in the Millwall Docks on the 23rd of October, 1872, she was boarded by a custom house officer, who, in consequence of her having cargo on board, had received orders

to board her to protect the interest of the revenue. No objection was made to the officer so boarding her, and he acted in all respects as he would have acted in regard to any merchant ship. When she arrived off Gravesend, she had been boarded by a custom house officer who remained on board till she arrived as aforesaid at the Millwall Docks. No objection had been raised to his boarding her, and he acted in every respect as if she was an ordinary merchant vessel. If there had been anything to lead to the belief that she was a government vessel she would not have been so boarded.

It was also alleged that she was not built or equipped for a ship of war. She had no guns except two 12-pounder signal guns, nor was she strong enough to carry heavy guns, nor was she pierced for guns. At the time of her being seized she had cargo in her, including 150 puncheons of rum and other cargo. She had been constantly seen carrying cargo, passengers and mails. Her officers wore no uniform.

It was also alleged that on the 29th of October, 1872, she was advertised in London to sail for Malta and Alexandria with cargo and passengers. The advertisement was as follows—

“(A.)

“Regular line of Screw Steamers to Malta and Alexandria. Will be promptly dispatched, to follow the ‘Mahalla,’ the remarkably fine first-class screw steamer

“*Charkieh*, A. 1,

“for

“Malta and Alexandria.

“Has excellent accommodation for

“Passengers.

“1,167 Tons register. 1,200 Horse power.

“John Anderlich, Commander.

“Loading in Millwall Dock.

“All goods received by special agreement, and must be sent alongside at least two clear days before the date of clearing, and must be distinctly marked with the name of the port for which they are destined, or the ship will not be responsible for the delivery of the same. Barges will be unloaded as quickly as possible to suit the convenience of stowage, but if delay occurs from any cause whatever the owners will not be responsible for deten-

tion of craft. Engagements of goods are subject to there being room in the vessel when they come alongside.

"For freight or passage apply to

"W. E. Bett & Co., 9 Billiter Street,
"or to G. L. Jackson & Sons,
"18, Billiter Street."

Other facts were sworn to in the affidavits for the purpose of shewing that *The Charkieh* was at the time of the collision used as a merchant vessel. Having been arrested under the warrant of the Court of Admiralty, as above mentioned, this rule was obtained.

Milward (Clarkson with him) (on Nov. 23, 1872), shewed cause against the rule.

—In *Wheaton on International Law*, vol. i.

p. 192, the following principles are laid down which are applicable to the question raised in this case. After stating that there is a "class of cases, in which every

sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation," the author continues—"First, One of these

was the exemption of the person of the sovereign from arrest or detention within a foreign territory. . . . Second. A second case standing on the same principles with the first, was the immunity which all civilised nations allow to foreign ministers. . . .

Third. A third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, was where he allows the troops of a foreign prince to pass through his dominions." And at p. 196, "But the rule which is applicable to armies did not appear to be equally applicable to ships of war entering the ports of a friendly power. . . . A different rule, therefore, with respect to this species of military force, had been generally adopted." And at p. 198, "According to the judgment of the Supreme Court of the United States, where without treaty the ports of a nation are open to the public and private ships of a friendly power, whose subjects have also liberty without special license to enter the country for business or amusement, a clear distinction was to be drawn between the rights accorded to private individuals or private trading vessels and those accorded

to public armed ships, which constitute a part of the military force of the nation."

There are no facts to shew *The Charkieh* was a public armed ship, or the property of a sovereign power in such a manner as to exempt her from liability to seizure. She belonged to a regular line of steamers, and although she put into the Thames for repairs, she was advertised as ready to take in cargo. Her officers were not commissioned in the Ottoman service. *The Ticonderoga* (1) was a case in which Dr. Lushington pronounced against a ship which was in the service of the French Government. See also *Hodgkinson v. Fernie* (2); *The Santissima Trinidad* (3). The treaty between England and Belgium (4) contains provisions as to the carriage of mails (5)—"The packets of his Britannic Majesty, being government vessels, shall be exempt from all duties and port charges in the ports of Belgium. They shall be considered and treated as vessels of war, and entitled to all the consideration and privileges which the interest and general importance of their functions demand." *The Charkieh* was not a ship claiming any such privileges.

[COCKBURN, C.J.—It strikes me that there is another question which goes to the root of the whole matter, viz., whether it is not for the Court of Admiralty to determine whether at the time of the collision she was the ship of a sovereign power or not, in fact, whether this is a mere unfounded claim to her as a ship of war.]

Yes; and the more so, as there would be an appeal to the Privy Council. There is no better jurisdiction in this Court than in the Court of Admiralty.

[COCKBURN, C.J.—Can the jurisdiction of the Court of Admiralty be ousted by simply raising the question? We must call upon the other side.]

Butt, Cohen and Gibson, in support of the rule.—A prohibition will go when facts are shewn to exist which would oust the jurisdiction of the inferior Court. The

(1) Sw. Ad. Rep. 215.

(2) 2 Com. B. Rep. N.S. 415; s. c. 26 Law J. Rep. (N.S.) C.P. 217.

(3) 7 Wheaton Rep. 57, 283.

(4) 7 Hertlet's Collection of Treaties.

(5) Par. 9.

question was very much discussed in *The Mayor of London v. Cox* (6), and all the authorities are there referred to. It is stated by Willes, J., in pronouncing the opinion of the Judges, that the notion of there being a substantial difference between the case of a patent defect of jurisdiction and a latent one, "as applied to prohibition before judgment is quite antiquated." In *De Haber v. The Queen of Portugal* and *Wadsworth v. The Queen of Spain* (7), a prohibition was granted to restrain the Lord Mayor's Court from proceeding by foreign attachment against a sovereign power.

[COCKBURN, C.J.—It was patent in that case that there was no jurisdiction.]

The judgment of the Court was delivered by Lord Campbell, C.J., referring to *The Duke of Brunswick v. The King of Hanover* (8), *Bynkerschoek, De Foro Legatorum*, chap. 4; the case of *The Prince Frederick* before Lord Stowell, reported to the Court by the Queen's Advocate, and other authorities; and upon the point as to the time at which the prohibition might be granted, his Lordship said, "We have now to consider whether we can grant the prohibition on the application of the Queen of Portugal before she appears in the Lord Mayor's Court. The plaintiffs' counsel argue that before she can be heard, she must appear and put in bail in the alternative to pay or to render. It would be very much to be lamented if, before doing justice to her, we were obliged to impose a condition upon her, which would be a further indignity, and a further violation of the law of nations. If the rule were that the application for a prohibition can only be by the defendant after appearance, we should have had little scruple in making this an exception to the rule. But we find it laid down in books of the highest authority, that where the Court, to which the prohibition is to go has no jurisdiction, a prohibition may be granted

upon the request of a stranger as well as of the defendant himself—2 Inst. 607; *Com. Dig.* tit. "Prohibition," E. The reason is, that where an inferior Court exceeds its jurisdiction, it is chargeable with a contempt of the Crown as well as a grievance to the party—*Ede v. Jackson* (9). Therefore this Court, invested with the power of preventing all inferior Courts from exceeding their jurisdiction, to the prejudice of the Queen or her subjects, is bound to interfere when duly informed of such an excess of jurisdiction." This Court has been duly informed of a matter which shews that the Court of Admiralty has no jurisdiction to entertain this suit; and *The Mayor of London v. Cox* (6) shews that a plea is not necessary if the facts are brought by affidavit before the Court. See *Burder v. Veley* (10); and *Wheaton*, pt. 3. cap. 1. s. 228. An instance of a Court of Common Law granting a prohibition to the Court of Admiralty is *Velthasen v. Ormsley* (11).

[BLACKBURN, J.—That case has very little bearing upon the present; it was admitted that the Court of Admiralty had no jurisdiction.]

Clay v. Snelgrave (12) is another case.

[BLACKBURN, J.—In this case, being one of collision, it must be admitted that the Court of Admiralty has a general jurisdiction, but then a question of personal privilege is raised; what is there to shew that that question may not be enquired into and determined by the Court of Admiralty?]

It is enough that facts are shewn which, if true, oust the jurisdiction of that Court. *The Mayor of London v. Cox* (6) is an authority to that extent. In *Howe v. Nappier* (13) a rule for a prohibition was made absolute although the question might have been tried in the Court of Admiralty as well as in this Court—*Argyle v. Hunt* (14), *Buggin v. Bennett* (15),

(6) 36 Law J. Rep. (N.S.) Exch. 225; s. c. Law Rep. 2 E. & I. Ap. 239.

(7) 17 Q.B. Rep. 171; s. c. 20 Law J. Rep. (N.S.) Q.B. 488.

(8) 6 Beav. 1; s. c. 13 Law J. Rep. (N.S.) Chanc. 107; 2 H. of L. Cas. 1.

(9) Fortesc. 345.

(10) 12 Ad. & E. 233.

(11) 3 Term Rep. 315.

(12) 1 Ld. Raym. 576.

(13) 4 Burr. 1944.

(14) 1 Str. 187.

(15) 4 Burr. 2035.

Gardner v. Booth (16), *Sewell v. Jones* (17), *In re Aykroyd* (18). If this be a suit against a foreign sovereign, the Court of Admiralty has no jurisdiction.

[QUAIN, J.—This is not a question of maritime law. BLACKBURN, J.—The suit is against the ship, a proceeding *in rem*. COCKBURN, C.J.—I think it is doubtful whether if she be the private property of the Viceroy, used for commerce, but not applied to purposes of state, she is within the principle which attaches in the case of the ship of a sovereign potentate. She has been seized under process from the Court of Admiralty, and unless we see clearly that she is exempt from seizure, we ought not to interfere by prohibition. When seized she was in the hands of private individuals, and they set up that she is the property of a sovereign potentate. I am informed by Mr. Rothery that the Court of Admiralty always allows the captain to appear and represent the owners.]

Milward was again heard to shew cause. —By 3 & 4 Vict. c. 65. s. 4 the Court of Admiralty has power to decide questions of ownership. This is not a case for prohibition, though possibly it might be so, if, in proceeding to hear the cause the Court of Admiralty had erroneously decided that the ship was not the property of a foreign sovereign. *The Ticonderoga* (1) is in point to shew that the Court of Admiralty may entertain the cause.

COCKBURN, C.J.—I am of opinion that this rule must be discharged. I proceed on this ground, that, assuming the facts to be as stated on behalf of those who are applying for this prohibition, a question is raised which is a question of international law, though it may be at the same time a question of the law of this country as well, whether a suit can be brought against the ship of a sovereign potentate. The question would arise here if an action were brought in this Court: *The Charkieh* was found in the River Thames, apparently prosecuting a voyage as a merchant

vessel, with cargo on board; a collision takes place, and it is alleged that she was to blame; she was arrested in the ordinary mode of proceeding in the Court of Admiralty, upon which she is said to be the property of the Khedive. If it were so, she was, at the time of seizure, in the hands of other persons, leading to the legitimate inference that she was not then in the service of a sovereign potentate. That being so, the question of law arises whether, assuming that she was the property of a sovereign potentate, but not being employed as a man-of-war or for purposes of state, she was or was not liable to be proceeded against in a cause of damage in the Court of Admiralty. I think that the questions which would arise under these circumstances would be peculiarly fit to be decided by the Court of Admiralty. If that Court decided wrongly the decision might be set right on appeal. I must say that I hesitate to make this rule absolute for a prohibition to restrain the Court of Admiralty from proceeding in a suit in which it would be as competent to decide as we should be in this Court. I do not think that there is any reason for a prohibition, when the Court of Admiralty is competent to decide the questions both of fact and law.

BLACKBURN, J.—I am of the same opinion. In general, a prohibition is granted where an inferior Court is proceeding without jurisdiction. Taking all the facts alleged before us to be true, it appears that the Khedive, who may be looked upon as a sovereign potentate, is the owner of the ship; she was sent into the Thames for repairs. The officers of the Khedive are in possession, and the question arises whether the Court of Admiralty having jurisdiction to determine questions of maritime law and of international law when questions arise as to rights and liabilities of foreigners, should be prohibited from proceeding in this suit on the ground that the ship was privileged. There is a good deal of authority for saying that there cannot be any proceeding against a sovereign potentate in respect of a ship of war, and it is doubtless most desirable that that should be so, but here it comes to be a

(16) 2 Salk. 548.

(17) 1 L. M. & P. 525.

(18) 1 Exch. Rep. 479; s. c. *nom. Grimby v. Aykroyd*, 17 Law J. Rep. (N.S.) Exch. 157.

question, whether a ship of this description, which at the time of the collision happens to be the property of a foreign potentate, is liable in this suit, upon which question I give no opinion. I think that the case of *The Prince Frederick* was a little stronger than the present case, and Lord Stowell gave no judicial opinion, but caused a representation to be made to the Dutch Government, who determined to defer to the opinion expressed by him in the position of arbitrator. It seems to me that it would be presumptuous in the Court of Queen's Bench to declare that it is a better authority upon such a question than the Court of Admiralty, which seems to be peculiarly adapted to consider such a question. That Court has jurisdiction to determine the facts, and also to decide whether, under the circumstances, the fact of the ship being the property of a foreign potentate amounts to a defence. If the decision is wrong, it may be set right by an appeal to the Privy Council. It is impossible to say that the Court of Admiralty has exceeded its jurisdiction, and that is the real question before us.

MELLOR, J.—I am of the same opinion, and it is unnecessary to add anything except that if we have arrived at a wrong conclusion, an application for a prohibition may be made to another Court.

QUAIN, J.—I give no opinion, as I have not heard the whole of the arguments.

Rule discharged.

Attorneys—McLeod & Watney, for the Khedive of Egypt; Clarkson, Son & Greenwell, for the owners of *The Batavier*.

1873. } ARNOLD (appellant) v. HOLBROOK
Jan. 21. } (respondent).

Highway—Footpath—Limited Dedication—Right to plough up—Nuisance.

The public had a right to use a footpath across the field of A., but subject to the right of A. to plough it up when he ploughed the rest of the field. He did

so plough it up, and having done so, did not set out or mark the line of the path, but left the public to tread it out. The public continued to walk across the field in the direction in which the path had been, but soon finding the path in a muddy and bad condition, turned out of it, and walked on either side thereof. To prevent them from doing so, A. placed hurdles on the parts upon which the public so walked, leaving a space of about six feet in width where the path had been. The respondent having thrown down the hurdles, an action was brought against him by A. in a County Court. The Judge having given judgment in favour of the respondent, this Court reversed that judgment, holding that the respondent could not claim a right to go off the line of the footpath, or a right to pull down the hurdles.

1. Appeal against a judgment of the Judge of the County Court of Sussex, holden at Brighton, on the 8th day of March, A.D., 1872, to recover the sum of twenty-one pounds as damages from the respondent, for his entering upon certain land in the occupation of the appellant, and pulling up and throwing down twenty hurdles of the appellant's set up upon the said land.

2. The respondent appeared and defended the said action.

3. The appellant was the tenant and occupier of an arable field situate in the parish of Portslade, in the county of Sussex, called Aldrington Lane, over which was a footpath running diagonally across the said field in a straight direction from one end to the other, and which path, it was admitted by the appellant, the public had a right to use, but such user was subject to the right of the appellant and others, the owners and occupiers of the said field, to plough the path up, whenever they required so to do in ploughing the said above mentioned field.

4. The right of the appellant so to plough up the said path had been determined by the judgment of the Court of Exchequer Chamber in the action of *Arnold v. Blaker* (1).

(1) 40 Law J. Rep. (N.S.) Q.B. 185; s. c. Law Rep. 6 Q.B. 433.

The CASE for the opinion of the Court in that action was settled by Bramwell, B., and the following statements from it are to be taken as part of this case.—

The footway in question is the nearest way, by half a mile, from the Portslade Station of the London, Brighton and South Coast Railway to the village and parish church of Portslade, and is the only footway leading from the village to the station. The said railway station was opened for public traffic in 1842, and since that time the number of inhabitants of the village and parish of Portslade has increased very largely;—58,774 railway passenger tickets were issued at the said railway station in 1867, and 65,631 in 1868. Since 1842 the said footway has been much more used by the public than before that time. And the jury found that any path which prevented the plaintiff from ploughing through it as formerly, would be a prejudice to him and not a benefit.

5. Prior to the last ploughing up of the said path, and to the said action of *Arnold v. Blaker* (1), the surveyors of the parish of Portslade had hardened the said path by bringing chalk and stones upon it, and had made it a solid and raised path of the average width of four or five feet, and which path the plaintiff, in consequence of its being so made solid, could not plough up, and he thereupon brought his said action against the surveyors of highways for Portslade, Blaker being one.

6. After the decision of the Court of Exchequer Chamber, the appellant gave the parish authorities notice in writing to remove, and they thereupon removed the material hardening the path, and the appellant afterwards ploughed up the path as portions of the field were ploughed up in the ordinary cultivation thereof, and sowed the whole with wheat, but did nothing, after such ploughing up and sowing, to make, set out or define the said path for the use of the public.

7. After the appellant had so ploughed up and sown the said field and path, the public continued to walk across the field in the direction where the path had been, but soon finding the ground where the path had been in a muddy and bad condi-

tion they walked out on either side of it for a better way, and in some parts to the width of eighteen feet or thereabouts, injuring thereby the appellant's crops.

8. To prevent the public from so walking out on either side, the appellant, in the month of December, placed hurdles on the parts which had been thus trodden over by the public at irregular intervals, but not opposite to each other, they being about twelve yards from each other, at right angles to the line where the path had been first trodden out on either side of it, leaving a space of about six feet between the inner ends of the said hurdles, and which hurdles were dangerous to the public in the dark. The appellant had, in previous years, placed at intervals bushes for a similar purpose after the field had been ploughed, but the public often walked outside of them when the path had become in a bad state.

9. The respondent threw down three of the said hurdles, and it was for such alleged trespass that the present action was brought.

10. The appellant's witnesses were cross-examined on the facts, and at the close of the appellant's case, the learned Judge suggested an adjournment to enable the parties hereto to come to some terms, the learned Judge having suggested that it would be more advantageous to all parties that the footpath should be hardened, and that in any future ploughing the appellant should plough on either side of the path instead of across it. But such adjournment having failed to produce any amicable arrangement, the learned Judge at a subsequent Court, without calling on the respondent, gave judgment in favour of the respondent, on the ground that it was the duty of the appellant, after he had ploughed up the said path, to set out again a proper path for the use of the public, instead of leaving them to tread out a path in the best way that they could, and that the path so trodden out having become in a muddy and foundrous state, the public were justified in deviating on the appellant's land to find a firmer and better path; that it was by the appellant's own negligence that the alleged trespass was occasioned, and that such negligence contributed to the injury

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complained of, and the respondent was therefore justified in removing the said hurdles.

The question for the opinion of this Court was whether, under the circumstances stated, the respondent was or was not justified in removing the said hurdles? If the Court should be of opinion that he was justified in doing so, the judgment of the Court below is to stand. If the contrary, the judgment is to be reversed. The costs to be in the discretion of the Court of Appeal.

Manisty (*Grantham* with him, for the appellant).—The case of *Arnold v. Blaker* (1) establishes that the public have a right to use this path, subject to the right of the appellant to plough it up. But the right to use it does not give the respondent or anyone else any right to go out of the line of the path, and trespass upon the rest of the field, or to pull down the hurdles which the appellant sets up on his own land. The judgment of the County Court Judge was wrong.

J. Browne (*Lord* with him), for the respondent).—The appellant ought to have marked out and levelled the path after he had exercised his right of ploughing it up. Instead of doing so, he sows seed over the whole space. He cannot complain of the respondent exercising his right of going off the path, which is a highway, when the path, in consequence of being ploughed up, becomes founde-rous and impassable. The right of going off the path is a right which is given by the common law, and is so stated by every text-book upon the subject. The earliest authority is *Sir Edward Duncomb's case* (2), stated in 1 Rolle's Abr. 390, tit: "Chimin Common." The material passages from the latter book are set out in the considered judgment delivered by Erle, J., in *The Queen v. Ramsden* (3). See also *Taylor v. Whitehead* (4); *Bullard v. Harrison* (5); *Young's case* (6); *The King v. Stoughton* (7), and the cases there collected.

[*Mellor, J.*—Is this not the case of a dedication of a highway, which the public must take with all its inconveniences? The appellant has a right to plough it up, though he would not be able to justify digging a pit where it exists. The cases upon the subject are to be found in the notes to *Dovaston v. Payne* (8)].

All the text-books treat the doctrine as well established. See also *The Queen v. Hornsea* (9); *Daves v. Hawkins* (10). Next, the respondent had a right to pull up the hurdles. They were so placed as to be dangerous, and resembled a trap set in the highway—*Barnes v. Ward* (11); *Hardcastle v. The South Yorkshire Railway Company* (12).

[*Cockburn, C.J.*—The hurdles are only dangerous, if at all, to such persons as go *extra viam*. *Lush, J.*—I think the meaning of the statement in the case is that they were dangerous to persons who chose to deviate from the path.]

Manisty, in reply.—In *Hardcastle v. The South Yorkshire Railway Company* (12) *Martin, B.*, in delivering the judgment of the Court, said, "When a man dedicates a way to the public, there does not seem any just ground in reason or good sense that he should restrict himself in the use of his land adjoining to any extent, further than that he should not make the use of the way dangerous to the persons who are upon it and using it." It is not found here that the hurdles were dangerous in that sense.

[*Cockburn, C.J.*—It seems to be put in this way by the respondent—"I have a right to go along this path both night and day; the hurdles might be dangerous to me by night, and therefore I may go by day and pull them down."]

He has no right to do so. He might go along the path in the direction in which it had been dedicated to the public without being obstructed by the hurdles. The law upon this subject is laid down in

(2) Cro. Car. 366.

(3) 27 Law J. Rep. (N.S.) M.C. 296.

(4) Dougl. 749.

(5) 4 M. & S. 387.

(6) 1 Ld. Raym. 725.

(7) 2 Wms. Saund. 160 b. n. 12.

(8) 2 Smith's L.C. 90.

(9) 23 Law J. Rep. (N.S.) M.C. 59.

(10) 8 Com. B. Rep. N.S. 848; s. c. 29 Law J. Rep. (N.S.) C.P. 343.

(11) 9 Com. B. Rep. 392; s. c. 19 Law J. Rep. (N.S.) C.P. 195.

(12) 28 Law J. Rep. (N.S.) Exch. 139.

Dimes v. Petley (13), where the defendant's ship had struck against the plaintiff's wharf and jetty in the river Thames. It was held that the defendant could not defend himself by pleading that the wharf and jetty obstructed the navigation of the river, unless he also shewed that there was a necessity to navigate the ship over the part of the river where the wharf and jetty were, or at any rate that the right course of the ship was over that part, and that she could not have avoided the nuisance by taking any other course with reasonable convenience. The decision was in accordance with *Bridge v. The Grand Junction Railway Company* (14), and *The Mayor of Colchester v. Brooke* (15). Those decisions are conclusive, and indeed it is not pretended that the act of the respondent was for the purpose of abating the nuisance.

COCKBURN, C.J.—I am of opinion that this judgment must be reversed. It is quite unnecessary to consider the doctrine laid down in the old authorities as to the right to go on to the lands adjoining a highway when the way becomes dangerous. It may well be that that doctrine is well established, and in old times there were reasons for so holding. Enclosed lands were comparatively few; the liability to repair was not well established, and it was for the public convenience that people should be permitted to go on to the adjoining land under such circumstances. But in all those old authorities the highways in question were ancient, and without any qualification of the right of the public to use them. The principles applicable to such highways do not apply to the case now before us, in which we have two coexistent rights—that of the public to use the path, and that of the occupier to plough it up in the course of the ordinary cultivation of the field, across which the path runs in a known direction. The appellant ploughs it up, and it becomes muddy and dirty; but it must be remembered that he had a right to plough

it up; so that the case is not like those which Mr. Browne has referred to. The path has been dedicated to the public, but with the right to make it so far impassable. I am, therefore, of opinion that the doctrine upon which reliance is placed does not apply to such a case.

Then another point is made, but I cannot agree that there is anything which entitles the respondent to pull up the hurdles which the appellant has set up on his own land for the purpose, not of impeding the right which the public have of passing along the line of the path, but for the purpose of preventing the deviation from the line of the path, a deviation which the respondent had no right to make. The public have no right to treat the hurdles as a nuisance to be abated by them. The law is correctly stated in *Dimes v. Petley* (13), which decides that a necessity must be shewn to pass the place where the alleged nuisance is, or a right to pass over that part, and that it would be inconvenient and difficult to have taken another course by which the nuisance might have been avoided. But here the abatement was not necessary to enable the respondent to enjoy the right which he had. It is said that the hurdles were dangerous at night, but that could not give the defendant a right to pull them down, as he has done.

BLACKBURN, J.—I am of the same opinion. The judgment cannot stand, and all that we can do, as the case is stated, is to reverse it. The first question is, whether or no the public had a right of deviation from the line of the path, because the way had become dangerous. There are many dicta to be found, but nothing which makes out this right to deviate. All the dicta and decisions go back to *Sir Edward Duncomb's Case* (2). But in that case there was a prescriptive highway, and the public were accustomed to deviate "per outlets sur le terre prochein adjoynant le chimyn gisant en le open field nemy enclose." It seems, therefore, that they were accustomed from time immemorial to go over certain definite portions of the open field. They had taken possession of these outlets. I hold that where there is a prescriptive

(13) 15 Q.B. Rep. 276; s. c. 19 Law J. Rep. (N.S.) Q.B. 449.

(14) 3 Mee. & W. 244.

(15) 7 Q.B. Rep. 339; s. c. 15 Law J. Rep. (N.S.) Q.B. 173.

highway over an open common, there would probably be a prescriptive right to deviate when the road itself becomes impassable, but I cannot think that there is a right in the public to deviate in such a case as the present, or to traverse the field in directions which they have not before used. I should require an extreme authority to shew that where in modern times a man gives a right of way to the public he also gives a right to deviate from that way, and go over other parts of his land. In this case no such thing is found; the land has been under cultivation, and there has always been a right to plough the path up. It is impossible to suppose that a right was given to deviate from the line of the path, and trample down the corn which was sown upon the land. After the path is ploughed up, it of necessity becomes foundrous until it is made hard by the people passing over it, and common sense leads one to see that it cannot follow that the public may trample down the corn growing at the side of the path.

The second point is as to the hurdles which the respondent pulled down. *Dimes v. Petley* (13) accurately expresses the law upon this subject, and shews that the respondent cannot set up any defence on the ground that they constituted a nuisance.

MELLOR, J.—This is the very same path which was before the Exchequer Chamber in *Arnold v. Blaker* (1), and that Court followed the decision of this Court in *Mercer v. Woodgate* (16). I do not think that it is necessary to refer to the old authorities cited by Mr. Browne. I agree also that the second point is settled by *Dimes v. Petley* (13).

LUSH, J.—I am of the same opinion, and for the reasons already given.

Judgment for the appellant.

Attorneys — Palmer, Bull & Fry, agents for Uppertons & Bacon, Brighton, for appellant; Clarke and Howlett, Brighton, for respondent.

1872.	} STEWART AND OTHERS v. THE WEST INDIAN AND PACIFIC STEAMSHIP COMPANY.
Nov. 8.	
1873.	
Jan. 25.	

Marine Insurance—General Average—Damage to Cargo by Water to extinguish Fire—Practice of Average Staters—Bill of Lading—"Average if any, to be adjusted according to British Custom."

A ship was lying at anchor in port with a general cargo on board, when a fire broke out in the forehold. Every effort was made, but without success, to extinguish the fire by throwing water down the hatchways and upon the cargo. Finally a hole was cut in the side of the vessel, and her fore compartment filled with water. This extinguished the fire, and if it had not been done the cargo would have been destroyed and the ship seriously damaged if not rendered a total wreck. Part of a quantity of bark shipped on board by the plaintiffs was damaged or destroyed by the water which was poured or let into the vessel to extinguish the fire. The bark was shipped under a bill of lading which contained the words "average if any, to be adjusted according to British custom." It is the practice of British average adjusters in adjusting losses to treat a loss occasioned by water in the manner above described as not a general average loss:—Held, first in accordance with *Nimick v. Holmes*, 25 *Pennsylv. Rep. (Amer.)* 366, that the loss was, according to the general law of England, properly the subject of a general average contribution; secondly, that such general law was excluded by the express terms of the bill of lading, inasmuch as the words "British custom" could only mean the practice of British average adjusters.

This was an action brought in respect of the loss of certain bark shipped on board the defendants' steamship *Venezuelan*, and consigned to the plaintiffs; and by consent the following CASE was stated for the opinion of the Court.

1. The plaintiffs are merchants carrying on business at Manchester under the style or firm of Robert Barbour and Brother. The defendants are a company registered pursuant to the provisions of the Companies Act, 1862, and are the owners of vessels trading regularly be-

tween the United Kingdom and the West Indies and South America, and amongst others of the steamship *Venezuelan*.

2. On September 19, 1871, the defendants' steamship *Venezuelan* left Liverpool with a general cargo of merchandise on a voyage to the West Indies. She arrived on October 8 at St. Thomas, and after discharging her cargo for that port proceeded on her voyage to the ports of Curaçoa, Santa Martha, Savanilla, and Colon, and having called at Curaçoa and there delivered her cargo for that place, came to an anchor in the port of Santa Martha on October 16. *The Venezuelan* after discharging at Santa Martha all her cargo for that port took on board there a general cargo of produce and merchandise for Savanilla, Colon, London and Liverpool.

3. The general cargo so taken on board *The Venezuelan* at Santa Martha consisted of goods shipped by various persons, and amongst these goods were 180 serons of bark which were shipped on behalf of the plaintiffs for carriage to London under the terms of two bills of lading, one for 100 and the other for 80 serons. These bills of lading were in the same form, and the following is a copy of the material part of the one comprising the 100 serons—"Shipped in good order and condition by Mr. Ide Mier, of Santa Martha, in and upon the good steamship or vessel called *The Venezuelan*, whereof Bremner is master for this present voyage, or whoever else may go as master, now lying in or off the port of Santa Martha, 100 serons bark covered by consignee's open policy of insurance, being marked and numbered as per margin, and to be delivered in the like good order and condition, subject to the terms and conditions stated in this bill of lading which constitute the contract between the shippers and the company, unto Messrs. Robert Barbour and Brother, of Manchester, or to his or their assigns, at the port of London or so near thereunto as steamers may safely get; freight to be paid at the port of destination of the goods (without any deduction, and before delivery if required) upon the gross weights or measurements taken on the landing of

the goods from the above-named steamer as per present tariff issued by the West Indian and Pacific Steamship Company (Limited), unless otherwise specially stipulated in the margin hereof; average, if any, to be adjusted according to British custom."

4. While *The Venezuelan* was at Santa Martha so loaded as aforesaid, and about to sail, a fire broke out at about 11 P.M. of October 18 in the forehold. Every effort was at once made to extinguish the fire by playing water down the hatchways by means of the fire-hose, and by cutting holes in the forecastle deck and pouring water down on the cargo stowed in the forehold. This was continued to be done until about 4 A.M. of the next day, when the men at work near the forehold were driven out by the heat and smoke. The steamship was then turned stern on to the wind to keep the fire forward, and portions of the cargo stowed in the afterholds of the vessel were discharged into lighters. The fire-hose was kept continually playing down the fore hatch and the forecastle skylights, but it did not subdue the flames, and at about 8 A.M. the fire reached the upper deck. A hole was then cut in the side of the vessel, and her fore compartment was thereby filled with water. By this means the crew ultimately succeeded in extinguishing the fire. If this had not been done, the remaining cargo would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. The whole of the contents of the forehold were entirely destroyed by fire and a great part of the cargo stowed in the adjoining holds was damaged or destroyed by the water which was poured or let into the vessel in order to extinguish the fire.

5. It is admitted for the purposes of this case that 152 of the 180 serons of bark shipped on behalf of the plaintiffs were destroyed by the water poured or let into the said steamship in the manner above described.

6. It has been the practice of British average adjusters in adjusting losses to treat a loss occasioned by water in the manner above described as not a general average loss.

7. The *Venezuelan*, after discharging and reloading cargo and undergoing temporary repairs at Santa Martha, subsequently proceeded on her voyage, and delivered the various portions of the cargo to the respective owners or consignees thereof.

8. The Court is to be at liberty to draw such inferences of fact as a jury would be justified in drawing.

The question for the opinion of the Court is—Whether the plaintiffs are entitled to recover from the defendants any sum of money by way of general average contribution or otherwise in respect of the aforementioned loss of the said 152 serons of bark. If the Court shall be of opinion in the affirmative, then the Court is respectfully requested to direct on what principles such sum is to be ascertained, and judgment shall be entered for the plaintiffs for such sum as shall be ascertained in accordance with the directions of the Court by the parties themselves, or, if they cannot agree, by Messrs. Bailey, Lowndes, and Stockley, of Liverpool, average adjusters, together with costs of suit. If the Court shall be of a contrary opinion, then judgment is to be entered for the defendants, with costs of defence.

Butt (Cohen with him), for the plaintiffs.—The practice of British average adjusters, by which damage done to goods by water poured into the hold to extinguish a fire, is not treated as general average, is unreasonable, and opposed to the principle upon which the right to contribution is founded. The damage was voluntarily incurred for the purpose of extinguishing a fire which threatened to destroy both the ship and cargo. The practice has received unqualified condemnation from different text writers—*Bencke on Average*, p. 243, *Baily, General Average*, 2nd ed. p. 40. The effect of the bill of lading is not to leave the liability to average to be decided by the average staters, but merely to provide that the question shall be determined according to English and not foreign law. The expression "adjusted" implies that a right to something under the head of average is already ascertained. The plaintiff must be presumed to have contracted with re-

ference to the English law, leaving the process of calculation to follow the practice of English average staters, and he cannot be presumed to have contracted with reference to a rule of that practice which is unfair and unreasonable. The only decision in our Courts which bears upon the matter in hand is *Johnson v. Chapman* (1), where, in the case, it was admitted that it had been the practice of average adjusters not to allow as general average the jettison of such portion of a deck load as immediately before the jettison was in a state of wreck, but the admission was to be taken without prejudice to the right of the defendant to contend "that such a practice cannot affect the law." In *Arnould's Marine Insurance*, 4th edition, vol. ii. p. 812, it is said, "As a general rule the place for the adjustment of general average is the ship's port of destination or discharge; when this happens to be a foreign port, the general average loss is adjusted there, according to the law and usage of the country to which such foreign port belongs, and the adjustment so made is called a foreign adjustment." And although there are no English decisions upon the subject, the American case of *Nimick v. Holmes* (2) is in point. It was there held that where a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire and by tearing up part of the vessel to gain access to the fire, is general average. He cited *Stevens on Average*, p. 12, *Parsons on Shipping*, Book I. c. 9. p. 465, *The Brig Mary* (3).

Sir G. Honyman (*R. G. Williams* with him), for the defendants.—Looking at the bill of lading and the circumstances under which it was drawn up, there can be no doubt that what the parties meant was that the question whether a damage to the cargo was general or particular average should be decided according to the existing English custom. Even if this custom be at variance with the principles of the general English law (which it is unnecessary to decide), the plaintiff is

(1) 19 Com. B. Rep. N.S. 563; s. c. 35 Law J. Rep. (N.S.) C.P. 23.

(2) 25 Pennsylv. (Amer.) Rep. 366.

(3) 1 Sprague (Amer.) Rep. 17.

bound by it. There is no question of implied assent to a custom, in which case the reasonableness of the custom would be material, for there is here an express contract to abide by it. It is well known that in this country the same rules are not observed in adjusting average as abroad. In *Arnould on Marine Insurance*, 4th edition, p. 813, it is said, "There is a great diversity in the practice of different countries with regard to what shall or shall not be included in general average; sometimes losses are included and charged for which are general average in the country where the adjustment is settled, but not in the country where the charter-party was entered into and the policy of insurance effected; and sometimes a different proportion of contribution is assessed in the foreign port from that which is chargeable in the home port." In *Harris v. Scaramanga* (4), where a marine policy contained a marginal note, "to pay general average as per foreign statement, if so made up," and a foreign adjustment was afterwards made, it was held that the underwriters had bound themselves to repay whatever had to be paid by the owners of the cargo, and was general average according to the foreign statement, whether or not it were general average according to the English law, Bovill, C.J., saying, "The general effect of the memorandum is to make the underwriters liable as for general average for whatever the assured owner of the goods might be called on to pay on that account by the foreign statement of adjustment. This memorandum was probably introduced in order to avoid all questions, not only as to the propriety of particular items being treated as the subjects of general average, but also as to the correctness of the apportionment." He also cited *Hopkins, Handbook of Average*, p. 59.

Butt in reply.—The plaintiff has agreed with regard to general average to be bound by British custom, not practice. Such a custom must be general and reasonable: a practice may be different in different places, as it notoriously is in the case of London and Liverpool.

Cur. adv. vult.

(4) 41 Law J. Rep. (N.S.) C.P. 170.

The judgment of the Court (5) was (on Jan. 25, 1873) delivered by

QUAIN, J.—This is an action brought by the plaintiffs as the owners of 152 serons of bark, shipped on board one of the vessels of the defendants, to recover a general average contribution in respect of the loss of the bark on a voyage from Santa Martha to England. The first question argued before us was, whether the loss in question was a loss which properly formed the subject of a general average contribution, according to the law of England. The manner in which the loss was occasioned is described in the fourth, fifth and sixth paragraphs of the Special Case. It appears that while the ship was lying at Santa Martha, and just when she was about to sail, a fire broke out in the forehold. Every effort was made to extinguish it by playing water down the hatchways, and through holes cut in the fore-castle deck. This not being sufficient to subdue the fire, a hole was cut in the side of the ship, and her fore compartment was thereby filled with water. In this manner the fire was extinguished; and it is found and admitted in paragraph 4, that if that course had not been taken, the remaining cargo (a portion having been discharged into lighters) would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. It is admitted in paragraph 6 that the plaintiffs' bark was destroyed by the water poured or let into the ship in the manner described, in order to extinguish the fire. On these facts, we are clearly of opinion that the loss was, according to the general law, properly the subject of a general average contribution. It was a voluntary and intentional sacrifice of the bark made under the pressure of imminent danger, and for the benefit and with a view to secure the safety of the whole adventure then at risk. No case has been cited in which the exact point to be decided has arisen in our Courts, but we have been referred to an American case in which the question was considered and decided. That case is *Nimick v. Holmes* (2), decided in the Supreme

(5) Cockburn, C.J.; Mellor, J.; Hannen, J.; and Quain, J.

Court of Pennsylvania. There Lowrie, J., in delivering the judgment of the Court, says—"Guided by the light of the rule and its instances, we feel constrained to say that when a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of the vessel in order to get at it, is general average. The danger is a common one, and the cost of the remedy must be common. It makes no difference how the water is applied, by the aid of fire-engines on the land, or in the form of steam, or by scuttling the vessel. . . . It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water in order to save the rest." We quite agree with this conclusion, and if the present case depended wholly on the common law applicable to general average losses, we think the plaintiffs would be entitled to recover.

But it is contended for the defendants that the general law, as we have just expounded it, is excluded in this case by the express terms of the bill of lading, which contains these words—"average, if any, to be adjusted according to British custom," inasmuch as "British custom" can only mean the practice of British average adjusters; and it is admitted in paragraph 7 of the case to be the practice of British average adjusters to treat a loss occasioned by water in the manner above described as not a general average loss. It appears from the works of Mr. Stevens and Mr. Bailly (*Stevens on Average*, p. 41, 5th ed.) that the practice, as stated in paragraph 7, does prevail among British average adjusters, though it is condemned by both writers as unjust. "The damage done to cargo," says Mr. Bailly (*on Average*, pp. 81, 82, 2nd ed.), "by pouring water upon it to extinguish a fire, or by water admitted into a vessel's hold when she is scuttled to extinguish a fire, is excluded from general average. In defence of this practice no valid reason can be urged. It is based on an erroneous idea that a general average cannot arise when the degree of danger is so great that it amounts

to a moral certainty of total loss, and on a fanciful distinction between the degree of danger existing in case of fire and the degree existing when a vessel is on her beam ends or on the point of foundering—a distinction which the ingenuity of argument may draw, but which will not bear the test of common sense." The question in this case, however, is, whether the parties have not by the words used in the bill of lading made this practice a part of their contract, for, if so, they are bound by it, though the practice may be, according to the best opinion, vicious and unreasonable. On the other hand, it is argued for the plaintiffs that it was not intended by the expression used in the bill of lading to draw any distinction between British law and British custom, and that the words were inserted solely in order to prevent the average being adjusted by different laws, according to the different ports of destination at which the ship stopped in the course of her voyage. But we are only entitled to infer the meaning of the parties from the language which they have used; and as it appears on the face of the case, and also from the authorities above cited, that a practice prevails among British average adjusters not to allow a loss like the present as a general average loss, we can only construe the expression "British custom" as intended to apply to that practice, as the mode of adjusting the average by which the parties have agreed to be bound. It follows, therefore, that as the parties have agreed to make this custom a part of their contract, the case must be decided in accordance with the custom, and the result is that our judgment must be for the defendants. It is to be hoped, however, that in future there will be no difference between law and custom on this point, and that average adjusters will act on the law as now declared, and that bills of lading will also be framed in accordance with it.

Judgment for the defendants.

Attorneys—Milne, Riddle & Mellor, agents for Hinde, Milne & Sudlow, Manchester, for plaintiffs; Chester & Co., agents for Haigh & Co., Liverpool, for defendants.

1873. { GILL v. THE MANCHESTER, SHEF-
Feb. 17. { FIELD AND LINCOLNSHIRE RAIL-
WAY COMPANY.

*Common Carriers—Railway Company—
Negligence—Cattle—Injury caused by Rest-
lessness.*

The G. N. R. Co. and the defendants agreed that a complete and full system of interchange of traffic should be established from all parts of one company and beyond its limits, to all parts of the other company and beyond its limits, with through tickets, through rates and invoices, and interchange of stock at junctions, the stock of the two companies being treated as one stock. The agreement provided for the division of the traffic. The plaintiff, wishing to send a cow from D. to S., went to the station of the G. N. R. Co. at D. and booked her for S. by the defendants' line. He signed a contract, by which it was agreed that the cow was to be conveyed upon certain conditions, one of which was as follows—"The G. N. R. Co. give notice that they convey horses, cattle, sheep, pigs and other live stock in waggons, subject to the following condition: That they will not be responsible for any loss or injury to any horse, cattle, sheep or other animal, in the receiving, forwarding or delivering, if such damage be occasioned by the kicking, plunging or restiveness of the animal." The cow was put into a truck belonging to the defendants, and was conveyed to S., where a servant of the defendants, who was in charge of the yard or loading place, let her out of the truck, although he was cautioned by the plaintiff not to do so at that time. The cow rushed out of the truck, and after running about the yard, got upon the line and was killed:—Held, *per totam Curiam*, having power to draw inferences of fact, that the G. N. R. Co. were the agents of the defendants to make the contract for the carriage of the cow, and that if the defendants were not protected by the condition above set out, an action was maintainable against them.

Held also, *per BLACKBURN, J., and LUSH, J. (MELLOR, J., dissentiente)*, that the accident to the cow was attributable to the fact that the porter let her out of the truck without waiting a reasonable time, as he might have done, and that the defendants

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were therefore liable to the plaintiff for the value of the cow.

First count of the declaration—That the defendants were carriers of cattle for hire, from Doncaster to Sheffield, and that the plaintiff delivered to the defendants, and the defendants received as such carriers, a certain cow of the plaintiff, to be by the defendants safely and securely carried from Doncaster to Sheffield aforesaid, and there delivered to the plaintiff, for reward to the defendants; and all conditions were fulfilled, and all things happened, and all time elapsed, necessary to entitle the plaintiff to have the said cow safely and securely carried from Doncaster to Sheffield aforesaid, and there delivered as aforesaid. Yet the defendants did not safely and securely carry the same from Doncaster to Sheffield aforesaid, nor there deliver the same for the plaintiff, whereby the plaintiff was wholly deprived of and lost the said cow.

Second count—That the plaintiff delivered to the defendants, being public carriers of cattle from Doncaster to Sheffield, and the defendants received a certain cow of the plaintiff's upon the terms that the defendants would safely carry the said cow from Doncaster to Sheffield aforesaid, and would at Sheffield aforesaid provide a safe and proper place for the unloading of the said cow from the carriage of the defendants, and for the delivering of the said cow to, and the receiving of the said cow by the plaintiff, and would use due care in and about the said unloading and delivering and receiving, for reward to the defendants; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach of the said terms herein-after alleged. Yet the defendants did not, at Sheffield aforesaid, provide such safe and proper place as aforesaid, nor use due care in and about the said unloading and delivering and receiving, and by reason thereof the said cow escaped and was killed, and the plaintiff was wholly deprived of the said cow.

Third count.—For that the plaintiff entrusted to the defendants a cow of the plaintiff, and the defendants received

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the same and undertook the care and custody thereof. Yet the defendants took so little and such bad care of the same, and so negligently conducted themselves in that behalf, that by reason thereof the said cow escaped out of their custody and was killed, whereby the plaintiff was wholly deprived of the said cow.

There were also the usual money counts.

Pleas, 1. As to the first count, that the defendants did not receive the said cow upon the terms alleged.

2. To the second count, that they did not receive the said cow upon the terms alleged.

3. To the third count, that the plaintiff did not entrust the said cow to them, nor did the defendants receive the same and undertake the care and custody thereof as alleged.

4. To the first three counts, not guilty.

5. To the first three counts, that the defendants received the said cow, in those counts mentioned, upon the terms that they should not be responsible for any loss or injury to the said cow in the receiving, forwarding or delivering the same, if such damage should be occasioned by the kicking, plunging or restiveness of the animal. And the defendants say that the loss or injury, in these counts mentioned, was occasioned by the kicking, plunging or restiveness of the animal in delivering the same.

6. To the residue of the declaration, never indebted.

Issue joined.

The cause was tried before Cleasby, B., at the last Summer Assizes for Leeds, where it was proved as follows*—That the plaintiff, a cowkeeper residing at Sheffield, had purchased a cow, which he desired to send from Doncaster to Sheffield, he accordingly took her to the Great Northern Railway Station at Doncaster and there booked her for Sheffield, by the Manchester, Sheffield and Lincolnshire Railway, and signed a contract under which it was agreed between the undersigned and the Great Northern Railway Company, "that the animal

named on the other side was to be conveyed *only upon the conditions* mentioned upon the ticket received by the undersigned from the company, and not to be insured;" one of the conditions referred to, and upon which the question turned, was as follows—"The Great Northern Railway Company give further notice that they convey horses, cattle, sheep, pigs and other live stock in waggons, subject to the following conditions, first, that they will not be responsible for any loss or injury to any horse, cattle, sheep or other animal in the receiving, forwarding or delivering, if such damage be occasioned by the kicking, plunging or restiveness of the animal."

The plaintiff's cow was put into a truck belonging to the Manchester, Sheffield and Lincolnshire Railway Company, and the plaintiff and his man travelled by the same train; they and the cow arrived at the station at Sheffield about twenty minutes to seven o'clock; the plaintiff and his man then got out and walked down to the place where the cattle arriving by train are unladen. They waited until the trucks were shunted to the usual place for the purpose of being unladen, being a sort of yard or landing place inclosed with a post and rail fence on one side and at one end, and by an inclosed pig pen at the other, and with an incline leading into it. It was separated from the line of railway by posts and chains, a servant of the defendants' company was in charge of this yard or loading place, and as soon as the trucks in which the cattle had been carried had been shunted to the side of the yard he called out, "Who belongs to the Sheffield cow?" the plaintiff immediately said, "I do." The porter in charge said, "Have you signed?" plaintiff said, "No;" whereupon he directed the plaintiff to go to the office and sign; the plaintiff accordingly did so, saying to the porter, "Don't let her out until I get back." After the plaintiff had signed the book at the office he came back just as the porter was unfastening the truck. The plaintiff thereupon said, "Don't let that cow out, if you do she'll go slap at you;" the porter turned and laughed, and said, "she'll be right when she gets out."

* These facts are as stated in the judgment of Mellor, J.

The porter said, "Close the gate;" whereupon the plaintiff said, "I shall go outside," and did so. The porter stood inside and drew the bolt of the truck, and the cow rushed out and ran about the yard; the chains were down, and the porter and plaintiff's man struck at her to turn her back; she ran up the incline into the pig pen, and then down and up again, and jumped over the rails of the pig pen on to the line and tunnel, and was killed.

The plaintiff, for the purpose of establishing his right to sue the defendants, called for and put in evidence an agreement between the Manchester, Sheffield and Lincolnshire Railway Company, and the Great Northern Railway Company, dated 17th of June, 1857, of which the material clauses were the following—

"That a complete and full system of interchange of traffic in passengers, goods, cattle, parcels, &c., be established from all parts of one company and beyond its limits, to all parts of the other company and beyond its limits with 'through tickets, through rates' and invoices, and interchange of stock at junctions, the stock of the two companies being treated as one stock, mileage and demurrage not being charged between the two companies, the repairs of the rolling stock of each company being done by the company owing it.

"That the two companies do aid and assist each other in every possible way, as if the whole concern of both companies were amalgamated, and that every possible facility be given by either party to developé and increase the traffic of both.

"That a joint committee of three directors of each of the two companies shall have the charge of the working out of this agreement, with power to call in a chairman unconnected with the traffic of either company, (say a barrister of good practice, or other public man of good standing,) summarily to settle any dispute that may arise.

"That, in dividing the through traffic, the following miles shall be given to the Manchester, Sheffield and Lincolnshire Company, from the total actual aggregate mileage

Between Manchester, and places west of Manchester, and London and places south of London . . .	20 miles.
Between Manchester and Sheffield inclusive of both, and London and places south of London . . .	18 miles.
Between Sheffield and London, ditto ditto . . .	10 miles.
Between Hull and London, ditto ditto . . .	10 miles.
Between Grimsby and London, ditto ditto . . .	20 miles.

"All other traffic to be divided on actual mileage. A model settlement to be prepared by the accountants.

"All traffic to be divided after the deduction of government passenger duty and the usual clearing house terminals on goods and parcel traffic."

Upon these facts, the learned Judge ordered that a nonsuit should be entered, with leave to the plaintiff to move to set the nonsuit aside and enter a verdict for the plaintiff for 15*l.*; the Court to have power to draw inferences of fact.

A rule having been obtained accordingly—

J. H. Mellor and Kennedy shewed cause against the rule (on Feb. 4).—(They first argued that the effect of the agreement was simply that the two companies should work in harmony, and not that they were partners or joint principals for one another.) Next, assuming that the action was properly brought against the defendants, it is submitted that the evidence establishes either that the cow, not being in a fit state to be carried, was delivered to the defendants without notice that she was in such a state, or that she had worked herself into such a state in the course of the journey. The defendants are protected from liability because the cow was killed in the course of being delivered at the end of the journey, and the damage was by reason of her restiveness. The defendants were not bound to keep her in the truck, and there was nothing to shew that the station yard was not reasonably fit for the delivery of cattle at the end of the journey. The defendants are only bound to supply a reasonably fit truck, which they did—*The Great Western Railway Company v*

Blower (1). In *Kendall v. The London and South Western Railway Company* (2), which was an action for injury sustained by a horse while being carried on defendants' railway, Bramwell, B., said, "There is no doubt that in this case the horse was the immediate cause of its own injuries. That is to say, no person got into the box and injured it. It slipped, or fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, 'its proper vice,' that is to say, from fright or temper or struggling to keep its legs, the defendants are not liable." So here it is submitted that the cow from its own proper vice got upon the line where it was killed.

Price and Dodd, in support of the rule.—The two companies are, in fact, partners, or at any rate, the Great Northern Company were agents to carry on behalf of the defendants. The effect of the agreement is to amalgamate the whole concern, to make it one undertaking. The train, engine and carriages were the property of the defendants, and clearly they are liable. Although there may not be a community of loss, there is of profit, and that is sufficient. The second question is a mixed question of law and fact. The porter was guilty of a distinct act of negligence. It was reasonable that the plaintiff should ask him not to turn the cow out at once. If the chains had been up and the pig pen closed, the accident could not have happened. It was a negligent act to keep the station in such a condition. Again, the porter turned her out at some risk to the people. The excitement of the cow was merely temporary; she might have been calmed if time had been given her. Timidity is not restiveness. In *Kendall v. The South Western Railway Company* (2), Bramwell, B., after the passage already referred to, said, "But if it so hurt itself from the defendants' negligence or any misfortune happening to the train, though not through any negligence of the defendants, as for instance from the horse

box leaving the line, owing to some obstructions maliciously put upon it, then the defendants would, as insurers, be liable." See also *Rooth v. The North Eastern Railway Company* (3).

Cur. adv. vult.

The learned Judges differing in opinion, the following judgments were delivered on Feb. 17.

MELLOR, J. (after stating the facts as above set forth) said: "This was the plaintiff's case, and it was therefore contended, on behalf of the defendants, that the contract for the carriage of the cow was with the Great Northern Railway Company, and not with the defendants, and further that the loss of the cow was caused by the cow being restive and unfit to be carried by railway.

My brother Cleasby being of opinion that the loss of the cow was wholly attributable to the character of the cow, and that if the defendants did not completely perform their contract, it was because the cow could not be delivered, directed the plaintiff to be nonsuited leaving the other question open to the defendants, and reserving leave to the plaintiff to move to enter the verdict for him for 15*l.*, if any contract was established between him and the defendants, and if the case was not within the exception in the contract as to restiveness. The Court to draw inferences from the facts.

At the conclusion of the arguments, we declared our opinion that the action was rightly brought against the defendants, inasmuch as the provisions of the agreement of the 17th of June, 1857, constituted, if not an actual partnership between the respective companies as to all the matters embraced by it, still that it came within the rule expressed by Lord Cranworth in *Cox v. Hickman* (4). "But the real ground of liability is that the trade has been carried on by persons acting on his behalf," and per Lord Wensleydale to the same effect, in the same case

(1) 41 Law J. Rep. (N.S.) C.P. 268; s. c. *nom. Blower v. The Great Western Railway Company*, Law. Rep. 7 C.P. 655.

(2) 41 Law J. Rep. (N.S.) Exch. 184; s. c. Law Rep. 7 Exch. 373.

(3) 36 Law J. Rep. (N.S.) Exch. 83; s. c. Law Rep. 2 Exch. 173.

(4) 8 H. L. Cas. 268; s. c. 30 Law J. Rep. (N.S.) C.P. 125.

(5). In our opinion the Great Northern Railway Company became, by virtue of their agreement with the defendants, the agents of the latter, to make the contract for the carriage of the cow with the plaintiff. We reserved for further consideration the question as to the effect of the exception as to restiveness contained in the contract.

It was contended for the plaintiff, that although the effect of the reservation was to relieve the defendants from liability for any injury to the cow, arising from the restiveness of the animal during the receiving, forwarding or delivering the same, yet it did not relieve them from liability for negligence on the part of the defendants' servants, in the delivery of the cow, and we are all agreed that such is the true effect of the contract. But it was further contended, that we ought to draw the inference that there was negligence on the part of the defendants' servants, in the delivery of the cow under the circumstances above stated, and it is with regard to this contention on the part of the plaintiff, that the difference of opinion amongst the members of the Court arises. It was suggested in the first place, that the porter in charge of the landing place was too hasty in unfastening the door of the truck after he had been warned by the owner that if he did so, the cow would run slap at him. Secondly, that he ought to have waited until other animals had been unloaded from the trucks, which might have had the effect of calming the restiveness and excitement of the cow; and thirdly, that the chains of the posts dividing the landing yard from the line of rails were some of them down. Now, I am of opinion, that there is nothing in any of these suggestions, or in the facts as they appear on the Judge's notes, which ought to induce us to draw the inference of negligence on the part of the company's servant, which frees the case from the effect of the reservation as to restiveness contained in the contract of carriage.

I think that the effect of that reservation was to relieve the defendants from all liability arising from the restiveness of the cow. I cannot doubt, that the *causa*

causans of the injury was the restiveness of the cow.

The contention of the plaintiff if it could be successful, would extend instead of diminish the liability of the defendants in the carriage and delivery of such animals, as it would require the company not merely to provide an ordinary and reasonable place of delivery, and to use ordinary and reasonable care adapted to animals in the normal condition, but the limit of the precautions to be adopted by the defendants, would necessarily be required to be commensurate with the excitement and restiveness of the cattle to be delivered. It cannot, I think, be doubted that if the cow in the present case, had not been restive within the meaning of the reservation in the contract, the place of delivery, and the course adopted by the company's servants would have insured the safe delivery of the cow. The place of delivery was the usual, and, under ordinary circumstances, a suitable place for delivery.

It is not pretended that the porter in charge was, in any sense, an improper or incompetent person to superintend the delivery of cattle, and most probably he had had great experience. Was there then any duty on his part to delay the delivery of the cow, because at the moment he was unfastening the door of the truck, the owner of the cow said to him, "Don't let that cow out; if you do she'll go slap at you." If the porter in charge was to govern the discharge of his duty by such an intimation of personal danger so conveyed, the business of the company would be greatly impeded; that the cow in question was not the only beast to be delivered, is manifest, not only from the evidence, but from the suggestion made by the plaintiff's counsel, that the porter ought to have delayed the delivery of that cow until other cattle had been unladen—how long was the delay to last? Was it to be co-extensive with the restiveness of the animal? Was the business of the company to suffer indefinite delay and inconvenience, because the plaintiff had chosen to send a cow in an unfit condition?

According to the contention on the part of the plaintiff, the reservation in the

(5) 8 H. L. Cas. 312, 313; s. c. 30 Law J. Rep. (n.s.) C.P. 140.

contract, instead of relieving the company and restricting their liability, would positively extend it, and instead of expressing that the company would not be liable for injury arising from the restiveness of such animals, would be construed to mean, that, "restive cows will be treated with unusual care."

Surely it cannot be contended that the delay was to be co-extensive with the excitement of the cow, or that other servants were to be drawn from other duties to assist in the delivery, or that other cattle should be unloaded out of turn for the purpose of quieting this restive cow. Only one other suggestion of negligence was made, viz., that the chains were down; the answer to that is, that the death of the cow was in no respect due to that fact.

In conclusion, I express my opinion that the porter was not bound to alter the usual and ordinary course of delivery by reason of what was said by the plaintiff as to the probability of his incurring personal danger, but that it was his duty to exercise his own judgment as to any danger resulting from letting out the cow, and if he did so honestly, it cannot be imputed to the company as negligence. I further think that the true effect of the company's contract was to take ordinary and usual and reasonable means of delivering cattle sufficient and reasonable for cattle in their normal condition, but that they were not under the contract in question, obliged to depart from such ordinary, usual and reasonable means, because the cow in question was restive, excited, and unfit to be delivered.

I agree, therefore, with the opinion of my brother Cleasby expressed at the trial, and I think that the loss of the cow was wholly attributable to her character and condition, and not to negligence on the part of the company; and therefore that the rule to enter the verdict for the plaintiff ought to be discharged.

LUSH, J., delivered the following judgment of himself and BLACKBURN, J.—We intimated, in the course of the argument, our opinion that the action if sustainable at all might be brought either against the present defendants or against the Great Northern Railway Company. The reasons

for our so holding have been stated by my brother Mellor in his judgment, and in those reasons we concur. The case was not submitted to the jury, but leave was reserved to the Court to enter a verdict for the plaintiff, if the Court should be of opinion that the case was not within the exception of "restiveness," and if any liability on the part of the defendants was established. We are, therefore, placed in the position of a jury, and bound to draw our own conclusions, and say whether a jury ought to have found their verdict for the plaintiff or for the defendants. It is upon the question what is the proper conclusion to be drawn from the evidence that the difference between us arises.

The facts lie in a very small compass. The plaintiff having bought a cow in the market, booked it at Doncaster to be carried by rail to Sheffield, where he resided, he and his man travelling as passengers by the same train. The train arrived at Sheffield between six and seven in the evening of the same day, the 16th of November, and the cattle trucks were drawn up to their proper place, by the side of the cattle yard. The plaintiff who had to go to the office and sign a receipt for the cow, before he was permitted to take her away, told the porter not to let the cow out of the truck till he came back. On his return from the office, he observed that the porter was unfastening the truck. He called out to him, "Don't let the cow out, if you do she'll go slap at you." The porter answered, "She'll be all right when she gets out, close the gate," and proceeded to unbolt the door. The plaintiff, thereupon, left the yard saying, "If you do that I shall go outside." The cow being let out began to run about the yard, and towards a spot whence she might have got on to the line. Being driven back by some persons who were there, she ran up to a pig pen at the other end of the yard, and leaped over the rails of the pen on to the line, where she was run over and killed by a passing train.

The fair inference from these facts is, we think, that the cow was, while in the truck, in so excited a state as to make it dangerous to let her out until preparations had been made for securing her, and taking her away in safety, which is what

I infer the plaintiff intended to do; and that the warning given to the porter, though it intimated only danger to himself as the consequence of liberating the cow at that moment, must or ought to have conveyed to his mind, that other mischief might happen, if the animal were then set at large.

It was contended for the defendants, that there was no evidence of negligence, and that at all events the company were exonerated from liability by virtue of the conditions printed on the cattle ticket, and by which, no doubt, the plaintiff was bound.

The condition relied on is in these terms—"The company give notice that they convey horses, cattle, sheep, pigs and other live stock in waggon, subject to the following conditions:

First. That they will not be responsible for any loss or injury to any horse, cattle, sheep or other animal in the receiving, forwarding or delivering, if such damage be occasioned by the kicking, plunging or restiveness of the animal."

It cannot, we think, be contended, that this condition dispenses with the use of reasonable care on the part of the company in the receiving, carrying and delivering cattle, any more than the exception of perils of the sea in a bill of lading relieves a shipowner from the obligation to navigate with ordinary skill and care. The exception goes to limit the liability, not the duty. It is the duty of the carrier to do what he can by reasonable skill and care to avoid all perils, including the excepted perils. If, notwithstanding such skill and care, damage does occur from these perils, he is released from liability, but if his negligence has brought on the peril, the damage is attributable to his breach of duty, and the exception does not aid him. See *Phillips v. Clark* (6). The precise degree of care which it is the duty of a carrier to use in delivering the goods entrusted to him, must depend upon and vary with the nature and condition of the thing carried, and the ever varying circumstances under which the delivery takes place. Some goods require much more

(6) 2 Com. B. Rep. N.S. 156; s. c. 26 Law J. Rep. (N.S.) C.P. 167.

tender handling than others; some animals much more care and management than others, according to their nature, habits and conditions; and the line of conduct which the carrier should propose to himself is that which a prudent owner would adopt if he were in the carrier's place, and had to deal with the goods or animals under the circumstances and subject to the condition in which the carrier is placed, and under which he is called on to act.

If it had appeared in this case that the exigencies of business required the porter to discharge the cattle trucks immediately, or that the plaintiff meant to put upon the company the charge of his cow, or to require the use of the truck, for an unreasonable time, the case would have borne a different complexion; but we infer that all which the plaintiff wanted was time to enable him either to soothe and quiet the cow, so that he might drive her home, or to secure her, and so prevent her doing mischief either to herself or to persons who might come in her way, and that the porter could, without loss or inconvenience to the company or any other person, have kept the cow in the truck for that reasonable time. This, we think, he was therefore bound to do, and that as the mischief was attributable to his letting her at large, the defendants are liable. We are therefore of opinion that the nonsuit was wrong, and that the verdict ought to be entered for the plaintiff for 15*l.*, the statutory value of the cow.

Rule absolute.

Attorneys—Pitman & Lane, agents for Chambers & Son, Sheffield, for plaintiff; Cunliffe & Beaumont, agents for J. R. & R. Lingard, Manchester, for defendants.

1873. }
Jan. 16. }

WAINE v. WILKINS.

The Mayor's Court—Foreign Attachment—Render—Imprisonment—The Debtors' Act, 1869 (32 & 33 Vict. c. 62), ss. 4 & 29.

Where in a proceeding by foreign attachment, the defendant renders himself in dis-

solution of the attachment, and the plaintiff goes on in the action and recovers judgment, the defendant is entitled to be discharged from custody by virtue of section 4 of The Debtors Act, 1869. The 29th section of that Act which preserves the custom of foreign attachment does not operate so as to make the defendant, under such circumstances, liable to be detained in custody.

A writ of habeas corpus had been granted, directed to the Governor of the Queen's Prison for London and Middlesex, at Holloway, directing him to bring the body of Samuel Wilkins immediately before the Court of Queen's Bench to undergo and receive all and singular such matters and things as the said Court should then and there consider.

The circumstances under which the said Samuel Wilkins was detained in the said prison were as follows—

In the month of February, 1872, he had purchased goods of the plaintiff, and after paying a sum of money down had given two bills for the remainder due from him to the plaintiff. He had a sum of money in the London and County Bank, at Hackney, and on the 25th of September, the plaintiff caused an attachment for the sum of 79*l.* 10*s.* 4*d.* to be issued out of the Mayor's Court, and the money in the bank amounting to such sum was attached. At the same time an action was commenced against him in the Mayor's Court to recover the said sum of 79*l.* 10*s.* 4*d.* In order to dissolve the attachment, Samuel Wilkins surrendered himself into the custody of the Sergeant at Mace of the Mayor's Court for the purpose of his appearance at the trial of the said action or other the termination thereof. On the 2nd of January, 1873, the said action was terminated by the plaintiff signing judgment for the sum of 80*l.* 19*s.* 2*d.*

An application was then made to the Mayor's Court for the discharge of Wilkins, but the judge declined to discharge him, thinking that this Court was the proper Court to order such discharge, if he was entitled to be discharged.

Kemp now moved that he might be discharged from custody.—The proceeding

by foreign attachment is not an original proceeding, but is ancillary to other proceedings to ensure the appearance of the defendant in the suit. In ancient times every freeman of the City of London lived within the city, and the Court had speedy remedies against them. All other persons who lived outside were called "foreigners," and this proceeding by foreign attachment came into use in order to compel such persons to appear to a suit brought against them. A defendant may appear in the action in dissolution of the attachment by three different methods—first, by bail; second, by render; third, by payment of money into Court. See *Brandon on Foreign Attachment*, p. 106. The present defendant has adopted the second method; he has rendered his body to prison and has thus dissolved the attachment. The plaintiff has obtained judgment, but has not issued execution, or charged the defendant thereon. The defendant is now entitled to be discharged under section 4 of the Debtors Act, 1869. If not, he might be kept in prison for his whole life unless he pays the debt. In *Brandon on Foreign Attachment*, p. 104, the law is thus stated: "An attachment is a process merely to compel the appearance of the defendant in an action brought against him; therefore, upon his appearance becoming perfected according to the custom, the attachment and all the proceedings thereupon become void, and the action becomes an action against the defendant, with security by bail or otherwise for his appearance."

[QUAIN, J.—In the notes to *Turbill's Case* (1), it is stated as follows: "However, a foreign attachment like the process by *distringas* in the Courts at Westminster, is to no other purpose than to compel the appearance of the defendant. Therefore if he appear within a year and a day and put in bail, though after judgment and execution against the garnishee, the attachment is at an end if satisfaction be not entered upon the record."]

The imprisonment of the defendant is no longer lawful. (He referred to *Day v. Paupierre* (2).)

(1) 1 Wm. Saund. 67 a.

(2) 18 Law J. Rep. (N.S.) Q.B. 270.

L. Glynn, for the plaintiff.—The defendant may be kept in custody till he pays the debt. The Lord Mayor's Court has refused to discharge him. It is true that by the Debtors Act, 1869, s. 4, no person, after the commencement of that Act, is to be arrested or imprisoned for making default in payment of a sum of money except in certain specified cases, but it is submitted, that the imprisonment of the defendant is not made illegal by that enactment, inasmuch as section 29 enacts "that nothing in the Act contained shall affect the custom of foreign attachment as exercised by any competent Court, or the proceedings in relation to such custom."

[COCKBURN, C.J. — The plaintiff has obtained the benefit of the foreign attachment by the render of the defendant. But the defendant must now be discharged, because the Legislature has by the 4th section made the imprisonment illegal.]

In *Brandon on Foreign Attachment*, p. 105, it is said, "A defendant may appear in the action in dissolution of the attachment at any time before the plaintiff has acknowledged satisfaction; the appearance may be by any of the methods hereafter spoken of; but after the acknowledgement of satisfaction, a defendant cannot dissolve the attachment, because the satisfaction is a receipt by the plaintiff of the property recovered under the attachment, and a discharge of the defendant upon the record of his debt due to the plaintiff, so far as the amount recovered will extend; but until this is perfected, the debt remains undischarged, and still liable to the plaintiff, the payment of the defendant's debt by the third party not being complete, and therefore the defendant is permitted to appear in dissolution." And again, at p. 109, "If bail has been put in, and upon the trial of the action, or in any other method, the plaintiff obtain judgment against the defendant, the defendant may issue a writ of execution in the ordinary form of writs of execution, upon which the defendant may be arrested if the amount exceed 20*l.*, or the plaintiff may direct the sergeant at mace immediately to return it *non est inventus*, which return the sergeant will make as of course."

[COCKBURN, C.J.—That shews that in
NEW SERIES, 42.—Q.B.

order to detain him it is necessary that you should take new proceedings against him. Has that been done?]

No. *Day v. Paupierre* (4) shews that he is not entitled to be discharged under 1 & 2 Vict. c. 110, which abolishes arrest on *mesne* process, because the render is voluntary.

COCKBURN, C.J.—I think it clear that the defendant is entitled to his discharge. The process of foreign attachment appears in ancient times, beyond all question, to have been resorted to and established, simply as a means of bringing within the jurisdiction of the city the "foreign" debtor (who could not be arrested by process issuing out of the Lord Mayor's Court) by the attachment of any goods that he had within the city, and which goods could only be released from the attachment by the debtor coming in and placing himself in the same position as though he had been within the jurisdiction of the city, and so capable of being arrested. He could only get the attachment dissolved by satisfying the debt, by rendering his person, or by giving bail. The rendering his person and the giving bail were both analogous to the arrest on *mesne* process by a *capias ad respondendum*; but it appears that in the Lord Mayor's Court, as in the other Courts of Common Law, the arrest on *mesne* process terminated with the judgment obtained in the suit. If bail were given, the bail were bound to surrender the body, and it was necessary in the superior Courts to charge the defendant by a writ of *capias ad satisfaciendum*, if it was intended to proceed against his person and not against his goods. It appears that there is an analogous proceeding in the Lord Mayor's Court, and whether against a citizen who has been served with process in that Court, or against a "foreigner" who has been brought within the jurisdiction by means of the process of foreign attachment, there must be a charging in execution. The Legislature has stepped in, and with the view of preventing the detention of the bodies of debtors who are unable to satisfy the claims of their creditors, has prevented the issuing of writs to arrest the person

in satisfaction of the debt, or charging persons in execution. That legislation applies to cases in the Lord Mayor's Court, as well as to cases in the superior Courts, and it is no longer possible to take out proceedings against a person whom a creditor could, under the old law, have taken in execution, upon a judgment which he had recovered. The Mayor's Court has therefore lost that mode of proceeding. The Legislature has said by section 29 of the Debtors Act, 1869, that nothing in that Act contained shall affect the process of "foreign attachment." But remembering that "foreign attachment" is merely an ancillary proceeding to enable the Mayor's Court to acquire jurisdiction over a person who was not a resident in the city but a "foreigner," the operation of section 29 must clearly be confined to the first part of the procedure in the suit up to judgment, and does not apply afterwards, when the plaintiff who has brought the defendant within the power of the Court, has recovered judgment. One cannot help seeing that although "foreign attachment" has been preserved intact, nothing could be done upon this judgment, consistently with the now existing law, to detain the defendant in custody. The proceeding has arrived at that stage at which the Legislature says that the defendant must be discharged.

BLACKBURN, J.—I am of the same opinion. The foreign attachment was a means of compelling appearance which the defendant might dissolve by render or by giving substantial bail. The defendant rendered his body, he was detained, and judgment has been obtained against him. Then Mr. Brandon, at page 112, writes, "If the plaintiff recover judgment against the defendant in the action he is bound to issue his execution and charge the defendant thereon, or the defendant may apply to the Court to compel the plaintiff to do so." Mr. Brandon does not add what I think is plainly intended, "letting the defendant out of custody." If at the time of the judgment the defendant was in custody on mesne process, there was a reasonable time within which the plaintiff must have charged him in execution. Then he would be in custody under a

ca. sa., not on mesne process, but final process. The Debtors Act, 1869, by section 4, enacts that, with the exceptions mentioned, "No person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money." The present case does not come within any of the exceptions. It is clear that the defendant is entitled to his discharge, on the ground that he is no longer liable to be detained, if it were not for the 29th section. [His Lordship read that section.] I think that that does shew that the Legislature has, for some reason sufficient to itself, decided that the detaining a defendant on foreign attachment, and requiring special bail up to the time of judgment, is retained; but I find nothing which states that when he has been charged in execution under the foreign attachment, the charge shall in any way differ from what it would have been if he had appeared in any other way. The 29th section does not therefore provide that he may be detained in execution on final process, if the suit has been commenced by a foreign attachment, any more than if commenced by any other process.

MELLOR, J.—I am of the same opinion. The passage cited by my brother Quain from the notes to *Turbill's case* (4) shews that the proceeding by foreign attachment is simply to compel the defendant to appear in the action. That being so, it follows that, under the existing law established by the Debtors Act, 1869, there is no longer any power, under the circumstances of this case, to keep the defendant in custody.

QUAIN, J.—I am of the same opinion. "Foreign attachment" is agreed to be a proceeding to compel appearance, or, in other words, to put the defendant in the same position as if he had been arrested under a *capias ad respondendum*, before the 1 & 2 Vict. c. 29. The person so arrested either gets rid of that by appearing and putting in special bail, or by surrendering himself to the action at once, and he is then arrested and is in custody, as it used to be called, on mesne process. The defendant remains in custody, and it is admitted that is

right up to the time of judgment being obtained. The special bail bond would in form be that if the plaintiff succeeds against the defendant, the bail should either pay the money or surrender the defendant to the custody of the Court. If special bail was put in, the bail would discharge themselves when they had surrendered the defendant, upon which he would be charged in execution under a *ca. sa.* under the old law. Now it is also admitted that as soon as the defendant puts in bail or renders himself, the attachment is dissolved. The warrant shews that he surrendered in dissolution of the attachment. [His Lordship read the words of the warrant.] That obviously means that he is to remain in custody until judgment has been recorded against him by the plaintiff, when he will be charged in execution under the old law. If that be so, at the present time the attachment is at an end, and it is clear that while the Legislature preserves the "foreign attachment," it was bound to insert the 29th section, because by the 6th it had enacted that "after the commencement of this Act a person shall not be arrested upon mesne process in any action." So that section 29 became necessary. The attachment being gone, and process under it being gone, the defendant could only be detained in custody until judgment is obtained, upon which event the ordinary law must take its course. I am of opinion that the Debtors Act, 1869, has taken away the power to detain the defendant any longer.

Order that the defendant be discharged.

Attorneys—Rickards & Walker, for plaintiff;
Keene & Marsland, for defendant.

1873. }
Jan. 14. } *In re* MARY ELLEN EDWARDS,
Feb. 5. } AN INFANT.

Habeas Corpus—Custody of Infant—Religious Education—Testamentary Guardian.

Upon an application for a *habeas corpus* to secure the custody of an infant affidavits were read, which stated that before marriage an arrangement was made between the parents of the infant (the father being a Roman Catholic and the mother a Protestant) that sons of the marriage should be brought up as Roman Catholics and the daughters as Protestants; that a daughter, the infant, who at the date of the application was about ten years old, was with the sanction of the father, who died a few months after her birth, baptized as a Protestant, and that when she was about a year old she was left in the custody of her maternal grandmother, by whom she was brought up as a Protestant, and at whose expense she was maintained and clothed until the date of the application. It was alleged that two days before the father's death he had executed a document appointing the applicant, his brother, testamentary guardian of his children, but it did not appear that the applicant made any claim to the custody of the child until it was about eight years old:—Held, notwithstanding the lateness of the application, that the Court had no power to refuse the writ, so as to give effect to the arrangement made by the father as to the religious education of his child, but as there appeared to be some doubt upon the affidavits as to the validity of the document appointing the applicant guardian, an issue must be directed in order that the question might be submitted to a jury.

Rule for a writ of *habeas corpus* to Mary Fleetcroft directing her to bring up the body of Mary Ellen Edwards, an infant, in order that she might be handed over to her testamentary guardian.

It appeared from the affidavits that the applicant, Joseph F. Andrews, was the uncle of the child. The father, T. Andrews, a Roman Catholic, died on the 16th of February, 1863, the child having been born May 22nd, 1862. After the father's death the mother, who had always

been a Protestant, married again, and the child lived with and was supported by her grandfather, Joseph Fleetcroft. No steps were taken by the applicant to assert any right of guardianship until April, 1871, when he stated he was guardian of the child under a document executed by the deceased father on the 14th of February, 1863, two days before his death. The following was stated to be a copy of the document—

"I, Thomas Andrews, of Manchester, in the county of Lancaster, chemist and druggist, hereby direct that my children shall be baptized and brought up as members of the Roman Catholic Church, and in the event of my death, I hereby appoint my brother, Joseph Andrews, of Manchester, reporter, the guardian of my children for the execution of this my request, giving him power, should he see fit, to appoint any other person being a Roman Catholic as guardian of my children, to act in case of his death or upon his ceasing voluntarily to discharge the duty, and to adopt any course which he may think proper for carrying out my intentions. In witness whereof I have hereto affixed my name.

"Thos. Andrews."

This document was attested by two witnesses, one of them a brother of the deceased.

In April, 1871, the applicant required that the child should be handed over to him as guardian, in order that it might be placed in a Roman Catholic school. The grandmother and her relations objected, stating that previous to the marriage of the father and mother it was agreed that if they had children the boys should be brought up as Roman Catholics and the girls as Protestants. The fact of any such agreement was denied by the applicant, and after a long correspondence, the proceedings in question were taken.

C. Russell, in support of the application.—There is nothing on the face of the affidavits which affords any ground for suggesting that the document appointing the applicant guardian was not duly executed or that it was improperly obtained. By the practice of the Court, so far as it can be gathered from the more recent

decisions, the Court will not direct any change in the custody of a child with a view to its religious education, where it is old enough to have formed any opinion of its own upon the subject of religion. But this child is too young to have any fixed opinions on the subject. The alleged agreement on the part of the father as to the religious education of the child is denied, but even if it existed, it could not oust the right of the father to appoint a guardian.

O'Malley shewed cause in the first instance.—The affidavits filed in answer to this application leave no doubt that there was an agreement before marriage that the child should be brought up as a Protestant. With regard to the written document, the fact that it was not published until eight years after the father's death, is enough to cause suspicion as to its validity.

COCKBURN, C.J.—We are satisfied from the statements in the affidavits that a compact was entered into by the parents before marriage, that the children should be brought up in their respective religions. If, therefore, the Court had a discretion in issuing the writ under such circumstances, we should be disposed to exercise that discretion, and refuse the writ. On the other hand, if it should turn out, on looking into the authorities, that this is a case in which the Court has no discretion, the question will turn upon the validity of the document, in which case, without expressing the grounds for our opinion, we think it is one in which the witnesses ought to be subjected to examination and cross-examination before a jury, and we should direct an issue.

Cur. adv. vult.

MELLOR, J. (on Feb. 5) read the judgment of the Court (1).—We postponed giving judgment in this case in order that we might consider the authorities bearing upon the question, whether, assuming the validity of the document appointing the applicant guardian, we have any discretion, under the

(1) Cockburn, C.J.; Mellor, J.; Lush, J.; and Archibald, J.

circumstances, to refuse the writ of *habeas corpus*, or to decline to change the custody of the infant.

The affidavits furnish evidence, that before marriage an arrangement was made between the parents of the infant (the father being a Roman Catholic and the mother a Protestant) that sons of the marriage should be brought up as Roman Catholics and the daughters as Protestants, and for the purpose of our judgment, but without intending in any way to prejudice the inquiry we are about to direct, we assume that such an arrangement was in fact made. It also appeared that the child, now about ten years of age, was with the sanction of the father baptized as a Protestant, that when she was about a year old she was left where she now is, in the custody of her maternal grandmother, by whom she has been brought up in the Protestant faith, and at whose expense she has hitherto been maintained and clothed.

The father died on the 16th of February, 1863, having, as alleged, executed, two days before his death, a document purporting to appoint Joseph Francis Andrews guardian of his children, and sufficient, if duly executed, to constitute him guardian under the provisions of the statute 12 Car. 2. c. 24. There is considerable doubt upon the affidavits as to when the appointment was first brought to the notice either of the mother or grandmother of the child; but it does not appear that any claim to the custody of the child was ever made by the applicant until the year 1871, about eight years after the father's death, and after the child had been left in the care of her grandmother and maintained and educated at her expense for about the same period. The question which arises is, whether as a Court of common law we can give any effect to the arrangement made before marriage with respect to the education of the child, and treat it as binding on the guardian who stands—See *Com. Dig. Guardian (D)*—*in loco parentis*, the admitted object of the present application being that the child shall thenceforth be brought up in the religious faith of the father, or whether we can decline to interfere with the present custody of the child on the ground

suggested, that the change proposed would be prejudicial to her interests.

In dealing with questions of this nature the Court of Chancery exerting the prerogative of the Sovereign as *parens patriæ*, has assumed a more extensive authority than that exercised by the common law Courts, and although that Court, in making any order as to the custody or education of an infant, pays in general the utmost regard to the rights and wishes or assumed wishes of the father as to the custody and education of his child—*Ex parte Skinner* (2), *Hawkesworth v. Hawkesworth* (3), still in carrying out what was conceived to be the true interest of an infant, an arrangement similar in effect to that in the present case was upheld by that Court. In the case of *Hill v. Hill* (4), a Roman Catholic, who lived until his eldest child was seven and had allowed the mother, a Protestant, to have exclusive charge of the education of the children during his life, and they, with his full knowledge, were brought up in the Protestant faith, was held to have abdicated his right to direct their religious education, and in ordering a scheme to be settled for their education, the Court disregarded a direction in his will, that they should be brought up in the Roman Catholic faith.

The Courts of Common Law, however, have always declined to give effect to any mere arrangement or consent on the part of the father disposing of the custody of the infant child, and have felt bound, notwithstanding, to enforce the right of the father when asserted. In the case of *The Queen v. Smith* (5), it was held by Erle, J., in the Bail Court, that a contract by the father of a child with a third person that the latter should have the custody of the child was in the nature of a mere consent and might be revoked by the father, and that he was entitled by a *habeas corpus* to have the child delivered over to him. Indeed it appears to have been the invariable practice of the Common Law Courts on an application for a *habeas corpus*

(2) 9 J. B. Moore, 278.

(3) 40 Law J. Rep. (n.s.) Chanc. 534.

(4) 31 Law J. Rep. (n.s.) Chanc. 505.

(5) 1 Bail C. C., 132; s. c. 22 Law J. Rep. (n.s.) Q. B. 116.

to bring up the body of a child detained from the father (and the case would be the same as to a testamentary guardian) to enforce the father's right to the custody, even against the mother, unless the child be of an age to judge for itself, or there be an apprehension of cruelty from the father, or contamination in consequence of his immorality or gross profligacy.

If the infant be of an age to elect for itself, the Court will merely interfere so far as to set it free from illegal restraint without handing it over to anybody. This was the course adopted in *The King v. Delaval* (6) in the case of a girl eighteen years of age, who was delivered from a custody considered illegal and left at liberty to go where she pleased, but in the absence of any right of choice the Court goes further and transfers the infant to the proper legal custody. The right to such an election, it has now been clearly decided, depends upon age alone, and not upon mental capacity—see *Alicia Race's Case* (7), and it may be taken as settled that no such choice can be made at all events by a female infant under the age of sixteen—*The Queen v. Howes* (8), followed by the Court of Probate and Divorce in the cases of *Cartledge v. Cartledge* (9) and *Mallinson v. Mallinson* (10).

The principle on which this Court acts in handing over to the parent or guardian an infant too young to make a choice as to its custody is well explained by Coleridge, J., in *The King v. Greenhill* (11). He says, "where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists, and when the child is in the hands of a third person that presumption is in favour of the father. But although the first presumption is that the right custody, according to law, is also the free

custody, yet if it be shewn that cruelty or corruption is to be apprehended from the father a counter presumption arises."

These views were adopted and acted on by this Court in the subsequent case of *The King v. Isley* (12), where upon a *habeas corpus* obtained by testamentary guardians appointed by the father's will two children, too young to make choice for themselves, were removed from the custody of the grandfather and grandmother, and directed to be handed over to the guardians although the grandparents had, at the request of the father, on the occasion of his wife's death, come over from America at considerable inconvenience and sacrifice, and settled in England for the express purpose of taking care of the children, who had continued under their care for a period of about four years. The same rule as to the paramount right of the father in the view of a Court of Common Law was also strongly expressed by the Court of Common Pleas in the case of *In re Haker-vill* (13), and fully approved by the Court in the case of *Alicia Race* (7) already cited.

It is with great regret that we therefore feel ourselves bound to hold, assuming the validity of the guardian's appointment, and notwithstanding the lateness of the application and the apparent harshness of such a proceeding towards the grandmother of the child, we have no discretion to refuse the writ, and we should be bound to hand over the child to the custody of the guardian as the only custody legally free from restraint.

The affidavits, however, disclose circumstances which give rise to doubts as to the validity of the document by which the applicant was appointed, and as we cannot undertake to decide that question upon the affidavits, we have come to the conclusion that an issue must be directed and that question submitted to a jury.

Application granted on terms.

Attorneys—Chester, Urquhart & Co., agents for Hostage & Co., Chester, for applicant; Nisbet & Co., for respondents.

(6) 3 Burr. 1434.

(7) 26 Law J. Rep. (N.S.) Q.B. 169; s. c. *nom. The Queen v. Clarke*, 7 E. & B. 186.

(8) 3 E. & E. 332; s. c. 30 Law J. Rep. (N.S.) M.C. 47.

(9) 31 Law J. Rep. (N.S.) P. & M. 85; s. c. 2 Sw. & Tr. 567.

(10) 35 Law J. Rep. (N.S.) P. & M. 84.

(11) 4 Ad. & E. 623.

(12) 5 Ad. & E. 441; s. c. 5 Law J. Rep. (N.S.) K.B. 263.

(13) 12 Com. B. Rep. 223.

1873. }
Feb. 17. } GOLDNEY P. O. v. LORDING.

"The Bankruptcy Act, 1869" (32 & 33 Vict. c. 71), s. 126—*Extraordinary Resolution of Creditors—Composition payable by Instalments—Security to be given.*

In accordance with the provisions of s. 126 of the Bankruptcy Act, 1869, an extraordinary resolution was passed by the proper majority in number and value of the creditors of the defendant, a debtor, that a composition should be accepted, payable by three instalments, and that the second and third instalments should be secured by the promissory notes of the defendant and a third person:—Held, in an action by a creditor who did not attend or vote on the resolution that such resolution, although duly passed and registered, did not constitute any defence, there being no proof that the defendant had paid or tendered the two instalments which had become due before action, or that he had delivered the promissory notes.

Declaration by the plaintiff as a public officer of the London Joint Stock Bank upon a bill of exchange for 87l. 11s. accepted by the defendant, indorsed to the Bank.

The defendant pleaded that after the accruing of the cause of action in the declaration mentioned, and before action, he being a debtor unable to pay his debts, and desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors, and submitting to the jurisdiction of the County Court of Kent, holden at Greenwich, which had jurisdiction in that behalf, he, the defendant, not residing or carrying on business within the London Bankruptcy District, but residing and carrying on business within the district of the said County Court, duly petitioned the said County Court that notices convening such formal meeting or meetings of his creditors as might be necessary to be given by him during the course of such proceedings, might be sent in the prescribed manner, and that such resolution or resolutions as his creditors might lawfully pass in the course of such proceedings and as might require registration

might be duly registered by the Registrar of the said Court, and such proceedings were thereupon had that the creditors of the defendant by an extraordinary resolution under and according to the Bankruptcy Act, 1869, resolved that a composition of 3s. in the pound payable by instalments of 1s. forthwith, 1s. in three months and 1s. in nine months should be accepted in satisfaction of the debts due to them from the defendant, which resolution was duly passed and confirmed as provided by the said Act, and the said resolution, together with the statement of the defendant as to his assets and debts, was duly presented to the Registrar of the said Court, who, after due enquiry, being satisfied that the same was passed as directed by the said Act, duly registered the same, and the name and addresses of the said co-partnership and the amount of the debt due to them were shewn in the statement of the defendant produced at the said meeting, at which the said resolution was passed, and all necessary conditions to make the said resolution binding on the said co-partnership have been fulfilled, and the defendant was in due time ready and willing to pay to the said co-partnership the first and second instalments of the said composition, the same amounting, to wit, to 9l. 17s., and he has always been ready and willing to pay the said instalments to the said co-partnership, and he now brings the same into Court ready to be paid to the said co-partnership, and the time for the payment of the third instalment is not yet arrived.

Issue and joinder.

At the trial before Hannen, J., at the sittings in London after Michaelmas Term, 1871, it was proved that the resolution was passed as averred in the plea in accordance with the 126th section of the Bankruptcy Act, 1869, and that it was also resolved that the second and third instalments should be secured by the promissory notes of the defendant and a third person. The bank did not attend or vote, but the resolution was passed by the proper majority in number and value of the creditors and was afterwards confirmed. The resolution was duly registered, but there was no proof that the defendant gave the pro-

missory notes, or that he paid either of the two instalments which had become due before the action was brought.

The learned Judge directed a verdict for the plaintiff, but gave leave to the defendant to move to enter a verdict for him if the Court should be of opinion that the matters not proved were immaterial. A rule *nisi* having been obtained,

W. H. Harrison (on May 30 and 31, 1872), shewed cause.—The mere proof that a resolution for a composition was passed by the creditors was not enough. The resolution has never been carried out. If it had been, it might be binding even upon non-assenting creditors. It will be said that the resolution is an answer to the action, and that the plaintiff may apply to the Court of Bankruptcy for the composition, but the resolution cannot be an answer to the action. It is not made a plea in bar at all. If the defendant had paid the instalments and had handed over the promissory notes this action would never have been brought. He referred to *Hazard v. Mare* (1), *Fessard v. Mugnier* (2), and *Ex parte Hemmingway* (3).

Prentice and Joyce in support of the rule.—Under the old law it was, no doubt, necessary that the composition should have been paid, but under s. 126 of 32 & 33 Vict. c. 71, the resolution itself is sufficient and puts an end to the cause of action. The intention was that all creditors should be paid equally, but if this action is maintainable, one creditor may recover 20s. in the pound, while others will only be entitled to the composition of 3s. The intention was that the creditors should only get their dividend under it. *Ex parte Hemmingway* (3) shews that no tender of the composition was necessary. The plaintiff's only remedy is to apply to the Court of Bankruptcy.

Cur. adv. vult.

QUAIN, J., now delivered the judgment of the Court (4).—This was an action on

(1) 6 Hurl. & N. 434; s. c. 30 Law J. Rep. (n.s.) Exch. 97.

(2) 18 Com. B. Rep. N.S. 286; s. c. 34 Law J. Rep. (n.s.) C.P. 126.

(3) 26 Law Times, N.S. 298.

(4) Cockburn, C.J., and Quain, J. (Hannen, J., having been appointed Judge of the Probate Court).

a bill of exchange for 87l. 11s., brought by the London Joint Stock Bank in the name of the plaintiff, as public officer, against the defendant, as acceptor, and which was indorsed by one Ellis, the drawer, to the bank.

The defendant pleaded that an extraordinary resolution was duly passed under the 126th section of the Bankruptcy Act, 1869, for the payment of a composition of 3s. in the pound to the defendant's creditors, which resolution was duly confirmed and registered according to the Act, and that the defendant had fulfilled all conditions necessary to make that resolution binding on the bank, and he brought into Court 9l. 17s., the first two instalments which had become due before action, the third instalment not being then due.

Issue was joined on this plea.

On the trial before Hannen, J., at the sittings after Michaelmas Term, 1871, it was proved that an extraordinary resolution of defendant's creditors was duly passed by the proper majority in number and value, in accordance with the provision of section 126 of the Bankruptcy Act, 1869, and afterwards confirmed, by which it was resolved that a composition of 3s. in the pound should be accepted, payable in three instalments of 1s. each, the first to be paid within a week of the first meeting, the second within three months from that date, and the third within nine months from the same date, and that the second and third instalment should be secured by the promissory notes of the defendant and a third person.

The bank did not attend or vote on this resolution. Two of the instalments had become due before action, but no proof was given that the defendant had paid or tendered or was ready to pay these two instalments or that he had delivered the promissory notes.

On this it was submitted for the plaintiff that the plea was not proved, but it was contended for the defendant, that it was not necessary to prove performance of the stipulations or conditions contained in the resolution, as the resolution in itself then duly passed and registered put an end to the cause of action, and that the plaintiff's remedy was to apply to the

Court of Bankruptcy to enforce performance of the resolution.

The learned Judge ordered the verdict to be entered for the plaintiff, and gave the defendant leave to move to enter the verdict for him, if the Court should be of opinion that the matters not proved were immaterial. A rule was accordingly obtained for that purpose, and argued before us. We think it sufficient to say that since the argument on this rule, the point, raised on behalf of the defendant, has been decided by the Court of Common Pleas, and afterwards by the Lords Justices.

In *Edwards v. Coombe* (5), the Court of Common Pleas held that it was competent for a non-assenting creditor to sue for his debt, where the debtor had failed to pay or tender the composition within the time agreed on. And in *Re Hatton* (6), the Lords Justices, following the judgment of the Court of Common Pleas, held that, where by resolutions under the Bankruptcy Act, 1869, the creditors agreed to accept a composition payable by instalments, and the debtor made default in paying an instalment, the creditor was entitled to maintain an action for the balance of the whole debt remaining due, and would not be restrained by the Court of Bankruptcy.

On the authority of these cases we think this rule must be discharged.

Rule discharged.

Attorneys—Scurd, for plaintiff; Clarke, Son & Rawlins, for defendant.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Queen's Bench.)

1873. } GEE v. THE METROPOLITAN
Feb. 3. } RAILWAY COMPANY.

Negligence—Railway Company—Underground Railway—Door left unfastened—Contributory Negligence.

The plaintiff, in company with his brother, was travelling by an underground

(5) 41 Law J. Rep. (N.S.) C.P. 202; s. c. Law Rep. 7 C.P. 519.

(6) 42 Law J. Rep. (N.S.) Bankr. 12; s. c. Law Rep. 7 Chanc. App. 723.

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railway. While the train was in motion he got up for the purpose of looking out of the window, in order to point out some object to his brother, and placed his hand against a bar which went across the carriage window, when the door immediately flew open, and he fell out and was injured:—

Held, by the Court of Exchequer Chamber, upon the argument of a rule to enter the verdict for the defendants, on the ground that there was no evidence of negligence to go to the jury, that the rule must be discharged, as the question whether the omission to fasten the door was the cause of the accident was rightly left to the jury.

Per KELLY, C.B.—Assuming that the question of contributory negligence could be taken into account in considering whether the plaintiff had established a *prima facie* case, that there was no evidence of contributory negligence on the part of the plaintiff.

This was an appeal from a decision of the Court of Queen's Bench discharging a rule to enter the verdict for the defendants, on the ground that there was no evidence of negligence for the jury.

The action was for negligence in carrying the plaintiff on the defendants' railway.

At the trial before Cockburn, C.J., at the Middlesex Sittings after Trinity Term, 1871, the plaintiff was called, and stated that in January, 1870, he, in company with his brother, took a ticket, to be carried from the Victoria to the Aldersgate Street Station, and entered a second-class carriage. The plaintiff's brother seated himself on the left hand or near side of the carriage, and the plaintiff on the right hand side, nearest the six foot-way. Across the windows of the carriage in use on the railway, there is a small brass rod or bar. Some conversation having arisen between the plaintiff and his brother with respect to the mode of signalling on the defendants' railway, the plaintiff, as the train was approaching the Sloane Square Station, stood up, with the intention of observing the signal lights at the station. He took hold of the cross-bar of the off-side door, and leant a little forward for the purpose of

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looking out, when the door immediately flew open, and he fell upon the railway and sustained the injury complained of. No further evidence was given as to the condition of the door, or its fastening, from the time the train left Westminster till the time of the accident. At the conclusion of the plaintiff's case, it was submitted that there was no evidence to go to the jury. The Chief Justice declined to stop the case, but reserved leave to the defendants to move to enter the verdict for them, or a nonsuit. The defendants tendered no evidence, and there was a verdict for the plaintiff for 250*l*. In January, 1872, the rule, as before stated, was discharged by the Court of Queen's Bench, and the present appeal was brought from that decision.

W. Harrison, for the defendants, cited—*Siner v. The Great Western Railway Company* (1), *Adams v. The Lancashire & Yorkshire Railway Company* (2), and *Bridges v. The North London Railway Company* (3). The nature of the argument is sufficiently explained in the judgments.

L. Kelly, for the plaintiff, was not heard.

KELLY, C.B.—I am of opinion that this judgment must be affirmed. The question upon the rule is whether there is any evidence that the defendants are liable for the accident to the plaintiff, and it is necessary to consider what was the evidence? [The Chief Baron referred at length to the facts.] The question may therefore be divided into two; first, was there evidence of negligence on the part of the company? secondly, was the injury to the plaintiff caused by that negligence?

With regard to the first question, I am of opinion that there was evidence for the jury to consider whether the defendants had not, when the train left the station, failed to see that the door was properly fastened in the ordinary manner in which such doors are fastened. I think it was their duty to see that the door was

fastened before it left the station, and that the fact that it flew open was evidence that it was not properly fastened. The degree of pressure applied by the plaintiff was not sufficient to account for its flying open. I agree, however, that it is necessary to go further, and enquire whether it was the negligence of the company which caused the mischief. Here the question is whether the plaintiff did anything which it was not lawful for him to do, and with regard to which we should be satisfied upon the evidence that it was the sole cause of the mischief which befel him. Now, in the first place, I think that there was clearly no evidence of contributory negligence; but even if there had been any such evidence, it must be recollected that this is not a rule for a new trial on the ground that the learned Judge did not leave the question of contributory negligence to the jury; or on the ground that the verdict was against the weight of evidence; but the simple question is whether there is any evidence of negligence on the part of the company. I have already said that I think there was, and I may add, that in my opinion the fact that the door was left improperly fastened was the real cause of the injury sustained by the plaintiff. I think that any passenger in a railway carriage who rises for the purpose of looking out of the window, or for some lawful purpose, and brings his body into contact with the door, has a right to assume and is justified in assuming the door is properly fastened; and if by reason of the door being improperly fastened, the act which he does causes the door to fly open, any accident which is caused thereby is owing to the omission on the part of the company. Thinking, therefore, that there was evidence, first, of negligence by leaving the door unfastened; and secondly, that it was by reason of that negligence that the plaintiff in doing that which every passenger has a right to do, attempting to look out of the window, was injured, I hold that the Court below were right in discharging the rule, and that the judgment must be affirmed.

MARTIN, B.—I am also of opinion, that the judgment of the Court below was

(1) 37 Law J. Rep. (N.S.) Exch. 98; in error, 38 Law J. Rep. (N.S.) Exch. 67, 71.

(2) 38 Law J. Rep. (N.S.) C.P. 277; s. c. Law Rep. 4 C.P. 739.

(3) 40 Law J. Rep. (N.S.) Q.B. 188.

right, and if the Lord Chief Justice at the trial had stopped the case and refused to allow it to go to the jury, he would have been liable to have had his direction set aside and a new trial directed. But I cannot go the same length as the Chief Baron, for I think that there was a question of contributory negligence for the jury, and they might possibly have decided that there was such negligence. A man travels upon the Underground Railway, where there is little to see except walls, and where, as every person who has travelled knows, bars are attached to the windows, which clearly indicate that it is a dangerous thing to put head or hand out of the window. It seems therefore to me, that it is impossible to exclude from the consideration of the jury the question, whether a man is not doing wrong and knows that he is doing wrong, in putting his head or hand out of the window. In this particular case, the plaintiff meant to look out of the window to see if certain lights were visible and to call his brother's attention to them, and before he did anything of the sort and while merely putting his hand on the bar, the door flew open and he fell out. The same thing would possibly have happened, if he had merely intended to shift his seat to the other side and had placed his hand on the bar. I think, therefore, that it was impossible to nonsuit the plaintiff, and in truth I do not think the case arguable.

KEATING, J.—I also think that the judgment of the Court below should be affirmed. It seems to me, that there was evidence to go to the jury upon the question of negligence. I agree with Mr. Harrison, that the question to be put to the jury is, whether the defendants have been guilty of negligence which caused the accident, and in considering such a question, it is of course extremely difficult to separate it from the question, whether there was or was not, contributory negligence on the part of the plaintiff. But assuming, for the purpose of argument, that there may be such contributory negligence, on the part of the person injured, as would entitle the judge to nonsuit on the ground that a verdict

finding that there was no contributory negligence would be set aside as perverse, it is clear that here the judge could not have withheld the case from the jury, whether the matter be taken as a simple question as to the negligence of the defendants, or whether the question be put, as I think rightly, whether there was negligence on the part of the defendants which caused the accident. Without going the length of saying that there was no evidence of contributory negligence, it seems clear to me that there was evidence that it was the negligence of the defendants which caused the accident, without such negligence on the part of the plaintiff as would have freed them from liability. I agree with the principle stated by my brother Brett in *Adams v. The Lancashire and Yorkshire Railway Company* (2). He says—"It has been argued that no amount of inconvenience, if there be no actual peril, will justify a person in incurring danger in attempting to get rid of it. I am not prepared to go to that length. I think if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, a person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience." Now, sitting in a Court of Error, I may be permitted to say, that I think this rule was rightly applied by my brother Brett at the trial, and not when the case was before the Court in Banco, and I think that if Mr. Harrison could have shewn that what was done here was obviously dangerous, that the plaintiff would not have been justified in incurring an obvious danger, for the sake of doing what was not even the removal of an inconvenience. But it appears to me, that he had a right to assume that the door was properly shut, and, therefore, to put his hand on it in the manner which he did put it. Of course each case must be judged by its peculiar circumstances, and looking at the facts of this case, I have no doubt that the judgment of the Court below was right.

BRETT, J.—I agree that in these cases the plaintiff is bound to give evidence to

satisfy the jury, that the injury of which he complains was caused by the negligence of the defendants or some person for whom the defendants were answerable, that the negligence by the defendants was the cause of the plaintiff's injury, and, further, that it was in a certain sense the sole cause. This does not mean that the defendants' negligence was the only cause, because, supposing that there were an attempt to shew that some person besides the defendants had also contributed by his negligence to the accident, this would be no defence for the defendants. The meaning of the expression that the injury must be solely caused by the defendants' negligence is, that it must be solely caused as between them and the plaintiff, that is, by their negligence, without any contribution from want of care on the part of the plaintiff. The question in this case is, whether there was evidence in support of each of those propositions on which a jury might properly find in favour of the plaintiff. It has been argued by Mr. Harrison that there is no evidence in support of the first proposition, viz., that there was negligence by the defendants. But I apprehend that negligence consists in this: that where something happens which would not in the ordinary course happen if ordinary care and skill were used, there is evidence on which a jury may find that there has been negligence on the part of the defendants. Now here a railway door upon a slight pressure flies open. Mr. Harrison seemed to think that the fact that it was the door opposite to the platform was more in favour of the defendants. I should suppose, as far as we are able to take notice of such matters, that the contrary was the law, and that a traveller had a greater right to assume that such a door was properly fastened. I think, therefore, that there was evidence on which a jury might properly find that there was negligence on the part of the company's servants. But was there any evidence upon which a jury might find, that this negligence was the cause of the accident? Now, we find that the door upon a slight pressure flies open, and thereupon the plaintiff falls out of the carriage. I apprehend that the jury were entitled to

say that it was the non-fastening of the door which was the cause of the accident. Then was there evidence that it was the sole cause? Now this question is somewhat more complicated. I am not prepared to say that, if during the proof of the plaintiff's case, an act of his was shewn which so clearly contributed to the accident that it would be unreasonable for reasonable men to find that it was not negligence, so that any Court would upon either of these grounds immediately set aside a verdict against the defendants, that the Judge might not then rule that the plaintiff had failed to produce evidence on which a jury could find in his favour, that the accident was solely caused by the defendants' negligence. But here it does not seem to me that the act of the plaintiff was such as any Judge or any Court would have a right of themselves to pronounce to be so negligent as to hold that it would be unreasonable for a jury to find that it was not negligence. I therefore think that the plaintiff, not being shut out from denying that he himself had been guilty of any negligence, that point was properly left to the jury, and that the jury would be justified in saying that he had not been guilty of negligence, that is to say, had not omitted to use ordinary care in his mode of travelling. It is said that this case is governed by *Adams v. The Lancashire and Yorkshire Railway Company* (2). I think not. The ground upon which that judgment was based was certainly that the plaintiff did do something so obviously dangerous and so obviously without necessity, that the Court were entitled to deal with the matter, and I think that the case put by Mr. Harrison may possibly come within the same rule when it arises. He said—If a door were open at the starting of the train, and the passengers were not to attempt to shut the door, but at once to jump out of the door either on the platform or after the train had passed the platform, it then might fairly be said, if a jury were to say that this was not evidence of negligence on the part of the plaintiff that it would be unreasonable, and so the Judge or Court might deal with the case. But however that might be, there was no such obvious danger in

this case. Whether the decision itself was correct as an application of the rule which it laid down I confess I at this moment very much doubt. I was a party to the judgment, but I think it is obvious that I was so reluctantly, and if the case were to come into a Court of Error I think I should be prepared to say that although the rule was right, yet that its application to the case in which it was laid down was wrong.

CLEASBY, B.—In the present case I think it clear that no question of contributory negligence arises. Such a question arises when both parties are substantially in fault and when the fault of each contributes to the disaster. The rule was established before railways were made, and an illustration of it would be a man driving furiously in the crowded streets of London at the rate of fifteen miles an hour, and a man driving on his wrong side, not quite so furiously perhaps, but still obviously in fault, and each having a share, though perhaps not an equal one, in the accident which takes place. In such a case neither can recover, because both were clearly in fault. But all that Mr. Harrison has made out in this case, as far as I can judge, is not that both parties were in fault, but that the *act* of the plaintiff, not his negligence, contributed to the accident. It is impossible to say that in getting up, touching, and pressing against the door as he did there was anything in the nature of negligence. This part of the defendants' case, therefore, it appears to me, fails altogether. Then the question is, whether there is such evidence on the part of the defendants that a jury might *reasonably* find them liable? That this is the proper way of stating the rule I think is clear from the cases of *Ryder v. Wombwell* (4) and *Toomey v. The London and Brighton Railway Company* (5). Where, as here, the rule is to enter the verdict for the defendants, the Court must look at the case and consider whether there is such evidence as might reasonably satisfy a

jury of the defendants' liability. I will not enter upon the question whether in a case of this description you may or may not look at the contributory negligence of the plaintiff, except for the purpose of saying that it cannot be done in all cases. Whether it could be done in cases in which it is the act of the plaintiff which causes the injury he sustains, for instance, jumping out of a carriage, which was the case in *Bridges v. The North London Railway Company* (3), where it is not so much the contributory act as the act itself which causes the accident, I will not say, but it appears to have been the opinion of some members of the Court in *Bridges v. The North London Railway Company* (3), that in such a case it might be done. It is unnecessary to deal with it in the present case, because we have no negligent act on the part of the plaintiff.

The only question, therefore, is, was there reasonable evidence of a want of due care on the part of the defendants? Now I think that we cannot say that there was any warranty on the part of the defendants that this door should be sufficiently and carefully fastened, so that the case can be put on the ground that, merely because the door was unfastened and flew open, the defendants were liable. I think there must be some evidence of a want of due care. But then you find that on a slight pressure the door opens. In considering what evidence is sufficient to call for an answer, I think that you must look at the means which the plaintiff has of proving more. It is almost out of his power to do more than give evidence which calls for an answer to shew that which by itself is a *prima facie* case, is not established when you come to look into the whole matter. The plaintiff would not be expected to shew that there was no fastening to the door, or that the fastening had become old and defective, and therefore could not be relied upon; or that having a good fastening the door had been carelessly put to by the porter. But he shewed that something happened which probably arose from some negligent act of the defendants; and he calls upon them for a reply. If they had shewn that the door was right in every respect—that the fastening was not defective;

(4) 38 Law J. Rep. (N.S.) Exch. 8; s. c. Law Rep. 4 Exch. 32.

(5) 3 Com. B. Rep. N.S. 146; s. c. 27 Law J. Rep. (N.S.) C.P. 39.

and if it had appeared that in shutting in succession a great number of doors with the necessary despatch, there had been some haste, so as to produce a case of almost inevitable accident—then the question would perhaps have arisen whether there was not some evidence for the jury; but, certainly, I think that the proper conclusion of the jury would be that it was not the sort of negligence which involves responsibility. But in any case I think the plaintiff proved enough to call on the defendants to shew that what happened arose from circumstances which did not amount to negligence.

GROVE, J.—I am of the same opinion. The Court, I suppose, must assume some ordinary facts, and we may assume that it was the ordinary case of a railway door which shuts from the outside, and can only be conveniently shut from the outside. Such a door is jammed to with some force to enable the latch to bite and hold the door firm, and it would be extremely inconvenient if it had to be shut by the passengers inside. This being the case, the ordinary duty of the servants when a train leaves the station would be to shut and firmly fasten the latch of the door, and they are deviating from their ordinary practice, and, I think, their ordinary duty, if they omit so to shut the doors. If you arranged a door so that the passenger could open it from the inside, it would be an extremely perilous system, for it would open with a comparatively light latch; frightened passengers would be continually opening the door, and it would be much worse for the general safety of the public. Then, if this be the duty of the company's servants, there was evidence of some breach of duty if the door was left open. Then it was said there was no evidence here that the company's servants left it open. It might have been opened by somebody else. But in almost every question that comes before a jury, probabilities must be looked at. Absolute mathematical proof of each circumstance in all human transactions cannot be furnished. The plaintiff was called; he was not cross-examined, and probably the jury assumed, no question having been asked him, that neither

he nor his brother had tampered with the door. Was there not therefore a *prima facie* probability that there had been negligence on the part of the servants of the company, and that they had left the door open? This might probably have been rebutted by the defendants calling their servants and letting them give evidence that they had shut all the doors in the ordinary way, and as to the state of the door when the train arrived at the next station. It seems to me that there was such a probability which ought to have been left to the jury. Secondly, upon the question of contributory negligence, without giving any opinion whether there may be cases in which a Court of Error, or a Court looking merely at the law of the question upon a bill of exceptions, may enter upon the question of contributory negligence, I must observe that in *Bridges v. The North London Railway Company* (3), there was practically an equal division of opinion as to whether, in considering whether there was evidence of negligence on the part of the defendants, the Court could take into account contributory negligence on the part of the plaintiff. There is another observation to be made upon the case, viz., that as the majority of the Court were of opinion that there was negligence on the part of the defendants, it was not absolutely necessary to enter into the question of contributory negligence. I cannot think that it could be seriously contended here that the evidence of contributory negligence was so strong that the Court could say that the verdict on that ground ought necessarily to have passed for the defendants. I am not quite sure that the test of a perverse verdict is a sufficient test, for I think that if this doctrine were applied to some cases, it might lead to some very novel results. At all events the question does not arise here.

Judgment affirmed.

Attorneys—G. Dixon, agent for W. H. Sams, Clare, Suffolk, for plaintiff; Burchells, for defendants.

1873. } SWIFT V. WINTERBOTHAM P. O.
Feb. 17. } AND GODDARD.

Banking Company—Misrepresentation by Manager—Credit of Customer—Joint Liability of Bank and Manager—9 Geo. 4. c. 14. s. 6—Signature of Agent.

The plaintiff, a customer of the S. & H. Bank, was asked to sell some iron of the value of 2,000*l.* or 3,000*l.* to R.; he required a reference as to the credit of R., and was referred to the C. branch of the G. Banking Company. At his request the manager of the S. and H. Bank wrote to the manager of the C. branch of the G. Banking Company, of which one of the defendants was a public officer—"I shall be much obliged by the favour of your opinion, in confidence, of the respectability and standing of Sir W. Russell, and whether you consider him responsible to the extent of 50,000*l.*" The defendant Goddard, who was the manager of the C. branch, wrote in answer—"I am in receipt of your favour of the 8th instant, and beg to say, in reply, that Sir William Russell is the Lord of the Manor of Charlton Kings, near this town, with a rent roll, I am told, of over 7,000*l.* per annum, the receipt of which is in his own hands, and has large expectancies, and I do not believe he would incur the liability you name, unless he was certain to meet the engagement. (Signed) J. B. Goddard, Manager." The representation contained in the last-mentioned letter was false, to the knowledge of the defendant Goddard, who, in writing it, acted within the scope of the general authority conferred upon him as manager of the branch, but the banking company had no knowledge otherwise than through Goddard that such a letter had been written, nor did they give him any express authority to write the particular letter. The G. Banking Company was a co-partnership, formed under 7 Geo. 4. c. 46:—Held, that the signature of the defendant Goddard was, under the circumstances, a signature not of an agent merely, but of the banking company, and therefore "of the party to be charged therewith" within the 6th section of 9 Geo. 4. c. 14.

Held, also, that the communication contained in the letter was not that of the defendant Goddard personally, but of the banking company; that the plaintiff being

a customer of the S. and H. bank was entitled to maintain an action in respect of the misrepresentation made in the letter written by Goddard; that the banking company was liable for the fraudulent representations of its manager made in the course of conducting the business of the company; and that Goddard the manager and the banking company were both liable to be sued jointly.

Declaration. For that the defendants Theophilus Bartlett Goddard and the said banking company (sued by one of their public officers), in answer to a letter, wherein the plaintiff enquired of the defendant Theophilus Bartlett Goddard, and the said banking company, what their opinion of the respectability and standing of Sir William Russell was, and whether they considered him responsible to the extent of 50,000*l.*, falsely and fraudulently represented to the plaintiff that the said Sir William Russell was the Lord of the Manor of Charlton Kings, and had a rent roll of over 7,000*l.* per annum, and that the receipt of the said rent roll was in the said Sir William Russell's own hands, and that the said Sir William Russell had large expectancies, and that they did not believe the said Sir William Russell would incur a liability of 50,000*l.* to the plaintiff unless he was certain to meet the engagement, whereas, as the defendant Theophilus Bartlett Goddard and the said banking company well knew, the said Sir William Russell was not then Lord of the Manor of Charlton Kings, and had not then a rent roll of over 7,000*l.* per annum, nor was the receipt of the said rent roll in the said Sir William Russell's own hands, nor had the said Sir William Russell large expectancies, nor did they believe that the said Sir William Russell was certain to meet the said liability, if he incurred it, to the plaintiff, but on the contrary well knew that it was exceedingly doubtful whether the said Sir William Russell would be in a position to meet the said liability if he incurred it, and the defendant Theophilus Bartlett Goddard and the said banking company, by so representing as aforesaid, induced the plaintiff to sell and deliver to the said Sir William Russell, goods on credit, and although the said credit has

expired, yet the price of the said goods is unpaid, and the plaintiff has lost the price thereof.

Second count, that the defendant Theophilus Bartlett Goddard and the said banking company falsely and fraudulently represented to the plaintiff that the said Sir William Russell, in the first count mentioned, then was in good and solvent circumstances, whereas the said Sir William Russell was not then in good and solvent circumstances, as the defendant Theophilus Bartlett Goddard and the said banking company then well knew. And the defendant Theophilus Bartlett Goddard and the said banking company, by so representing as aforesaid, induced the plaintiff to sell and deliver to the said Sir William Russell goods on credit, as in the first count mentioned, whereby the plaintiff suffered the damage in that count mentioned.

The defendants severally pleaded not guilty. Issue thereon.

At the trial which took place before Cockburn, C.J., at the sittings in London after Hilary Term, 1872, it appeared that the plaintiff, having been asked by an agent of Sir William Russell to sell some iron of the value of between 2,000*l.* and 3,000*l.* to Sir William Russell, requested a reference as to his credit, and was referred to the Cheltenham Branch Bank of the Gloucestershire Banking Company. The plaintiff being a customer of the Sheffield and Hallamshire Bank at Sheffield, requested the manager of that bank to make the inquiry for him, and in consequence of that request, the manager of the latter bank wrote to the manager of the Gloucestershire Banking Company, at Cheltenham, a letter, dated November 8, 1869, of which the following is a copy—

“ Sheffield & Hallamshire Bank,
“ Sheffield, Nov. 8, 1869.

“ Sir,—I shall be much obliged by the favour of your opinion in confidence of the respectability and standing of Sir William Russell, Bart., M.P. for Norwich, and whether you consider him responsible to the extent of 50,000*l.*

“ I am, Sir, yours faithfully,

“ H. J. Wells, manager.

“ The Manager,
“ Gloucestershire Banking Company,
“ Cheltenham.”

To that letter the defendant, Goddard, replied by a letter dated November 9, 1869, which is as follows—

“ Gloucestershire Banking Company.
“ Cheltenham, 9 Nov. 1869.

“ The Sheffield and Hallamshire Bank,
“ Sheffield.

“ Gentlemen,—I am in receipt of your favour of the 8th instant, and beg to say, in reply, that Sir William Russell, Bart., M.P. for Norwich, is the Lord of the Manor of Charlton Kings, near this town, with a rent roll, I am told, of over 7,000*l.* per annum, the receipt of which is in his own hands, and has large expectations, and I do not believe he would incur the liability you name unless he was certain to meet the engagement.

“ I am, Gentlemen, yours faithfully,
“ J. B. Goddard, manager.”

It was upon the representation contained in this letter of November 9, 1869, that the action was founded, the plaintiff alleging that the letter contained a misrepresentation by which he was injured.

It was found by the jury that the representation contained in this letter was false to the knowledge of the defendant Goddard; that the Banking Company had no knowledge (otherwise than through its manager, Goddard) that such a letter had been written, and gave him no express authority to write the particular letter.

The jury further found as a fact, on the question being left to them, that the writing of such a letter as that of November 9, was an act done within the scope of the general authority conferred on Goddard, as manager of the branch bank. On these findings the verdict was entered for the plaintiff against both defendants, for 2,937*l.*

Upon the part of the defendant Winterbotham a rule was subsequently obtained, calling upon the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the defendant Winterbotham, or a nonsuit, pursuant to leave reserved, on the ground that there was no writing signed by the bank; that

the defendant Goddard was not the agent of the bank to sign; that the bank was not liable for a false representation by the defendant Goddard; that there was no representation by the bank to the plaintiff, and that there was no representation made by the bank, or false statement by them; or why a new trial should not be had on the ground that the verdict was against the evidence.

Upon the part of the defendant Goddard a rule was obtained, which was substantially the same as the above, so far as the points made affected his case.

Day and Edward Clarke (on June 6, 8, 1872) shewed cause against the rule.—The rules are substantially the same. But on behalf of the banking company it will be contended that Goddard was not their agent. [He proceeded to argue that the verdict against both the defendants was not against the weight of evidence, but was stopped by the Court.] Next, it is said that it was not the duty of the bank to send a true answer to the plaintiff, and that if there was any duty at all it was to the Sheffield and Hallamshire Bank, and that, therefore, no action can be maintained by the plaintiff; but among bankers the understanding is that they may make enquiries of one another for their customers as well as for themselves. It is indisputable that the defendant, Goddard, knew that the representation was to be used for the purposes of the bank and its customers, and he must be liable in this action. See *Langridge v. Levy* (1). Next, as to the liability of the bank for the acts of Goddard the manager. The finding of the jury as to this part of the case cannot be disturbed. But, further, *Barwick v. The English Joint Stock Bank* (2) shews that corporations may be liable like individuals; and that a banking company may be liable for the misrepresentations of the manager. In that case, the manager was alleged to have made a misrepresentation as to the state of a customer's account at the bank, and it was held that the bank would be liable, assuming that the misrepresentation had

been made by the manager in the course of business. There may be some *dicta* in *The Western Bank of Scotland v. Addie* (3) which would seem to convey a contrary impression, but it is clear that that case does not overrule *Barwick v. The English Joint Stock Bank* (2). *The Western Bank of Scotland v. Addie* (3) was the case of a corporation, not of a company like the defendants in this case, formed under 7 Geo. 4. c. 46, and does not apply to the question now before the Court; and in *The National Exchange Company of Glasgow v. Drew* (4) it was held by the Lord Chancellor that the company could only act by its directors and managers, and that a fraud by them was a fraud by the aggregate body, and that the general interests of society required that representations by directors should bind the entire corporation, although the individuals composing it might be ignorant of the representation and of its falsehood. In *Ranger v. The Great Western Railway Company* (5), the Lord Chancellor said, "The question on this part of the case is one of fact. Is it established that any imposition was practised on the appellant to induce him to enter into the contract? For if there was, he is clearly entitled to relief, though whether precisely that which he asks for is another question. Strictly speaking, a corporation cannot of itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail when the principal under whom the agent acts is a corporation." That is the principle for which the plaintiff in the present case contends, and the principle is a sound one, that, so far, corporations are in the same position as individuals. Observations upon *Ranger v. The Great Western Railway Company* (5) were made

(1) 6 Law J. Rep. (N.S.) Exch. 137; s. c. 2 Mee. & W. 519; in error, 4 Mee. & W. 337.

(2) 36 Law J. Rep. (N.S.) Exch. 147; s. c. Law Rep. 2 Exch. 259.

NEW SERIES, 42.—Q.B.

(3) Law Rep. 1 Scotch App. 145.

(4) 2 Macq. H.L. Cas. 103.

(5) 5 H.L. Cas. 72.

by Lord Cranworth in *The Western Bank of Scotland v. Addie* (3), p. 166, but it is difficult to suppose that in both cases he is reported correctly.

[HANNEN, J.—I see that in the latter case he is reported as saying, "A person defrauded by the directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally."]

It is difficult to see how in the present case the banking company can be relieved from liability. It will also be contended that the bank is not liable, because by Lord Tenterden's Act, 9 Geo. 4. c. 14. s. 6, no action can be brought unless the representation "be made in writing, signed by the party to be charged therewith," and because the letter, which is the foundation of the present action, is only signed by the defendant Goddard. No decision has been given upon that particular section, but reliance will be placed upon *Hyde v. Johnson* (6), which was decided upon the 1st section of the same Act, in which the words are "signed by the party chargeable thereby." It was there held that a letter signed by the defendant's wife, at his request, was not sufficient to bar the Statute of Limitations, inasmuch as it was not signed by the "party chargeable." But it is doubtful whether the reasoning in that judgment would apply to a case under the 6th section. Since the decision in *Hyde v. Johnson* (6), the Legislature has interfered, and by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13, has, with reference to the above-mentioned 1st section, provided that "an acknowledgment or promise, made or contained by or in a writing, signed by an agent of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself." But the Legislature did not alter the effect of the provision in the 6th section, and it is submitted that the maxim *qui facit per alium facit per se* applies, so that the banking company must be taken to have made the representation by its agent Goddard. But, farther, it is doubtful

(6) 2 Bing. N.C. 776; s. c. 5 Law J. Rep. (N.S.) C.P. 291.

how the construction adopted by the Court in *Hyde v. Johnson* (6) can apply to a case where the signature by the party himself is an impossibility. This company, which is a *quasi* corporation, cannot itself sign the representation, and the signature of such a company by its manager is within the words of the 6th section. Some light is thrown upon the matter by *Kingsford v. The Great Western Railway Company* (7), which was decided upon the 50th section of the Common Law Procedure Act, 1854. That section provides for an order for the discovery of documents upon the application of either party to any cause or other civil proceeding in any of the Superior Courts "upon an affidavit by such party," &c. It was held in the last mentioned case that the affidavit might be made by the attorney of the defendants, as they would otherwise be deprived of the benefit of the section. So here the bank can only act through its agents, and Goddard was the ordinary signing instrument of the bank for the purpose of writing such letters. The letter of inquiry was addressed to the manager, and Goddard signs as "manager," the agent of the bank, and commences his letter "Gentlemen." So a Judge at Chambers signs by the hand of his clerk. Next, it will be said that the signature, if that of Goddard, is not that of the bank, and *vice versa*; that it cannot be the signature of both. This point was not taken at the trial, but the answer is, that both Goddard and the bank are tortfeasors. An action upon the case for a deceit shall be brought against all the parties to the deceit. See *Com. Dig.* tit. "Action," upon the case for a deceit (B). So this case is like an action for a wrongful distress which may be brought against both the landlord and the agent who distrains. Goddard cannot relieve himself from liability by saying that he acted as agent for the banking company.

H. James, Risdon Bennett, and Jeune (on June 8) supported the rule obtained by the defendant Goddard.—(They first argued that the verdict was against the weight of evidence.) It is a grave question whether the letter of God-

(7) 16 Com. B. Rep. N.S. 761; s. c. 33 Law J. Rep. (N.S.) C.P. 307.

dard, being an answer to an inquiry made in confidence as to the position of Sir William Russell, is ground for an action by the plaintiff at all, there not being any finding by the jury that Goddard knew that the representation in the letter would be acted upon. The mere fact of a misrepresentation without an intention that the representation should be acted upon would not render him liable. Goddard knew nothing of the plaintiff; how, then, can the plaintiff be allowed to say to Goddard, "You represented to me certain matters, and intended that I should act upon that representation?" The fact that bankers are in the habit of making enquiries of this kind of one another is not enough to shew that Goddard intended that the plaintiff should act upon his answer to such an enquiry. The most that can be said is, that he knew that it might be acted upon by some one, not that it would be so. The plaintiff must admit that there must be something in the nature of privity. There was nothing to shew Goddard that a customer of the Sheffield and Hallamshire Bank would act upon the representation. The plaintiff never authorised an enquiry as to Sir W. Russell's responsibility to the extent of 50,000*l.* In *Bedford v. Bagshaw* (8), Pollock, C.B., said, "I am not prepared to lay down, as a general rule, that if a person makes a false representation, everyone to whom it is repeated and who acts upon it, may sue him. . . . Generally, if a false and fraudulent statement is made with a view to deceive the party who is injured by it, that affords a ground of action. But I think that there must always be this evidence against the party to be charged, viz., that the plaintiff was one of the persons to whom he contemplated that the representation should be made, or a person whom the defendant ought to have been aware that he was injuring, or might injure." Again, in *Barry v. Croskey* (9), Wood, V.C., said, "Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or

damnified—provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss." In *Langridge v. Levy* (10), the defendant represented to the father of the plaintiff that a gun was made by Nock, and was a good gun; it was held that the plaintiff, who was injured by the bursting of the gun, which the father had bought under a belief that the representation was true, could maintain an action against the defendant, but if a friend of the plaintiff's father had been thus injured he could not have brought an action. This case shews that Goddard is not liable, unless he wrote the letter with the deliberate intention that the representation should be communicated to a third party, and acted on by him. See also *Pilmore v. Hood* (11), *Ward v. Weeks* (12), and *Blakemore v. The Bristol and Exeter Railway Company* (13). The cases upon this subject are collected in the notes to *Pasley v. Freeman* (14). Next, it is submitted that if the Court should be of opinion that the banking company is liable in this action, it will follow that the defendant Goddard will not be liable, because, if the banking company is liable, it can only be as being bound by the signature of Goddard, which becomes the signature of the banking company. Goddard cannot be taken to have signed in two capacities, both as the banking company and as himself.

Sir John Karslake, Sir George Honyman and Anstie, supported the rule, which had been obtained on behalf of the Banking Company. — The first question is, has there been any misrepresentation by the banking company or by any one by whom the company are bound? The "opinion" of the manager is asked for in the letter of the 8th of November, not the opinion of the bank. Then comes the letter of the 9th, in which Goddard writes in his own character, and using the first person, and gives his own opinion. His opinion

(10) 2 Mee. & W. 519; s. c. 6 Law J. Rep. (n.s.) Exch. 137.

(11) 5 Bing. N.C. 97; s. c. 8 Law J. Rep. (n.s.) C.P. 11.

(12) 7 Bing. N.C. 211.

(13) 8 E. & B. 1,035; s. c. 27 Law J. Rep. (n.s.) Q.B. 167.

(14) 2 Smith's Leading Cases, 68.

(8) 4 Hurl. & N. 533; s. c. 29 Law J. Rep. (n.s.) Exch. 59.

(9) 2 Jo. & H. 130; s. c. 31 Law J. Rep. (n.s.) Chanc. 121.

of the position and respectability of Sir William Russell might be very different from that of the directors of the bank, each of whom might have answered the question differently. Next, is the bank to be held liable for the fraud of every one of the managers of the branches? They have no authority to bind the company. There is a permission or delegated authority to give an answer to an enquiry made by another bank, but not to make a false representation; nor was any representation made in the course of business from which the bank would derive a profit. See *The New Brunswick and Canada Railway and Land Company v. Coneybeare* (15), in which *The National Exchange Bank of Glasgow v. Drew* (4), and *Ranger v. The Great Western Railway Company* (5) were considered. *Ferguson v. Wilson* (16) shews what is the position of directors of a company and their secretary as to contracts made with the company, and the fact of defendants being a company formed under 7 Geo. 4. c. 46 makes no difference; the co-partnership is to all intents and purposes an incorporated company. In *Dodgson's case* (17) it was held that directors who fraudulently induced a person to become a purchaser of shares in a company may be personally liable to him, but that they cannot be considered as the agents of the body of shareholders to commit a fraud of this kind. If this be a delegated authority, it is only an authority to make a true statement and not a false one; the bank therefore cannot be made liable in respect of a fraudulent statement. *Barwick v. The English Joint Stock Bank* (2) did not decide that the fraud by an agent could be the foundation for an action against a corporation. It is distinguishable from the present case on the ground that a benefit had been obtained by the act of the agent. Subsequently the action was brought to recover back money which had been fraudulently obtained. *The Western Bank of Scotland v. Addie* (3) shews that there is a great distinction between setting aside a contract or recovering back money obtained by fraud of

an agent, and bringing an action against the principal for that fraud. In *Udell v. Atherton* (18) there was no count for money had and received. It was held (see per Bramwell, B.) that moral fraud must be shewn to support the action, and therefore as the principal never knew of the fraud of the agent, or ratified it, he could not be liable in that form of action. Suppose A authorised his coachman to give to B a character of A's groom C. If the coachman gave a false character, A could not be liable.

Next as to Lord Tenterden's Act. The signature is that of Goddard, and is not professedly the signature of the whole co-partnership. The Mercantile Law Amendment Act does not extend the signature of an agent to the provisions of section 6, and this clearly shews that the signature by an agent is not sufficient. *Hyde v. Johnson* (6) was simply a confirmation of *Whippy v. Hillary* (19), and the decision was afterwards followed by the provision in the Mercantile Law Amendment Act. By the Bills of Lading Act (18 & 19 Vict. c. 111), s. 3, every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods, &c., shall be conclusive evidence of such shipment as against the master or other person signing the same. In *Jessel v. Bath* (20) the judgment of Bramwell, B., shews that the signature of one owner would not bind the other owners. See also *Richardson v. Younge* (21) upon the Statute of Limitations, 3 & 4 Will. 4. c. 27. s. 28, *D'Arcy v. The Tamar Kit Hill and Callington Railway Company* (22), *Raphael v. Goodman* (23), *Kapp v. Latham* (24), and *Taylor v. Ashton* (25).

Our. adv. vult.

(18) 7 Hurl. & N. 172; s. c. 30 Law J. Rep. (n.s.) Exch. 337.

(19) 3 B. & Ad. 399; s. c. 4 Law J. Rep. (n.s.) K.B. 178.

(20) 36 Law J. Rep. (n.s.) Exch. 149; s. c. Law Rep. 2 Exch. 267.

(21) 39 Law J. Rep. (n.s.) Chanc. 475.

(22) 36 Law J. Rep. (n.s.) Exch. 37; s. c. Law Rep. 2 Exch. 158.

(23) 8 Ad. & E. 565; s. c. 7 Law J. Rep. (n.s.) Q.B. 220.

(24) 3 B. & Ad. 795.

(25) 11 Mee. & W. 401; s. c. 12 Law J. Rep. (n.s.) Exch. 363.

(15) 9 H.L. Cas. 711; s. c. 31 Law J. Rep. (n.s.) Chanc. 297.

(16) Law Rep. 17 Chanc. App. 77, 90.

(17) 3 De Gex & S. 85.

The judgment of the Court (26) was (on Feb. 17) delivered by

QUAIN, J.—This is an action brought by the plaintiff against the defendant, Winterbotham, as the public officer of the Gloucestershire Banking Company, and against the defendant Goddard, who was the manager for the company at the Branch Bank at Cheltenham, for a false representation.

The declaration charged the defendants with making a joint false representation with respect to the credit and solvency of one Sir W. Russell, whereby the plaintiff was induced to sell to Russell certain goods for which the plaintiff has not been paid in consequence of Russell's insolvency.

The defendants severed in their pleadings, and some grounds of defence were set up on the part of the bank, which were not applicable to the other defendant.

The facts were these. [The learned Judge stated them as they are above set out.]

Both defendants moved to set aside the verdict, on the ground that it was against the weight of evidence, but after considering the oral evidence adduced at the trial, and reading all the correspondence which passed between Sir W. Russell and the defendants respectively, we are not disposed to disturb the verdict on any of the questions of fact left to the jury. But several questions of law were raised on behalf of the defendants, and were argued before us, which it now becomes necessary to dispose of.

It was first objected, on the part of the banking company, that the action being founded on a representation which, under the 9 Geo. 4. c. 14. s. 6, must be made in writing and signed "by the party to be charged therewith," the signature of Goddard, who, it was contended, was at best only an agent of the company, would not suffice to charge the company. For this contention, the case of *Hyde v. Johnson* (6) was chiefly relied on. That was a case decided on the first section of the same Act, which enacts that no promise or acknowledgement shall suffice to take a debt out of the Statute of Limitations,

unless it is contained in some writing "signed to the party chargeable thereby," and it was held, under that enactment, that the signature of an agent would not suffice, although in that case the agent was duly authorised to sign the acknowledgement, and it appeared that the defendant could not write. In the judgment of the Court, the Chief Justice refers to the various sections of the 9 Geo. 4, and to the sections of the Statute of Frauds as *in pari materia*; and the conclusion at which the Court arrives is that, whenever the legislature intended that the party to be charged should be bound by the signature of his agent, there was an express enactment to that effect, and that, in other cases, the signature must be the signature of the actual party to be charged. This case was confirmed by the same Court in *Clark v. Alexander* (27), and in another case of *Toms v. Cuming* (28), where an Act of Parliament required that "every notice of objection shall be signed by the person objecting," the law as laid down in *Hyde v. Johnson* (6) was again acted on, and it was held that the signature by the agent of the "person objecting" was not sufficient. Since these cases were decided the legislature has enacted by the 13th section of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), that the signature of a duly authorised agent shall be sufficient under the 1st section of 9 Geo. 4. c. 14; but it still left the law as expounded in *Hyde v. Johnson* (6) applicable to the 6th section of the Act.

We consider ourselves bound by these decisions to hold, there being no substantial difference between the language as to the signature used in sections 1 and 6, that, in an ordinary case of principal and agent, a written representation within section 6 of 9 Geo. 4. c. 14, signed by the agent alone, would not be binding on the principal, although such signature was duly authorised by him.

But it is contended, on the part of the plaintiff, that this law is not applicable to the present case, on the ground that the

(27) 8 Sc. N.R. 147; s. c. 13 Law J. Rep. (N.S.) C.P. 133.

(28) 8 Sc. N.R. 910; s. c. 14 Law J. Rep. (N.S.) C.P. 67.

banking company, "the party to be charged" can sign in no other way than by its agent or manager, and therefore that either the signature of Goddard is in fact and law the signature of the banking company, within the 6th section of 9 Geo. 4. c. 14, or that where the principal is a body that cannot sign in any other way than by agent, the signature of the agent (being the only signature possible) is sufficient.

In order to decide this question, it becomes necessary to investigate the constitution of this banking company. It appears that the Gloucestershire Banking Company is a co-partnership formed under 7 Geo. 4. c. 46, for the purpose of carrying on the business of bankers at places more than sixty-five miles from London. The company is not a corporation, and has therefore no common seal. It is a co-partnership, created by deed or articles of co-partnership, for a particular purposes, with certain statutable privileges. It can sue and be sued only in the name of one of its public officers, and in all litigious business the company is represented by one of its public officers, who must be a member of the company, and individual members of the company cannot be sued in respect of transactions with the company, till a judgment or decree has been first obtained against the company through one of its public officers. In *Powles v. Page* (29) a company established under this Act was considered a *quasi* corporate body so as not to be affected by what may have been known to any individual member.

The Act contains no provision as to the manner in which the company shall make or sign deeds, contracts or documents of any other description. It confers no authority on the public officers to bind the company, but makes him the representative of the bank only for litigious purposes, and although he must be a member of the company he may have nothing to do with the management of its affairs. On the other hand, it is obvious that, from the nature of its constitution as a fluctuating and numerous body, the company cannot affix its signature to

documents otherwise than by the hand of some individual or individuals, who by the articles of co-partnership are appointed to represent the general body in such matters.

Now, in the present case, the deed of co-partnership has not been produced, and all that we have to inform or guide us as to the mode in which the company sign a contract or written representation, like the present letter, is the finding of the jury founded on the evidence as to the practice of Joint Stock Banking Companies given on the trial, that it was within the authority of Goddard, as manager of a Joint Stock Banking Company, to answer enquiries made by another joint stock company respecting the responsibility of a particular person, and consequently that, for the present purpose, the signature of Goddard to the letter of the 9th of November must be taken to have been that of the company itself. And as the deed of co-partnership was not produced, we may fairly infer that, if produced, it would have confirmed the finding of the jury. No other mode of signing by the bank has been proved before us.

Under these circumstances, we are of opinion that the signature of Goddard in this case, signing as he does as manager for the banking company, is in fact the signature, not merely of an agent, but of the banking company itself, and therefore the signature of the "party to be charged" within the 6th section of 9 Geo. 4. c. 14. We may add that this question cannot now arise with respect to banking co-partnerships, or other joint stock companies formed under the Joint Stock Companies Act, 1862, so far at least as the signing of contracts is concerned, for the 37th section of 30 & 31 Vict. c. 131 enacts that "any contract which if made between private parties would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company."

It was further objected on behalf of the banking company that the representation was not the representation of the bank, but of Goddard personally. We

(29) 3 Com. B. Rep. 16; s. c. 15 Law J. Rep. (N.S.) C.P. 217.

think there is no foundation for this objection. The enquiry was made by the Sheffield Bank, and is signed by its sub-manager, and is addressed to the manager of the Gloucestershire Banking Company, and the reply is signed by Goddard as manager of that bank. We think it clear, therefore, that the communications were in fact and were intended to be communications between the banks respectively.

The next point relied on, on behalf of both defendants, was, that the representation on which the action is founded was made not to the plaintiff but to the Sheffield and Hallamshire Bank, and that the plaintiff therefore cannot sue upon it, and that, at all events, the plaintiff never authorised any inquiry as to which Sir W. Russell was responsible to the extent of 50,000*l.*

We think the facts as proved, and as they must be considered to have been found by the jury, dispose of this objection. The plaintiff was a customer of the Sheffield Bank, and it was clearly established by the evidence that it was he who put the Sheffield Bank in motion to make the enquiry, and that the enquiry was in fact made on his behalf and for his benefit. It is true that he was proposing to trust Sir W. Russell only to the extent of between 2,000*l.* and 3,000*l.*, and that it would have been sufficient for his purpose if the bank had enquired in respect of the responsibility of Sir W. Russell to that extent. But the plaintiff did not prescribe to his bankers how or in what manner they were to make the enquiry. He did not say to them, "Enquire if Sir W. Russell is responsible to the extent of 2,000*l.* or 3,000*l.*," but he went to his bankers in the usual manner, and asked them to enquire generally as to the responsibility and standing of Sir W. Russell, and they made the enquiry in the form of the letter of November 8, asking if he was responsible to the extent of 50,000*l.* On these facts, we think that the enquiry was made on behalf of the plaintiff, and that it is of no consequence that the Sheffield Bank, without any express order from the plaintiff, put the enquiry in the form of asking if Sir W. Russell was a responsible person for 50,000*l.*; nor are the defendants at all prejudiced by the form of the enquiry,

for, of course, if Sir W. Russell was represented to be a responsible person for 50,000*l.*, the plaintiff was entitled to infer that his credit must be good to the extent of 2,000*l.* or 3,000*l.* It was further proved in evidence, that the usual way for customers of a bank to make enquiries of this description is through the bankers, because bankers uniformly refuse to answer enquiries made by private individuals, strangers to the bank from which the information is sought, and only answer those made by other bankers, while it is notorious amongst bankers that such enquiries are constantly made on behalf of customers. We think, therefore, that it must be intended that the answers to such enquiries would be sent, not merely for the use or benefit of the bank making the enquiry, but for the use and benefit of the customers on whose behalf the enquiry is made, and we think it must be taken in this case that the jury have so found.

These facts, we think, bring the present case within the law as laid down in *Langridge v. Levi* (10), as it must be considered that it was within the contemplation of the defendants when this representation was made, that it would or might be communicated to the customer of the bank on whose behalf the information was sought; and where that is so, and the person to whom the false representation is thus communicated acts on it, and suffers damage thereby, he is entitled to maintain an action for such damage in the same manner as if the representation had been made directly to himself.

It is now well established that, in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff, as one of the public, acts on it and suffers damage thereby. We think that the law on this subject is correctly stated by Pollock, C.B., in *Bedford v. Bagshaw* (30): "Generally a false and

fraudulent statement must be made with a view to deceive the party who makes the complaint, or, at all events, to deceive the class to whom he may be supposed to belong, although he may not be individually and particularly intended. There must always be evidence that the person charged with the false statement, and the fraudulent conduct had in his contemplation the individual making the complaint, or, at all events, that the individual making the complaint must have been one of those whom he ought to have been aware he was injuring or might injure by what he was doing."

In the present case it has been proved to be the usage amongst bankers to make enquiries of this kind on behalf of their customers, and we think, therefore, that when Goddard wrote the letter of the 9th of November, he must necessarily be considered to have known and contemplated that it would or might be communicated to the customer of the Sheffield Bank (if any) on whose behalf the information was sought; and we are therefore of opinion that, under these circumstances, the customer (though not individually known to Goddard), the representation having been communicated to and acted upon by him, and he having been injured thereby, may sue upon it.

It must, however, be understood that our judgment is confined to the case before us, viz., the case of the customer at whose request the enquiry was actually made, and that it is not intended to apply to any other customer to whom the bank may have subsequently communicated the contents of the letter. For these reasons we think that the plaintiff is entitled to maintain an action on this representation.

Lastly, it is contended on behalf of the defendants, that the signature of Goddard to the letter of the 9th of November, is not sufficient to enable the plaintiff to bring an action against both defendants, as on a joint false representation, for that it either binds Goddard personally, and not the bank jointly with him, or that it binds the bank only, and then Goddard is not liable jointly with the bank; and it was further objected on the part of the bank, that the company, as a principal, was not liable for the fraud of its agent, Goddard, unless it authorised the com-

mission of the fraud or ratified it. As to this last point, assuming the case to be one in which a principal is sought to be made liable for the fraud of his agent, we consider that the case of *Barwick v. The English Joint Stock Bank* (2) is conclusive to shew that the banking company is liable for the fraudulent representation of its manager made in the course of conducting the business of the company.

As regards the objection that the defendants cannot be sued together as for a joint representation, it must be remembered that this is an action of tort, and, in such actions all persons liable for the commission of the tort, whether principals, agents or servants, are liable to be sued jointly. In *Cullen v. Thompson's Trustees and others* (31) Lord Westbury says, "All persons directly concerned in the commission of a fraud are to be treated as principals; no party can be permitted to excuse himself on the ground that he acted as the agent, or as the servant of another." Besides, in the present case, we hold that the letter of the 9th of November is signed by the bank as well as by Goddard personally, and that as the verdict establishes that the representation was false to the knowledge of Goddard, his knowledge is imputable to the bank, and therefore both are liable to be sued jointly.

For these reasons we are of opinion that both rules must be discharged, and that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Attorneys—Harper, Broad & Battcock, for plaintiff; Waterhouse & Winterbotham, for defendant.

1873.
Jan. 31. }

Ex parte JOLLIFFE.

County Court—Contempt of Inferior Court, not Committed in Face of Court—Right to Punish Offender—County Courts Act, 9 & 10 Vict. c. 95. ss. 113, 114.

A County Court Judge has no power to commit any one for contempt which has not occurred in the face of the Court.

*By the County Court Act, 9 & 10 Vict. c. 95. s. 3, County Courts held under the Act are to be Courts of Record. By section 113, the judge is empowered to impose a fine not exceeding 5*l.* upon, or to imprison for a term not exceeding seven days, any person insulting the judge during his attendance in, or in going to or returning from the Court, or interrupting the proceedings of the Court, or otherwise misbehaving in Court. At the hearing of a judgment summons a County Court Judge made observations reflecting upon the conduct of J., an attorney. The summons was adjourned, and while the case was pending, J. published letters in a newspaper accusing the Judge of tyranny and injustice. The Judge then cited J. to appear before him for contempt of Court. A rule for a prohibition to restrain the proceedings having been obtained,—Held, that the rule must be made absolute as there was no authority for the proposition that the Judge of an inferior Court had power to deal summarily with contempt not committed in the face of the Court, and there was no reason upon principle in favour of such a power.*

Per COCKBURN, C.J., and MELLOR, J.—The fact that the County Courts Act, 9 & 10 Vict. c. 95 (ss. 113, 114), gives a limited power of summarily dealing with contempt committed in face of the Court, but is silent as to contempt committed out of Court, is a strong, if not conclusive, argument against the summary power claimed by the County Court Judge.

Rule for a County Court Judge to shew cause why a prohibition should not issue to prevent him from proceeding in a matter in which he had required one J. A. Jolliffe to appear before him, to be dealt with according to law for a contempt of Court, upon the ground that the Court

had no jurisdiction to hear and adjudicate upon the matter.

*It appeared from the affidavits that Mr. Jolliffe was an attorney, and had acted for one W. Larcombe, who was the plaintiff in certain County Court proceedings. Judgment was given against Larcombe, and a summons taken out for him to shew cause why he should not pay the costs due from him at the hearing of the summons. The Judge made some observations respecting Mr. Jolliffe, who appeared for Larcombe. The summons was adjourned and during the period over which it was adjourned Mr. Jolliffe published letters in answer to the Judge's observations in a newspaper called *Pulman's Weekly News*, upon which summonses were issued for him and the editor to appear before the County Court Judge on a charge of contempt.*

Manisty and Oppenheim shewed cause.—The County Court Judge had a right to commit Mr. Jolliffe for contempt. A County Court is by Act of Parliament a Court of Record (1), and there are ex-

(1) By the County Court Act (9 & 10 Vict. c. 95. s. 3) County Courts held under the Act are to be Courts of Record.

*By section 113, "If any person shall wilfully insult the Judge or any juror, or any bailiff, clerk, or officer of the said Court, for the time being, during his sitting or attendance in Court or in going to or returning from the Court, or shall wilfully interrupt the proceedings of the Court or otherwise misbehave in Court, it shall be lawful for any bailiff or officer of the Court, with or without the assistance of any other person, by the order of the judge, to take such offender into custody, and detain him until the rising of the Court; and the judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the Court, to commit any such offender to any prison to which he has any power to commit offenders under this Act, for any term not exceeding seven days, or to impose upon any such offender a fine not exceeding 5*l.* for every such offence, and in default of payment thereof, to commit the offender to any such prison as aforesaid, for any term not exceeding seven days, unless the said fine be sooner paid."*

*By section 114, "If any officer or bailiff of any Court holden under this Act shall be assaulted while in the execution of his duty, or if any rescue shall be made or attempted to be made of any goods levied under process of the Court, the person so offending shall be liable to a fine not exceeding 5*l.*, to be recovered by order of the Court, or before a justice of the peace as hereafter provided; and it shall be lawful for the bailiff of*

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press decisions to shew that such Courts may summarily punish conduct which tends to obstruct their proceedings. It cannot matter whether the contempt was in or out of Court.

[COCKBURN, C.J.—Does not section 113 of the County Court Act, 9 & 10 Vict. c. 95, limit the power of committing for contempt?]

In the absence of express provision it must not be assumed that a Court of Record has parted with its jurisdiction. In *The King v. Faulkner* (2) the Court held that a commissioner in bankruptcy under 1 & 2 Will. 4. c. 56, had no power sitting alone to fine or commit for contempt, but that was because he had not the power which the whole Court had; here a single Judge forms the whole Court. In *The King v. Clement* (3), where a fine was imposed by a Court of general gaol delivery, Holroyd, J., said, p. 233, "The cases . . . establish that anything done, either for the purpose of obstructing justice, or which will have that effect, may be punished as a contempt of the Court before whom the proceedings are had. Courts, inferior to the Courts at Westminster, may clearly fine and imprison for a contempt, if they are Courts of record, as the Court of quarter sessions, and the Court of oyer and terminer." The learned judge also refers to *The King v. Almon* (4), where it is shewn that publications libelling the Superior Courts may be punished as contempt. In *Re Pater* (5), where the Middlesex Sessions fined a barrister for contempt, the order was upheld by this Court.

[QUAIN, J.—That was a case of contempt in the face of the Court.]

In a previous case, *Re Crawford* (6), this Court refused a *habeas corpus* to bring up a person imprisoned by the Court of

the Court or any peace officer in any such case to take the offender into custody (with or without warrant), and bring him before such Court or justices accordingly."

(2) 2 Cr. M. & R. 255; s. c. 4 Law J. Rep. (N.S.) Exch. 308.

(3) 4 B. & Ald. 218.

(4) Wilmot's Notes, 243.

(5) 5 B. & S. 299; s. c. 33 Law J. Rep. (N.S.) M.C. 142.

(6) 13 Q.B. Rep. 613; s. c. 18 Law J. Rep. (N.S.) Q.B. 225.

Chancery of the Isle of Man, for contempt, similar to that in the present case.

[COCKBURN, C.J., referred to *The King v. Fleet* (7), where there was a criminal information for comments in a newspaper upon evidence before a coroner's jury.]

The question is really whether an inferior Court has less power than the superior Courts in punishing for contempt, and no reason can be suggested for any such difference between these tribunals. They cited *Ex parte Fernandez* (8), *McDermott v. The Judges of British Guiana* (9).

Sir J. Karslake and Bullen, in support of the rule.—County Courts under 9 & 10 Vict. c. 95, section 113, possess a regulated power of dealing with contempt committed in *facie curiæ*, but there is not the slightest pretence for saying that they possess or have ever claimed to possess a power of summarily punishing contempt committed out of Court, such as articles written in a newspaper. There is no presumption in favour of the jurisdiction of an inferior Court. In *Owens v. Breese* (10), the Exchequer Chamber held that County Courts established under 9 & 10 Vict. c. 95, were not such Courts of Record as were contemplated by the 3 & 4 Will. 4. c. 42, that is, "Courts of Record proceeding according to the course of the common law." And in *Levy v. Moylan* (11) it was said "there were strong reasons for saying that the Courts held under the 9 & 10 Vict. c. 95, are inferior Courts, although Courts of Record." It cannot be said that it is necessary for the administration of justice that inferior Courts should be entrusted with the jurisdiction which is now claimed. They have become very numerous, and a power which enables the Judge to sit upon the trial of his own case ought not to be extended.

COCKBURN, C.J.—I am of opinion that the rule must be made absolute for a pro-

(7) 1 B. & Ald. 379.

(8) 10 Com. B. Rep. N.S. 3; s. c. 30 Law J. Rep. (N.S.) C.P. 321.

(9) 38 Law J. Rep. (N.S.) P.C. 1.

(10) 6 Exch. Rep. 916; s. c. 20 Law J. Rep. (N.S.) Exch. 359.

(11) 10 Com. B. Rep. 189; s. c. 19 Law J. Rep. (N.S.) C.P. 308.

hibition, on the ground that a County Court judge has no authority to punish a person for contempt not committed in the face of the Court. It is very true that it is laid down by high authorities, and it is according to the reason of the thing, that every Court of Record has power to fine and imprison for contempt committed in the face of the Court, while the Court is sitting in the administration of justice. Such a power is obviously necessary for the administration of public justice, which may be interrupted or obstructed unless there is a power to summarily repress such outrages. But it is a very different thing to say that a Court shall have power to fine and imprison for contempts not committed in the face of the Court, and not amounting to an actual obstruction of the course of justice, but only to the use of contumelious language, or the publication of articles or comments reflecting on the conduct of the judge. It is laid down in *Hawkins (Pleas of the Crown)* and other writers of authority that the power of committing for contempts committed in the face of the Court is given to inferior Courts, but it is nowhere said that they have power so to punish contempts committed out of Court. There is an obvious distinction between inferior Courts created by statute and superior Courts of law or equity. In these superior Courts the power of committing for contempt is inherent in their constitution, has been coeval with their original institution, and has been always exercised. The origin can be traced to the time when all the Courts were divisions of the great *Curia Regis*—the supreme Court of the sovereign, in which he personally, or by his immediate representative, sat to administer justice. The power of the Courts in this respect was therefore an emanation from the royal authority, which, when exercised personally or in the presence of the sovereign, made a contempt of the Crown punishable summarily, and this power passed to the superior Courts when they were created. It is a very different thing when we come to the inferior Courts, which have never exercised this power, or have never been recognised as possessing it, and I should be prepared to hold that it does not exist. We need not, how-

ever, go so far as that in the present instance, for the statute under which the County Courts are constituted itself points out what is the extent of the power to deal with contempt which the legislature intended to confer upon these Courts. The County Court Act, 9 & 10 Vict. c. 95. s. 113, provides that any person insulting the Judge or interrupting the proceedings of the Court may be taken into custody and detained until the rising of the Court, and that the Judge may commit him to prison or fine him a sum not exceeding 5*l.* for any such offence. Now if the County Courts in the absence of express provision possessed the same powers of committing for contempt as the superior Courts, there would be an obvious inconsistency in limiting the imprisonment for a gross contempt in the face of the Court to seven days, and to allow it in the case of a contempt committed out of Court to be extended to months or years. I think, therefore, that we must assume that the Legislature has provided for the only cases in which it intended to invest the County Courts with power to punish for contempt, and as it appears that these Courts have never exercised such a jurisdiction as that which is now claimed, there is an additional reason for thinking that the Act intended there should be a difference between the two kinds of contempt. There can therefore be no doubt, but that there has been an excess of jurisdiction, and the rule must be made absolute.

MELLOR, J.—I am of the same opinion, on both points. I think there can be little doubt that the superior Courts originally derived their power of summarily dealing with contempts from their institution as part of the King's Court. In *Hawkins' Pleas of the Crown* (Book 2, ch. 3, sec. 1) it is said, "justice is said to have been administered sometimes by the king himself in person, and sometimes by the high justicier."

The foundation of the authority of this Court is that it has existed from time immemorial. It was originally, as the *Aula Regia*, a supreme Court, and it retains many of the powers which at first belonged to it. On the other hand no precedent can be found for a right in

inferior Courts to punish for contempt, except where the contempt has been committed in the face of the Court. Coming to later times, the County Court Act created a new class of Courts, and their power of committing for contempt is expressly limited by section 113, which leaves the Judges of these Courts to the protection afforded by the general law in proceedings by indictment or information for anything done out of Court.

QUAIN, J.—I am of the same opinion. As soon as it was conceded by the counsel shewing cause, that they could find no case in which an inferior Court had committed for contempt which did not occur in the face of the Court, there was an inference that inferior Courts had no power of committing for such an offence. If there were any ground for holding that the power did exist, I should have some difficulty in saying that it would not require express words in an Act of Parliament to take it away, and with regard to the more extensive rights possessed by the Superior Courts, it seems from Wilmot's Notes, p. 254, that "the power which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court acted in the face of it (1 Vent. 1). And the issuing of attachments by the supreme Courts of Justice in Westminster Hall for contempts out of Court, stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terræ*, and within the exception of Magna Charta, as the issuing any other legal process whatsoever." This, too, is to be found in Blackstone, vol. 4. pp. 283, 288. In these authorities the power is confined to those Courts which possess it by an immemorial practice. It has been urged that it would be quite as convenient if the power were possessed by a County Court. But whether this be so or not, such an extraordinary right ought not to be created by inference.

The power of the Judge of an inferior Court of Record is limited to contempts actually before him, as appears from that of a sheriff, of whom Hawkins says in

vol. 2 of *Pleas of the Crown*, book 2. c. 10. s. 15, "It follows that he still continues a Judge of Record, and may impose a fine on all such as are guilty of contempt in the face of the Court." It will be observed that the contempt here specified is a contempt in the face of the Court. And as the power to deal summarily with contempt out of Court is not given by the County Court Act, I think that we ought not to confer it by implication. Such a power allows the Judge to decide in his own cause, and unless it were absolutely necessary, I do not think that it ought to be bestowed upon the different tribunals at large. The rule must therefore be made absolute.

Rule absolute.

Attorneys—R. D. Hughes, agent for J. H. Jolliffe, Crewkerne, for applicant; G. B. Lefroy, for County Court Judge.

(In the Second Division of the Court.)

1873. }
Jan. 30. } THE QUEEN v. COUSINS (1).

Quo Warranto; Information in the Nature of—Want of Grievance—Delay—Discretion of Court—4 & 5 Will. & M. c. 18. s. 2.

A rule for an information, in the nature of a *quo warranto*, in respect of an annual office of guardian of the poor, the election to which was on the 14th of May, on the ground that the mode of election adopted was not a proper one, was not applied for till the 13th of January following, and it was then not shewn that any ratepayer had been prevented from voting, or that the result of the election was affected by the mode adopted. In the exercise of its discretion, the Court discharged the rule.

Pinder (on Jan. 13) obtained a rule, calling upon the defendant to shew cause why an information in the nature of a *quo warranto* should not issue on the ground that the mode of taking the votes by the process called "scratching," at the election on the 14th of May, 1872, when James Bevan Cousins was elected

(1) Coram Blackburn, J., Lush, J., and Archibald, J.

one of the guardians of the poor for the borough of Plymouth, was unreasonable and bad, and rendered the election void.

The borough of Plymouth was constituted a corporation under an Act passed in the 6 Anne, consisting of the mayor, recorder, six magistrates, six common councillors, and twenty persons to be chosen out of the parish of St. Andrew, and eighteen out of the parish of Charles, to be called guardians of the poor of the town of Plymouth, who were to be chosen by the major number of votes of the inhabitants of the said parishes respectively of a certain rating qualification, such election to take place on the second Tuesday of May yearly.

The elections had been for many years made by a process called "scratching," and this was adopted at the election held on the 14th of May last. After the several candidates had been proposed and seconded, a poll was demanded, when the names of the candidates were written, each on separate pieces of paper, which were thrown together in a hat, and thence drawn by the chairman and read by him, while they were written down in a list on a sheet of paper in the order in which they were drawn from the hat. The voters present then left the vestry, and returned again, one by one. On returning, each voter perused the said list of candidates, and was allowed to make a scratch or mark with a pen against the name of each candidate for whom he wished to vote. When the voter had marked in this way as many names as there were persons to be elected, he retired. If he reached the bottom of the list without marking as many names as there were persons to be elected, he was not allowed to go back over the list and mark the name of a candidate for whom he wished to vote but whose name he had once inadvertently passed over. The names of the voters were not taken down, nor was there any means of identifying a vote upon a scrutiny, and no provision was made for voting by electors who might be unable to read. Before the voting began certain ratepayers protested against this "scratching" system, and did not vote at all. The defendant was elected at the head of the poll. There

were upwards of 2,000 ratepayers qualified as electors, but only 132 electors voted for the defendant, and only 200 or 300 were in the habit of voting in each parish, in consequence of the unsatisfactory method of taking the votes.

Kingdon (*J. O. Griffiths* with him), shewed cause.—Since *Darley v. The Queen* (2), and *The Queen v. Hampton* (3), it cannot be contended that an information in the nature of a *quo warranto* will not lie for such an office as this; but with reference to the discretion of the Court as to allowing it to be filed, it is an annual office, and commenced on the 14th of May last, and will expire next 14th of May, while the rule was not moved for until the 13th of January. In *The Queen v. Hodson* (4) the Court refused a rule for a *quo warranto* against a burgess of a borough who was put on the roll in November, when the rule was not applied for until the last day of the succeeding Hilary Term. Lord Denman, C.J., there said, "We do not say that we will under no circumstances entertain such an application, but we shall require proof of some good reason for the delay, and it certainly is in the first instance apparently very vexatious and improper that such a matter should be kept back for an unnecessary time." This mode of voting has prevailed for a long period, and no injustice is stated to have been done. It is not shewn that any ratepayer has ever demanded to go through the list a second time and been refused. There is no absolute right to a scrutiny—*Reg. v. Hammer-smith* (5). The applicant does not state that he has any grievance. In the absence of any practical injustice or proof that anyone entitled to vote has been prevented from voting, the Court will not grant the rule—*The Queen v. The Incumbent and Churchwardens of Goole* (6).

Cole (*Pinder* with him), in support of the rule.—It is a sufficient grievance if any ratepayers have abstained from voting in

(2) 12 Cl. & F. 520.

(3) 6 B. & S. 923.

(4) 4 Q.B. Rep. 648; s. c. 11 Law J. Rep. (N.S.) Q.B. 219.

(5) 3 B. & S. 504.

(6) 4 Law Times N.S. 322.

consequence of their thinking that the mode of voting was improper. In *The King v. The Rector of Lambeth* (7) it is said by Lord Denman in giving judgment on an application for a *mandamus* to hold a vestry for the election of churchwardens on the ground that at a prior election the poll had been improperly taken, "If any single person had been excluded in the present case, it might have been a reason for demanding that the election should be set aside." The statute of Anne requires the election to be by the major number of electors, and here a number objected to vote by reason of the mode of election—*The King v. The Churchwardens of the Parish of St. James, Clerkenwell* (8). An election to the office of master of the Company of Patten Makers under a charter was held bad, because it was held under a bye-law which required it to be in a particular mode not prescribed or sanctioned by the charter—*The King v. Bumstead* (9).

BLACKBURN, J.—This rule must be discharged with costs. This is a proceeding which can be taken by the Attorney-General, as of right, to turn out of office a person alleged to fill it improperly, or by the common law it might be taken by the Queen's Coroner or Attorney; but that power being found to be abused in practice and to produce hardship, by statute 4 & 5 Will. & M. c. 18. s. 2, the application must be made in open Court, and since then this Court has exercised its discretion in granting or refusing leave to file any such information. That section enacts, that the Clerk of the Crown shall not without express order to be given by the Court in open Court file any information, &c.

When the object is to turn out a person from an office, especially an annual office, if he is the right man to be in the place, and no one else can be improperly out, and no harm is done, we cannot, in our discretion, grant leave to file the information. I express no opinion as to this mode of voting. If a voter *bona fide* shall by mistake have passed over a person for

whom he wanted to vote, and if he should not be allowed to go back over the list and mark the name of the person inadvertently passed over, he may then raise the question. We are asked in the present case to give an opinion upon an abstract question as to this mode of voting, but this we decline to do. This Court sits as a Court of Law to decide contested points, and to correct a mischief in a particular case, and not to give advice.

LUSH, J.—I concur. I express no opinion on the mode of voting. I do not think this case is so strong as *The King v. The Rector of Lambeth* (7), cited by Mr. Pinder. In that case the doors were closed, but notwithstanding that fact, Lord Denman says that it not appearing that the result of the election would have been different, the rule must be discharged. My impression is that, considering the office to be an annual one, and expiring in May, this application is too late.

ARCHIBALD, J.—I think some actual mischief ought to be shewn. There is nothing in the affidavits to make out that. No one is said to have passed over a name for which he desired to vote inadvertently, and been refused to return and record his vote. Therefore I think the rule should be discharged.

Rule discharged.

Attorneys—Fox & Robinson, for plaintiff;
Vizard & Co., for defendant.

(In the Second Division of the Court.)

1873. }
Jan. 31. } THE QUEEN v. WARD (1).
Feb. 17. }

Public Health Act, 1848—Irregularity Immaterial as to the Result—Quo Warranto—11 & 12 Vict. c. 63. ss. 21, 23, 24—Election of Local Board—Discretion of Court.

W. was chairman of a Local Board, and it was his duty under 11 & 12 Vict. c. 63. s. 21, to conduct and complete the elections of members for the ensuing year, and by the same section if the chairman became unable to act, some other person was to be ap-

(1) Coram Blackburn, J.; Lush, J.; and Archibald, J.

(7) 8 Ad. & E. 356.

(8) 1 Ad. & E. 317.

(9) 2 B. & Ad. 699.

pointed by the Local Board to perform such of his duties as then remained to be performed. F. was appointed by the Local Board to act as returning officer in case of nomination of chairman as a candidate. W. published a notice, fixing day of election and day for receiving nomination papers. He received a nomination paper nominating himself, and afterwards continued to receive other nomination papers. More candidates were nominated than vacancies. W. filled up the form of voting paper under section 23, and sent it to be printed, with directions for the printer to return it to F., and from that time forward everything was done by F. W. was elected, and returned by F. No improper motive was imputed to W., nor did his acts produce any inconvenience, or in any way influence the result of the election. The Court, in the exercise of its discretion, refused leave to file an information in the nature of a "quo warranto."

Crump, on a former day, had obtained a rule, calling upon James Ward to shew cause why an information, in the nature of a quo warranto, should not be exhibited against him, to shew by what authority he claims to exercise the office of a member of a Local Board for the district of Sheerness, in the county of Kent, on the ground that, at the time of his nomination, he was the chairman of the said Board, and therefore returning officer, and ineligible as a candidate.

The district of Sheerness was a district constituted under the Public Health Act, 1848. The defendant was the chairman of the Local Board for that district, from September, 1871, to September, 1872. In September, 1872, an election took place of members of the Local Board for the ensuing year. His term of office expired on the 29th of September, 1872. At a meeting of the Board, held on the 29th of August, 1872, Mr. Edward Felkin, the clerk to the Board, suggested that it was expedient that a returning officer should be appointed by the Board, in case the chairman should be a candidate, and Mr. Felkin was appointed returning officer of the Board, in the event of the defendant being nominated for the office of a member for the ensuing year, or of his

not refusing to serve. The defendant published a notice, pursuant to section 23 of the Public Health Act, dated the 7th of September, 1872. The notice stated that the nomination papers were to be delivered to the defendant at his residence on or before the 16th of September, and that the number of persons to be elected was four. On the 10th of September a nomination paper was delivered, nominating himself and two others; on the 11th other nomination papers were delivered, nominating nine other persons; on the 13th a nomination paper was left, nominating three other persons; and on the 16th nomination papers were left, nominating two other persons. On the 17th of September, the defendant sent the paper, containing the names of the candidates and of the nominators, placed in the order in which he had received them, to the printer, with directions to send them to the said Mr. Felkin; and the latter person had the voting papers prepared and filled up from the rate books, and the claims to vote as owners that had been sent to him as clerk, fourteen days before the election day, viz., the 29th of September. After the 16th of September notices, refusing to serve as members of the Board, signed by eight or nine persons nominated, were left in sealed envelopes at the defendant's residence, and by him handed over to Felkin. On the 26th the voting papers were given out at Felkin's office, at the Board of Health offices, to the distributors for delivery and collection; and from that time Felkin acted as returning officer, and the defendant did not interfere in any way with the election after receiving the nomination papers and making out the list. He was elected a member of the Board, and at the next meeting of the Board was elected chairman.

Prentice (O'Malley with him) now shewed cause.—The defendant was lawfully elected a member of the Local Board at the election in September last. He was chairman of the Board at the time, and as such returning officer [11 & 12 Vict. c. 63, s. 21 (2)]; but, inasmuch as the returning

(2) By sect. 23 of 11 & 12 Vict. c. 63, the chairman shall before every such election prepare, sign and publish a notice containing the number and

officer could not also be a candidate for election, he was, upon nomination, unable to discharge the duties of returning officer. Felkin was appointed under the above section to perform such powers and duties as then remained to be exercised or performed. The defendant was not nominated when he published the notice required by section 24, and he might not have been nominated, so there was nothing irregular in his publishing the notice. Then the number nominated exceeding the number to be elected, he inserted in the voting papers the names of the persons nominated, in the order in which the nomination papers were received, as is prescribed in section 24. It is said that by so doing he rendered his election void; but that is not so. He was capable of being a candidate, and being nominated and elected, but incapable to act as returning officer—*The Queen v. White* (3). Upon the acceptance of the nomination papers he, *ipso facto*, vacated the office of returning officer—*Kydd on Corporations*, vol. i. 359.

qualifications of the persons to be elected, the persons by whom and the places where the nomination papers are to be received, and the last day on which they are to be sent, and the mode of voting in case of a contest, and the days on which the voting papers shall be delivered and collected, and the time and place for the examination and casting up of the votes.

Sect. 24. Any person entitled to vote may nominate any person so qualified not exceeding the number of persons to be elected, and every such nomination shall be in writing and shall state, &c., and be sent to the said chairman; and if the number of persons nominated shall be the same or less than the number of persons to be elected, such persons, if duly qualified, shall be deemed to be elected, and shall be certified accordingly by the said chairman under his hand; but if the number so nominated shall exceed the number to be elected the said chairman shall cause voting papers in the form in schedule A to be prepared and filled up, and shall insert therein the names of all persons nominated in the order in which the nomination papers were received, but it shall not be necessary to insert more than once the names of any person nominated; and the said chairman shall three days before the day of election cause one of such voting papers to be delivered by the persons appointed for the purpose to the address in the wards for which the election is to be held of each owner and proxy, and at the residence of each ratepayer entitled to vote therein.

(3) 36 Law J. Rep. (N.S.) Q.B. 267; s. c. Law Rep. 2 Q.B. 557.

The Court has a discretion to exercise in granting this rule, and, at any rate, no injustice has been shewn to have been done, or that anything was done by the defendant to affect or alter the result of the election.

Crump, in support of the rule.—The chairman of the Board is, as returning officer, not eligible. He cannot be a candidate, and votes tendered for him cannot be received. He was acting as returning officer when he was nominated, and he continued to receive the nomination papers—*The Queen v. Owens* (4). It is necessary that the returning officer should not be capable of election, because, as was pointed out in *The Queen v. Parkinson* (5), if the number of candidates nominated is equal or less than the number of members to be elected the candidates are elected without any voting, and if the returning officer were allowed to receive the nomination papers he might say that there were no more candidates than the number to be elected, when, in fact, more had been nominated. It is not necessary to shew that actual malpractices have existed, it is enough if there be a danger that they may—*The Queen v. Owens* (4).

[BLACKBURN, J.—Is that sufficient with reference to our discretion as to granting the writ?]

The returning officer has to see whether the nominator of the candidate is properly qualified, and it is open to him to say that they were not qualified to nominate, or their nominees to be nominated—*The Queen v. Morgan* (6). He is liable to penalties under section 28.

[LUSH, J.—Upon these affidavits, we must take it that Mr. Ward did not do anything wrong.]

He did nothing wrong, except so far as it was wrong to receive the nomination papers.

[ARCHIBALD, J.—Do you say it was wrong, although he handed them over at once to his deputy?]

Yes; if he adopted the receipt in any way, as by arranging them in any way.

(4) 28 Law J. Rep. (N.S.) Q.B. 316.

(5) 37 Law J. Rep. (N.S.) Q.B. 52; s. c. Law Rep. 3 Q.B. 12.

(6) 41 Law J. Rep. (N.S.) Q.B. 55; s. c. Law Rep. 7 Q.B. 26.

If he handed them over without doing anything he would, in fact, then be resigning. It is submitted that the nomination is void, if he continued ever so short a time afterwards as returning officer, even if he did not do any act.

Cur. adv. vult.

BLACKBURN, J. (on Feb. 17th), delivered the judgment of the Court.—This was a rule obtained for leave to file an information in the nature of a *quo warranto* for the office of member of a local board of health, against which cause was shewn in the sittings of last term before my brothers Lush and Archibald and myself, when the Court took time to consider of their judgment. We are of opinion that the rule ought to be discharged. It is convenient, in the first place, to state the facts as appearing on the affidavits. The defendant was chairman of the local board, and consequently under the 21st section of the 11 & 12 Vict. c. 63, he was to perform all the duties in conducting and completing the elections for members of the local board. That section, however, contains a provision that in case the chairman "from illness or other sufficient cause shall be unable to act or shall be absent or shall refuse to act, some other person who shall be appointed by the local board of health shall exercise or perform such of the said powers and duties as then remained to be exercised or performed." It was known that three members of the local board, one of whom was the defendant, were to go out of office, and that in the event of the defendant being again nominated as a candidate, he would be incapable of acting as returning officer in his own election. On the 29th of August the local board came to a resolution that another member of the local board of the name of Felkin should be appointed under this section to act in the event of Ward being nominated and accepting the nomination.

The next step to be taken was under section 23, to prepare and publish a notice of the election. Ward, as chairman, did accordingly on the 7th of September publish a notice fixing the days of election for the 29th and 30th of September, directing that the nomination papers

should be delivered at his own house and fixing the 16th of September as the last day on which nomination papers should be received.

On the 10th of September a nomination paper nominating Ward as a candidate was delivered at his house, and we think it must be considered that he, on that day, accepted the nomination and became a candidate, and ought, therefore, from that date to have ceased altogether to act and to have called upon Felkin to perform all the duties which yet remained to be performed. He did not, however, immediately do so, but continued to receive the nomination papers, and on the 16th of September there were more nomination papers received than there were vacancies. The 24th sect. requires that in such a case "the chairman should cause voting papers to be filled up and insert therein the names of all the persons nominated in the order in which the nomination papers were received." Instead of leaving this to be done by Felkin, which would clearly have been the right course, Ward himself filled up the form of a voting paper and sent it to the printer's, with directions to send the papers when printed to Felkin. This was done, and from that time forward everything was done by Felkin. The election was duly held, and Ward was elected and returned by Felkin. There was no affidavit in support of the rule affording any evidence that the names of the candidates were not inserted in the voting paper in the order in which the nomination papers were received, and there was the positive and express affidavit of Ward that they were inserted in that order, and there was no suggestion on the affidavits that the election would have been in any respect different if Felkin had begun to act on the 10th of September as soon as Ward became a candidate, instead of delaying to act until the voting paper had been sent to the printers. It was, however, contended that, inasmuch as Ward did act as chairman after he had become a candidate, his election was, in point of law, void, however short the time was during which he acted, and however immaterial in the result his acting turned out to be. We are not prepared to express an opinion on

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this point, nor is it necessary, as we all agree that the point is one of sufficient difficulty to make it proper to let the *writ* (*sic*) go, in order that it might be raised on the record, if the only question were whether the election was strictly legal. But that is not the only question. The power of the Master of the Crown Office, as attorney for the Queen in the Court of Queen's Bench, had before the Revolution been much abused, and, consequently, the legislature, by statute 4 & 5 Wm. & Mary, c. 18. s. 2, enacted that he should not, "without express order to be given by the Court in open Court," exhibit or file any information. An information in the nature of a *quo warranto*, though not expressly named in the statute, is within it, whatever be the nature of the franchise in respect of which the information is to be filed. Before the Reform Bill the return of members of Parliament, in a very large number of boroughs, depended upon the municipal corporation which made *quo warranto* for municipal franchises of exceptional importance, and there are subsequent statutes regulating the mode of proceeding in *quo warranto* for municipal offices within which the present case would not fall. But the very object of requiring that the information should not be filed without express order by the Court of Queen's Bench made in open Court was that the Court might in its discretion refuse to file an information when it would be vexatious so to do. And we think that, in exercising our discretion in the way in which it has been for many years exercised by this Court, we ought to refuse to make the order in the present case. In *The King v. Stacey* (7) Lord Mansfield, speaking, in 1785, says, "I remember when it was so much the practice of the Court to grant *quo warranto* informations as of course, that it was held prudent never to shew cause against the rule for fear of disclosing the grounds on which the party went. But now, since these matters have come more under consideration, it is no longer a motion of course; and the Court are bound to consider all the circumstances of the case before they disturb the peace and quiet of

any corporation." We do not rely on the particular circumstances in that case as being in point, but cite it for the principle laid down by Lord Mansfield, which we think has been uniformly acted upon since.

We pass over the intermediate cases prior to *The King v. Parry* (8). There, in the considered judgment of the Court, it is said, "It was in effect asserted that wherever a reasonable doubt is raised as to the legal validity of a corporate title, we are bound to grant leave to file the information. The proposition, however, is wholly untenable. Every case (and they are most numerous) which has turned upon the interest, motives or conduct of the relator, proceeds upon the principle of the Court's discretion; however clear in point of law the objection may have been to the party's abstract right to retain his office, yet the Court has, again and again, refused to look at it or to interfere upon one or other of these grounds." Later in the judgment the grounds are stated on which the Court exercised their discretion in that case. "On the one hand, if the rule be made absolute, the dissolution of the corporation may at least be reasonably apprehended." We may at once say that this was a greater inconvenience than any to be apprehended in the present case; but what follows seems to us quite applicable to the present case. "On the other, it is remarkable that the affidavits in support of the rule impute no corrupt, fraudulent or indirect motive for the acts complained of as irregular, nor do they allege that they have produced injustice, inconvenience, or even any one result different from what would have followed the fullest compliance with the law as they lay it down. They do not go the length of suspecting that a single vote has been won or lost, or that the Burgess list would have varied in a single name." . . . "In fact, neither claim nor objection as regarded the Monmouth Ward was made to the overseers' list. We do not say that the Court of Revision had therefore no duties to perform, but, in fact, they were not called upon to perform any; and the defective constitution of the Court has been

(7) 1 Term Rep. 1.

(8) 6 Ad. & E. 810, in 1837.

in all respects an immaterial circumstance." One argument much relied on in support of the rule was that though Ward, as chairman, had performed no duty, except the almost mechanical one of filling up the voting paper with the candidates' names in the order in which the nomination papers were received, yet the chairman might have had to consider the qualification of those who signed the nomination papers, a matter of a judicial or, at least, quasi-judicial nature. Probably had he been called upon so to do, he would have perceived the propriety of holding his hand, and calling on Felkin to begin to act; but we think, in exercising our discretion, we may well adopt the view of the King's Bench in *The King v. Parry* (8), and say that as in fact he was not called upon to perform any such duty, the irregularity has been in all respects an immaterial circumstance.

The next case that we would refer to is that of *The Queen v. The Rector of Lambeth* (9), and I refer to it principally because the office there in question was not a corporate office, and that the inconvenience which would have been sustained from ousting the churchwardens would only have been that the quiet of the parish would be disturbed by a new election when the former election was substantially right though irregular. Yet the Court discharged the rule on the ground that nothing was stated to shew that the result of the election was different from what it would have been if the irregularity had not taken place. The same principle was acted upon in *The Queen v. Goole* (10), and in the very recent case of *The Queen v. Cousins* (11) in this Court, a short time before the present rule was argued.

We think, therefore, that seeing the mistake committed here has produced no result whatever, that the same persons would have been elected if the election had been conducted with the most scrupulous regularity, and that the defendant's title, if bad at all, is only bad, as I may say, on special demurrer, we ought, in the exercise of our discretion, to refuse leave to dis-

turb the peace of this district by filing this information.

It is worth saying that if in any future case it should appear that the chairman wilfully and contumaciously acted at all in his own election, the Court might well, in its discretion, order the filing of an information in order to check such a practice. Nothing that we have said is intended to apply to such a case.

Rule discharged.

Attorneys—Brook & Chapman, agents for Mole, Sheerness, for relator; Evans, Laing & Co., for defendant.

(In the Second Division of the Court.)

1872.	} THE QUEEN v. THE LOCAL BOARD OF GRASMERE (1).
Nov. 21, 22.	
1873.	
Jan. 29.	

Local Government Act, 1858 (21 & 22 Vict. c. 98)—Adoption of the Act—Place having a Known and Defined Boundary—26 & 27 Vict. c. 17—Order of Local Government Board—Certiorari.

By the *Local Government Act, 1858 (21 & 22 Vict. c. 98)*, it is enacted that the Act may be adopted in corporate boroughs and places under the jurisdiction of a board of competent commissioners, and in all other places having a known or defined boundary, by a resolution of the owners and ratepayers, subject to appeal to the Local Government Board:—Held, that in interpreting the words "place having a known or defined boundary" in the above statute, the word "place" is to be received with the widest possible signification, and is not restricted to the accustomed legal divisions of the country, such as manors, hamlets, townships or parishes, and may, therefore, consist of portions of different townships or parishes, and a place so composed has a "known or defined boundary," which has a physical, visible and notorious boundary, so that there can be no mistake as to its limits.

Therefore where the township of Grasmere contained certain small detached portions of the neighbouring townships of Rydal and Loughrigg wholly surrounded by portions of the township of Grasmere, and included

(9) 8 Ad. & E. 356.

(10) 4 Law Times, N.S. p. 322.

(11) Ante, p. 124.

(1) Coram Quain, J., and Archibald, J.

within the boundary of that township, the district so composed was held to be a place having a known or defined boundary within the above statute, and an order of the Local Government Board made under section 17 of that Act, and 34 & 35 Vict. c. 70. s. 2, for the adoption of the first-mentioned Act by such district, was held valid.

Rule calling upon the Local Government Board to shew cause why a writ of *certiorari* should not issue to remove an order of that board for the adoption of the Local Government Act, 1858 (2), by the district of Grasmere.

(2) The 21 & 22 Vict. c. 98. s. 12, enacts—“This Act may be adopted—1, in corporate boroughs; 2, in places under the jurisdiction of a board of competent commissioners; 3, in all other places having a known or defined boundary by a resolution of the owners and ratepayers.

“Section 13. Meetings for the preceding section may be summoned on the requisition in writing of any twenty ratepayers or owners . . . in places having known and defined boundaries, not being corporate boroughs or towns under the jurisdiction of such Improvement Commissioners as are hereinbefore mentioned by the churchwardens or one of them; or if there are no churchwardens, the overseers of one of them; or if there is none of the officers respectively above enumerated, or if such officer in any case neglects, is unable, or refuses to perform the duties hereby imposed upon him by any person appointed by one of Her Majesty's principal Secretaries of State. 2. In such places as last aforesaid, the Summoning Officer shall, upon such requisition, fix a time and place for holding such meeting, and shall forthwith give notice thereof by advertisement in some one or more of the newspapers circulated in the place.

“By causing such notice to be affixed to the principal doors of every church and chapel in the place to which notices are usually affixed. 4. The chairman shall propose to the meeting the resolution for the adoption of the Act, and the meeting shall decide for or against such adoption, &c., &c.”

“Section 14. In cases where any place hereby authorised to adopt this Act includes within its limits any less place, which if it were not so included, would of itself be authorised to adopt this Act, such less place shall not be entitled to adopt this Act unless the greater place within the limits of which it is included has refused to adopt the same, or unless it has been determined by one of Her Majesty's principal Secretaries of State in manner hereinafter mentioned, that such less place ought, as respects the adoption of this Act, to be excluded from the limits of such greater place.”

“Section 16. 1. Any place not having a known or defined boundary may petition one of Her Majesty's principal Secretaries of State to settle

The Attorney-General (Lumley with him) shewed cause on behalf of the Board.

Manisty (W. G. Harrison with him), for the Local Board of Grasmere.

Lumley Smith supported the rule.

The facts and the arguments sufficiently appear from the judgment of the Court, as well as the cases cited in the judgment.

Ex parte Smith (3) was also referred to.

Our. adv. vult.

its boundaries for the purposes of this Act. 2. The petition shall state the proposed boundaries of the place, shall be signed by one-tenth of the ratepayers resident within such boundaries, and shall be supported by such evidence as the said Secretary of State may require.

“3. Upon the receipt of such petition the Secretary of State may direct inquiry to be made as to the genuineness of the petition, and as to the propriety of the proposed boundaries, and

“4. Fourteen days' notice of the time, place and subject of such inquiry shall be given in the place to which it refers.

“5. The said Secretary of State, may, upon consideration of the matter, either dismiss the petition altogether, or make order as to the boundaries of the place. He may also make order as to the costs of the proceeding under this section, and the parties by whom such costs are to be borne.

6. Any place the boundaries of which have been settled in pursuance of the foregoing provisions shall thenceforth, for the purposes of this Act, be deemed to be a place with a known and defined boundary, and may adopt this Act accordingly, and for the purpose of enabling it so to do a summoning officer shall be appointed by the order settling the boundaries, whose duty it shall be forthwith to take all such steps as may be necessary for convening a meeting of the ratepayers to decide as to the adoption of the Act, &c.”

“Section 17. 1. In cases where a resolution adopting this Act has been passed in any place, if any number not being less than one-twentieth of the owners and ratepayers of such place, such twentieth to be one-twentieth in number of the owners and ratepayers of the place taken together, or the owners and ratepayers in respect of one-twentieth of the rateable property in the place are desirous that the whole or any part of such place should be excluded from the operation of this Act, they may present a petition to one of Her Majesty's principal Secretaries of State appealing against such resolution, and praying that such exclusion may be made.”

“Section 19. Whenever a resolution adopting this Act has been passed in any place, notice thereof shall be given to one of Her Majesty's principal Secretaries of State by the following persons, that is to say—Incorporate boroughs by the mayor. In other places under the jurisdiction of such Improvement Commissioners as aforesaid

Judgment was (on Jan. 29) delivered by Archibald, J.—

This was a rule obtained at the instance of Mary Grace Taylor, calling on the Local Government Board to shew cause why a writ of *certiorari* should not issue to remove an order of the board of the 17th of April, 1872, for the adoption of the

by the Chairman of the Board of Commissioners. In other places by the Summoning Officer. The notice so sent shall be in writing under the hand of the officer hereby required to give the same; and it shall be the duty of such last-mentioned officer to publish a copy of such notice in manner following, that is to say—By advertisement for three successive weeks in some one or more of the newspapers circulated in the place; by causing a copy of such notice to be affixed to the principal doors of every church and chapel in such place to which notices are usually affixed, and when such notice has been so given, and the time for such appeal has expired, or such appeal has been dismissed, a notice shall be published in the *London Gazette* by one of Her Majesty's principal Secretaries of State that this Act has been adopted within such place."

"Section 20. Whenever any resolution adopting this Act has been passed in any place, this Act shall, at the expiration of two months from the date of the passing of such resolution, or in the event of an appeal, or of a division of the district into wards, as hereinafter provided, then at such time as may be mentioned in the order made on such appeal, or in the order setting out wards, have the force of law within such place; and the expiration of such period of two months, or such date as may be mentioned in the said order as the time for this Act to come in force, shall be called the date of the constitution of the district, provided that the provisions of this Act relating to purposes already included in any Local Act in force within the district with relation to any of the purposes of the Public Health Act, 1848, or this Act, and not conferring power or privileges upon corporations, companies, undertakers or individuals for their own pecuniary benefit, notwithstanding the adoption of the Act as hereinbefore provided, shall not come into operation until an order has been made and confirmed as hereinafter prescribed for the future execution, repeal or alteration of the said Local Act."

"Section 24. The duty of carrying into execution this Act shall be vested in a local board; and such local board shall be—1. In corporate boroughs the mayor, alderman and burgesses acting by the council. 2. In other places under the jurisdiction of such a Board of Improvement Commissioners as hereinbefore mentioned, the Board of Commissioners. 3. In other places such number of elective members as may be determined by a resolution of the owners and ratepayers passed in manner in which resolutions for the adoption of this Act are hereinbefore directed to be passed at any meeting held for the purpose of adopting this Act, or at

Local Government Act, 1858, by the district of Grasmere, in the county of Westmoreland, against which cause was shewn on the 21st and 22nd of November last.

It appeared that in the township of Grasmere, in the county of Westmoreland, certain small detached portions of the neighbouring township of Rydal and

any meeting to be summoned by the Summoning Officer for the purpose of this section, &c."

"By section 45. The provisions of 'The Town Police Clauses Act, 1547,' with respect to the following matter (*inter alia*, that is to say)—5. With respect to the supply of water, except the proviso thereto, shall be incorporated with the Act."

"Section 77. The 14th sect. of the Public Health Act, 1848, shall be repealed, and in lieu thereof be it enacted as follows—Whenever it appears desirable to the Local Board of any district or to the majority of the owners and ratepayers in any parish, township, hamlet or place maintaining its own roads or its own poor adjoining any district, or to the majority of owners and ratepayers in any part of a district, such majorities to be ascertained in the way herein provided for, voting with respect to the adoption of this Act:

"That any portion of such parish, township, hamlet or place should be incorporated with the district, or that such part of the district should be separated therefrom:

"Or whenever it appears to the Local Board of any district desirable that provision should be made for the future execution of any Local Acts in force within such district having relation to the purposes of this Act, and not conferring powers or privileges upon corporations, companies, undertakers or individuals for their own pecuniary benefit; or that any such Acts or any exemptions from rating derived therefrom, or any provisional order or order in council applying the Public Health Act, 1848, or Act confirming such provisional orders, should be wholly or partially repealed or altered. 1. They may present a petition to one of Her Majesty's principal Secretaries of State praying for such incorporation, separation, provision, repeal and alteration as aforesaid, or for any of such things, and such petition shall be supported by such evidence as the said secretary requires. 3. A provisional order may be issued, &c., and when the order provides for the incorporation of a portion of any such parish, township, hamlet or place with the district, or the separation of any part from the district, an inspector shall proceed to the district for the purpose of obtaining the consent to such order of the place of which it is proposed that a portion should be incorporated or of the part to be separated, and also, if such order provide for any such incorporation, the consent of the petitioning district."

"Section 81. All orders made by one of Her Majesty's principal Secretaries of State in pursuance of this Act shall be binding and conclusive in respect of the matters to which they refer.

26 Vict. c. 17. s. 2.—The adoption of the

Loughrigg were comprised, wholly surrounded by portions of the township of Grasmere, and included within the boundary of that township. The detached portions of Rydal and Loughrigg consist of four fields of about eight acres in all, with nine houses on them, and a population of about thirty-seven persons (rated to the township of Rydal and Loughrigg), and of about a rood of shingle and bare stones at the mouth of the river Rothany. The population of the whole of the township of Grasmere and of the detached portions of Rydal and Loughrigg was at the last census less than 3,000.

It appeared that on the 4th of November, 1871, at a meeting duly convened under section 13 of the Local Government Act, 1858, of the owners and ratepayers of the township of Grasmere and of the detached portions of Rydal and Loughrigg, as of a place having a known and defined boundary, a resolution was

Local Government Act, 1858, by any place where that Act was not in force on the 1st of March, 1863, and where the population according to the then last census is less than 3,000, shall not be of any validity unless it is approved by one of Her Majesty's principal Secretaries of State on proof being given to his satisfaction that by reason of special circumstances it is expedient that such place should be allowed to adopt the Act.

Before signifying his approval or disapproval the said Secretary may cause an inquiry to be made in the place as to the circumstances alleged in support of the expediency of the adoption of the Act of the time and place, of which inquiry fourteen days' public notice shall be given, and on the determination of such inquiry shall give or withhold, as he thinks just, his approval of the adoption of the Act.

"The approval or disapproval of the said Secretary of State shall be published by the said Secretary in the *Gazette*, and such publication shall be evidence of the fact of that approval or disapproval having been given."

"Section 3. Petitions appealing against the resolution of adoption, and praying for exclusion from the operation of the Local Government Act under the 17th section of that Act, and appeals from owners and ratepayers who dispute the validity of the vote for adoption under the 18th section of the same Act, may be presented and had at any time before the expiration of six weeks from the date of any resolution adopting the Act."

34 & 35 Vict. c. 70. s. 2.—All powers, duties vested in, or imposed on, one of Her Majesty's principal Secretaries of State by the 21 & 22 Vict. c. 98, are transferred to, or imposed on, the Local Government Board.

passed adopting the Act, and notice of the resolution was duly given to the Local Government Board. A petition was afterwards presented to the board under the 17th section of the Local Government Act, 1858, by certain owners and ratepayers of the place, appealing against the resolution, and praying that the board would not approve or sanction the adoption of the Act within any part of the intended district. An enquiry was thereupon held, and in the result an order was made by the board on the 17th of April, 1872, excluding certain parts (not being the detached portions of Rydal and Loughrigg above referred to) from the intended district, but subject to such exclusion defining the boundaries of the district, and directing that from and after the date of the order, the Act should come into force within the district. A Local Board was afterwards, on the 24th of May, elected for the district thus constituted, which proceeded to put in force the provisions of the Act, and it appeared that upwards of 1,250*l.* had already been expended, chiefly in providing a supply of water. An application for a *certiorari* was originally made at chambers before Mr. Justice Quain, which was referred by him to the Court, and the date of the first notice of application or motion by the prosecutor was the 24th of September, 1872.

Under these circumstances it was at first contended, in shewing cause, that, inasmuch as the 25th section of the Act provides that any order made on appeal against a resolution adopting the Act shall, after the expiration of two months from its date, have the force of law, the order was conclusive, and the application out of time. It was further contended that, by virtue of the 81st section of the Act, the order of the board upon the petition against the adoption of the Act was conclusive, and in support of that contention *Ex parte Bird* (4) was cited. It was argued that the remedy, if any part of the proposed district desired exclusion, was under the 14th and 17th sections of the Act, and that as an application had in fact been made under the latter section

(4) 1 E. & E. 931; s. c. 28 Law J. Rep. (n.s.) Q.B. 223.

and adjudicated on, the decision of the Local Government Board could not be impugned; but in the course of the argument we intimated our opinion that neither of these contentions could be sustained, unless the district in question was at the time of the resolution a place having "a known and defined boundary," which we thought essential, in order to give jurisdiction to make an order under section 20, and the subsequent argument was addressed to that question. On this point the contention on behalf of the Local Government Board was that, notwithstanding the inclusion of the detached portions of Rydal and Loughrigg within the township of Grasmere, the entire area was within the meaning of section 12, sub-section 3, "a place having a known or defined boundary," viz., the boundary of the township of Grasmere. On the other hand, it was argued that the boundary of that township could not be regarded for the purposes of this Act as the boundary of the detached portions of the neighbouring townships; that a mere physical boundary including such detached portions was not sufficient, and that to satisfy the 3rd sub-section of section 12 of the Act, the whole of the district within the boundary must be some entire district or division known to the law, such as a hamlet, a township or parish; and that the mere accidental circumstance that the detached portions of Rydal and Loughrigg were so situated that the township of Grasmere embraced them was not a sufficient foundation for the application of the Act to the entire area, without first taking the proceedings directed by section 16 of the Act to have the boundary settled by the Secretary of State as of a place not having a known or defined boundary. We were referred to the cases of *Re The Matlock Bath District* (5), *The Queen v. North Owram* (6), and *The Queen v. Hardy* (7); but these cases have little if any bearing on the precise question before us, which we must endeavour to

answer according to what appears to us to be the true construction of the Act. The Act unfortunately furnishes no interpretation of the word "place," or of "place having a known or defined boundary," nor is any such interpretation to be found in the Public Health Act, 1848 (11 & 12 Vict. c. 63); but in some of its sections (see sections 8 & 9) the word place is used in connection with city, town, borough or parish. In the 18 & 19 Vict. c. 121 (to consolidate and amend the Nuisances Removal and Diseases Prevention Acts) the word "place" is expressed to include any city, borough, district, parish, township or hamlet, or part of any such city, borough, district, town, parish, township or hamlet, but with this exception we are not aware of any interpretation of the word in the Acts relating to the public health, and it is to be observed that the definition just referred to is inclusive and not exclusive. In order, therefore to ascertain the meaning of "place," and of the same word with the qualification of "a known and defined boundary," we must consider the object and intention of the Act. The object, as expressed in the preamble, is to make provision for the local government of towns and populous districts in England. For this purpose, and with a view to promote public health, the Act contains ample provisions for the formation and constitution under the authority of the Secretary of State (now of the Local Government Board), of areas or districts convenient in point of locality, size and limits for the adoption and application of the Act. The 16th section gives the Secretary of State on petition the power to settle, for the purpose of this Act, the boundary of any "place" not having a "known or defined boundary," and this power is conferred without being in any way restricted to the accustomed legal divisions of the country, such as manors, hamlets, townships or parishes. Such divisions, it is obvious, might often prove most inconvenient and impracticable for the purposes of sewage and drainage, or the exercise of the other powers of the Act, while the union of several distinct portions of such adjoining divisions into one district might often be the only practi-

(5) 2 B. & S. 543; s. c. 31 Law J. Rep. (N.S.) Q.B. 177.

(6) 35 Law J. Rep. (N.S.) Q.B. 90; s. c. Law Rep. 1 Q.B. 110.

(7) 38 Law J. Rep. (N.S.) Q.B. 9; s. c. Law Rep. 4 Q.B. 117.

able or useful course. The word "place," therefore, in the 16th section, must we think be received with the widest possible signification. It remains then to consider what is the meaning of "known or defined boundary." The Act may (see section 12) be adopted by resolution. First, in corporate boroughs, to which the Public Health Act has not been applied, by a resolution of the council assembled at a meeting held for the purpose. Second, in other places under the jurisdiction of improvement commissioners, by a resolution of the commissioners. And third, in all other places having a known or defined boundary, by a resolution of the owners and ratepayers; and then section 16 points out the course to be adopted with respect to places not having a known or defined boundary. The two first sub-sections of section 12 refer to places having a legal status; first, a borough, and second, a place under the jurisdiction of commissioners, *i.e.*, commissioners appointed by statute. The 3rd sub-section is much more general, and bearing in mind the object of the Act and the provisions of section 16, the word "place" in this sub-section must have at least as extensive a meaning as in section 16. It may therefore, we conceive, apply to a place consisting of portions of different townships or parishes. In *Smith v. Redding* (8), a decision under the Beer House Act (3 & 4 Vict. c. 61. s. 15), Blackburn, J., observed, with reference to the meaning of the word "place," "that it may well be that if a collection of houses has acquired a distinct name, it may be a place within the meaning of the statute," and Lush, J. says, it may be a place of many thousand inhabitants, popularly called a town, made up of several parishes or parts of parishes. What then is the nature of the boundary that is necessary to satisfy the description "known or defined?" If the place is to receive a signification as large as that we have intimated, it cannot be necessary that the boundary should be some legal boundary of the whole enclosed area, as of a legal district, for such a boundary would seldom exist in fact, and no such

qualification as that of "legal" is attached to the phrase. To attribute to the words "known or defined" their literal meaning seems to us to accord best with convenience and with the object which the Legislature had in view, and we think it therefore sufficient if there be an actual known and defined boundary, or one which is physical, visible and notorious, so that there may be no mistake as to the limits within which the Act is to be applied. This we conceive to be on the whole the true meaning of the phrase, "a place with a known or defined boundary," and as we think the boundary of the township of Grasmere answers to this description, we think the Act was properly adopted and made applicable to the whole area encircled by that boundary, including the detached portions of Rydal and Loughrigg. Some argument was presented to us, grounded on the inconvenience that might arise from the detached portions still remaining part of the neighbouring townships of Rydal and Loughrigg, but this inconvenience would equally have existed if the boundary of the district had been settled, including these detached portions, under section 16, which would have been within the power of the Local Government Board, if the boundary were not in fact a known and defined one. When exclusion of any portion included within a known and defined boundary is desired, there is a ready remedy under the provisions of section 17, and in fact proceedings were taken under that section in this very case, though it does not appear that exclusion of the detached portions was asked for. Again, no difficulty arises in this case upon the provisions of section 14, the detached portions of Rydal and Loughrigg having no power alone to claim the adoption of the Act.

On the whole, therefore, we are of opinion that the order sanctioning the adoption and directing the application of the Act was valid, and that this rule must be discharged.

Rule discharged with costs.

Attorneys—Johnson & Weatheralls, for relator;
Sharpe, Parkers, & Co., for defendants.

(8) 35 Law J. Rep. (N.S.) M.C. 202; s. c. Law Rep. 1 Q.B. 489.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

1873. } CRONSHAW v. THE WIGAN
Feb. 4. } BURIAL BOARD.

Burial Fees — Right of Incumbent —
"New Parish" — 58 Geo. 3. c. 45; 59
 Geo. 3. c. 134; 20 & 21 Vict. c. 81. s. 5.

In 1851, the church of St. T. was built and consecrated. In 1852, an order in council under 59 Geo. 3. c. 134. s. 16, authorised services to be performed in the new church, assigned a district to it out of the ancient parish of W., in which it was situated, and granted the incumbent the fees. There was then no burial ground in the district, and the persons dying in it continued to be buried as before in the churchyard of the parish. The plaintiff was appointed incumbent of this church in 1854, and in 1856, a burial ground for the whole parish was consecrated, the district of the new church contributing to the rates for providing it. A new rector of the parish was appointed in 1864:—Held, by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the district of St. T. was a "new parish" within 20 & 21 Vict. c. 81, and that the plaintiff, on the first avoidance of the rectory, was entitled to the burial fees in respect of inhabitants of St. T. buried within the parish.

Error from the judgment of the Queen's Bench in favour of the plaintiff on a Special Case, which was as follows—

The action was for the recovery of fees claimed to be payable by the defendants to the plaintiff for burials in the burial ground provided by the defendants for the borough and township of Wigan, under the provisions of the statutes relating to the burial of the dead, between the 11th September, 1869, and the 23rd March, 1870.

The plaintiff declared for money received by the defendants for the use of the plaintiff, and the defendants pleaded never indebted.

The rectory and ancient parish of Wigan comprises the borough and township of Wigan, and the several outlying townships,
 NEW SERIES, 42.—Q.B.

and until a burial ground was provided for the borough and township, under the statutes relating to the burial of the dead, as after mentioned, the remains of the inhabitants and of such of the outlying townships as had not burial grounds attached to their respective churches, were interred in the churchyard of the ancient parish church, and on all such interments a burial fee was payable by the custom of the parish; and the rector was alone authorised and entitled to perform the rite of burial, and to receive the fees.

In the year 1851 the church of St. Thomas was built and consecrated in the said borough and township of Wigan, as a chapel of ease under the provisions of the statutes 43 Geo. 3. c. 108; 58 Geo. 3. c. 45; and 59 Geo. 3. c. 134, the sentence of consecration reciting that the ground enclosed round the church was not intended for interments.

The plaintiff was appointed incumbent of the church of St. Thomas on the 25th March, 1854.

By an order of her Majesty in council, made on the 11th February, 1852, upon the recommendation of the Commissioners for Building New Churches, under the 16th section of the said statute 59 Geo. 3. c. 134, and under and by virtue of any other power or authority in that behalf, vested in Her Majesty and the said Commissioners, a particular district was duly assigned to the church of St. Thomas, and the order in council authorised banns of matrimony to be published, and marriages, baptisms, churchings and burials to be solemnized and performed in the church of St. Thomas, and directed that the fees to arise therefrom should be paid and belong to the incumbent of such church for the time being. A description of the bounds of the district so assigned was also then duly enrolled in the High Court of Chancery, and registered in the office of the registry of the diocese, as required by the statutes in that behalf, and a copy of the order and of the description of the boundaries so assigned was inserted in the *London Gazette*, on the 24th February, 1852.

The plaintiff contends that from and after the passing of the New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 14, the

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said district so assigned as aforesaid to the said church of St. Thomas, became a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the New Parishes Act, 1843 (6 & 7 Vict. c. 37), but as this is not admitted by the defendants, the parties have agreed to call St. Thomas throughout the remainder of this case a "district," without prejudice to the question which is hereby submitted to the decision of the Court.

There has never been any burying ground belonging to the district of St. Thomas, nor has any vestry or meeting in the nature of a vestry of the district appointed any burial board or provided a burial ground as aforesaid, but the remains of the parishioners and inhabitants thereof continued to be interred in the burial ground of the ancient parish church, until a burial ground was provided by the defendants for the borough and township of Wigan.

The district of St. Thomas does not separately maintain its own poor, but lies wholly within the borough and township of Wigan, which has separate overseers of the poor, and separately maintains its own poor.

In the year 1854, under the provisions of the various statutes relating to the burial of the dead, a burial board for the borough and township of Wigan was duly established, and the said board afterwards duly provided under the said statutes a burial ground for the borough and township.

In the year 1856, the churchyard of the ancient parish church of Wigan was closed by the order of one of Her Majesty's Secretaries of State. The burial ground so provided by the burial board was, with a chapel erected thereon, on or about the 13th of August, 1856, duly consecrated; from which time it became the burial ground for the said borough and township of Wigan, within the meaning, and according to the provisions of the last mentioned statutes.

The district of St. Thomas contributed to the rates, out of which the said last mentioned burial ground was provided. At the time when the said last mentioned burial ground was so provided and conse-

crated as aforesaid, the Rev. Henry John Gunning was rector of the ancient parish of Wigan, but on his resignation the Hon. and Rev. George Bridgeman was, on the 22nd of October, 1864, instituted and inducted to the rectory of Wigan, and has since continued to be rector of the parish.

The plaintiff, as incumbent of the district of St. Thomas, has since the avoidance of the rectory of Wigan next after the passing of the New Parishes Act, 1856, claimed under the statute 20 & 21 Vict. c. 81. s. 5, to be entitled to perform, and has offered to perform, the religious service in the burials in the burial ground so provided by the burial board, of the remains of the parishioners or inhabitants of the district of St. Thomas, and also to be entitled to receive the same fees in respect of such burials as if the said burial ground were exclusively the burial ground of the district of St. Thomas.

From the 24th of February, 1868, until the 10th of September, 1869, the defendants allowed the plaintiff to perform the religious service in the chapel, in the defendants' burial ground, of the remains of the parishioners and inhabitants of the district of St. Thomas, and paid to him the fees arising from the burials, but since the last mentioned date the defendants, in consequence of a claim to the same fees being made by the rector of Wigan, have refused to allow the plaintiff to perform any such religious service in the defendants' burial grounds, and have retained the fees arising from the burial of the remains of the parishioners and inhabitants of the district of St. Thomas, until it shall be determined by the Court whether the plaintiff or the rector of Wigan is entitled to receive them.

The Court upon the above statement is authorised to amend the pleadings, if necessary for determining the questions at issue between the parties, and to draw any inferences of fact which may be necessary to the decision of the case.

The questions for the opinion of the Court are, whether the plaintiff is entitled to perform the service on the burial of the dead in the defendants' burial ground, and to receive the fees above claimed by him.

Bristowe, of the Chancery Bar (*Mac Connell* with him), for the defendants, referred to the statutes mentioned in the case, and cited *Hornby v. Tosteth Park* (1), *Day v. Peacock* (2), and *The Queen v. Walcot* (3).

Manisty (*Forbes* with him), for the plaintiff, cited *Gough v. Jones* (4).

Bristowe in reply.

KELLY, C.B.—We are of opinion that the judgment should be affirmed. Under the provisions of 59 Geo. 3. c. 134, a district had been created and a church built, and various provisions made, and acts done by means of an order in council, which, among other things, provides for the publication of banns of matrimony and the solemnization of marriages, churchings and baptisms, and which confers upon the minister of St. Thomas a right to the fees upon the publication and performance of these offices. Matters remained in this state until the passing of the 19 & 20 Vict. c. 104, on the 29th of July, 1856, and the question which arises in this case, important as it is, is whether the 14th section of the 19 & 20 Vict. c. 104, commonly called Lord Blandford's Act, applies to the present case. We are all of opinion that it does apply. It provides, "Where-soever banns of matrimony and the solemnisation of marriages, churchings and baptisms are authorised to be published and performed, in any consecrated church to which a district shall belong, and the incumbent of which is by such authority entitled to the entire fees arising from the performance of such offices, without any reservation thereout, such district shall become a separate and distinct parish for ecclesiastical purposes." In this case there was a consecrated church and a district, brought into existence under the provisions of 58 Geo. 3. c. 45, and 59 Geo. 3. c. 134, such district not being at the time of the passing of

Lord Blandford's Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which, under the authority of the order in council, was entitled for his own benefit to the entire fees arising from the publication and performance of banns of matrimony, marriages, churchings and baptisms. Now the object of the Legislature was to give to the provisions of this Act a general—I might almost say a universal—operation; and when we find that the language strictly and literally, as well as substantially, applies to St. Thomas's, I am unable to see why it is to be excepted out of the operation of this clause, when it comes strictly within its terms. If this be so, the district became at the time of the passing of the Act a separate and distinct parish for ecclesiastical purposes. Now let us see the further operation upon the case before us of the provisions of 20 & 21 Vict. c. 81. s. 5. We find in it a provision in these terms—"Until a burial ground shall be provided for any new parish, created pursuant to 19 & 20 Vict. c. 104, the incumbent of such new parish shall perform the same duties, and be entitled to the same fees, in respect of the burials of the remains of the parishioners of such new parish in any burial ground provided under the Burial Act, to which such new parish shall have contributed, as if the said burial ground were exclusively the burial ground of such new parish, reserving, however, the rights of existing incumbents." Now this provision strictly and literally applies to the present case, and is sufficient of itself to entitle the plaintiff to the judgment which he claims. I might refer further to the objects of the Legislature in passing Lord Blandford's Act, but any further reference to that Act of Parliament and the object of the Legislature is altogether superfluous, when we remember that this question came before the late Dr. Lushington in the case of *St. Mary's, Shrewsbury, Gough v. Jones* (4); and he then, under similar circumstances, held that the provision of Lord Blandford's Act applied in a new district like the present. With reference to the cases cited by Mr. Bristowe, they were all determined upon the particular circumstances of each case,

(1) 31 Beav. 52; s. c. 31 Law J. Rep. (N.S.) Chanc. 643.

(2) 18 Com. B. Rep. N.S. 702; s. c. 34 Law J. Rep. (N.S.) C.P. 225.

(3) 2 B. & S. 555; s. c. 31 Law J. Rep. (N.S.) M.C. 221.

(4) 9 Jur. N.S. 82.

and in none of them was there any direct construction put upon this clause of Lord Blandford's Act. Upon these grounds we are all of opinion that the judgment of the Court of Queen's Bench should be affirmed.

MARTIN, B.; KEATING, J.; PIGOTT, B.; BRETT, J.; CLEASBY, B.; and GROVE, J., concurred.

Judgment affirmed.

Attorneys—Bell, Brodrick & Gray, for plaintiff;
Gregory, Rowcliffes & Co., agents for T. F. Taylor, Wigan, for defendants.

(In the Second Division of the Court.)

1872. }
May 31. } SMITH v. DABBY.*

Demise of Mines and Minerals—Compensation Clause—Right of Surface Owner to Support.

Declaration for negligently excavating and working mines under and adjacent to land of the plaintiff, whereby the land gave way and sank, and a mill, cottage and other buildings became prostrate and ruinous, and a stream of water was diverted from the plaintiff's land. Plea, that by an indenture of lease made before the plaintiff became possessed of the land as alleged, the owners in fee demised unto certain lessees, whose interest afterwards vested in the defendants, for thirty-eight years from the 25th of March, 1839, all and all manner of veins and seams of coal, ironstone and other stone and minerals of any manner or sort whatsoever, that should or might be found or discovered in or under the land, with full power, liberty and authority to get the coal, ironstone and other stone and other minerals out of all pits already sunk or open, and the like liberty and authority to bore, dig, delve and sink as many other pits as the lessees might think necessary, the lessees making reasonable satisfaction to the owners in fee, their heirs and assigns, and their tenants, for the damage done to them respectively by the surface of their land

* Decided in Easter Term, 1872.

being covered with rubbish or otherwise injured, or as they might sustain as well by the injury done to the lands of the owners in fee in sinking and getting the mines and minerals, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said owners by so doing. The lessees covenanted in case of damage or injury to such buildings to rebuild or repair the same; and also over and besides the immediate damage to stock or crops so damaged, to pay a satisfaction for all damages sustained by the owners in fee after the rate of 40s. per annum for five years from the commencement of the damage, and after that time to pay such a price for the land so damaged as should be settled by arbitration:—Held, that upon the true construction of the lease, the owners in fee granted the absolute right to work the minerals, without regard to injury to the surface, subject only to the obligation to pay compensation according to the covenant.

Declaration.—First count, That the plaintiff was possessed of certain land, and the defendants wrongfully and negligently excavated and worked certain mines under and adjacent to the said land, and dug for and got and took away coals, minerals and earth out of the mines, without leaving proper or sufficient support for the said land, and thereby the land gave way and sank, and the foundations of a certain mill and machinery, and the foundations of a certain cottage, and the foundations of other buildings erected on the land and belonging to the plaintiff, gave way and sank, and the walls of the mill, cottage and other buildings fell, and the mill, &c., became prostrate and ruinous, and the mill became broken and useless; and the plaintiff incurred great expenses in repairing the said mill, machinery, cottage and buildings, and in endeavouring to maintain the same, and in repairing the machinery, and also lost the use of the land, mill, machinery, cottage and buildings for a long time, and was unable to let the same; and thereby also a stream of water, which then flowed over the land to the mill, and was then used to supply water for working the same, was diverted

from the land, and the plaintiff has lost the use of the water.

Second count, that the plaintiff was possessed of land and of a mill and a cottage and other buildings erected and being on the land, and there were then certain foundations of and supporting the mill, cottage and buildings which the plaintiff had of right enjoyed and ought to enjoy, yet the defendants negligently and improperly, without leaving sufficient support, worked certain mines near to and adjoining the land, whereby the said land and the foundations of the mill, cottage and outbuildings sank and gave way, and the mill, cottage and buildings became prostrate and ruinous, and certain machinery of the plaintiffs, fixed in the mill, was broken, and the plaintiff incurred great expenses in endeavouring to repair the mill, cottage, buildings and machinery, and lost the use of the same for a long time, and was unable to let the same, and the same for a long time past have been, and now are, of no use or value to the plaintiff.

Third count, that at the time of committing the grievances in this count mentioned, the plaintiff was possessed of certain land, and of a mill and a cottage and other buildings erected on the land, and was entitled to have the land, mill, cottage and other buildings, and the water, supported by the soil, coal and minerals under and adjacent to the land, mill, cottage and other buildings; and the defendants wrongfully and negligently dug out and removed the soil, coal and minerals under and adjacent to the mill, cottage and buildings, without leaving proper and sufficient support for the land, mill, cottage and buildings, whereby the land, mill, cottage and buildings sank and gave way, and the walls thereof fell, and the mill, cottage and buildings became prostrate and ruinous, and certain machinery of the plaintiff, fixed in the mill, became broken and useless, and the plaintiff incurred great expenses in repairing the mill, cottage and buildings, and in endeavouring to maintain the same, and in repairing the machinery, and lost the use of the mill, cottage and buildings and land for a long time, and was unable to let the same; and the mill, cottage,

buildings and land are now, and for a long time past have been, of no use or value to the plaintiff.

In the fourth and fifth counts the plaintiff sued for injury to his reversion.

Third plea to the first count,—That the land in that count was the land in the third count, repeating the allegations in the tenth plea, and further saying that the acts in the first count complained of were the lawful and reasonable getting by the defendants of coals and minerals out of the mines, in the usual, customary and proper manner, and without any wrongful act or negligence on the part of the defendants.

Tenth plea to first, second and third counts,—That before the plaintiff became possessed of the lands, mill, cottage and other buildings, on the 25th of March, 1817, one Robert Slaney and one Robert Aglionby Slaney, were seized in fee of the land in those counts mentioned, and other land adjacent thereto, and of the mines under the same, being the mines in those counts respectively mentioned, and Robert Slaney and Robert Aglionby Slaney being so seized, did by indenture of the above date, and between them, as lessors, of the one part, Sarah Darby, R. Darby, &c., as lessees, of the other part, demise and lease unto the lessees, for the term of thirty-eight years from the 25th March, 1839, all and all manner of veins and seams of coal, ironstone and other stone and minerals of any manner or sort whatsoever that should or might at any time after the expiration of a certain therein recited lease of the 1st April, 1779, be found or discovered in or under the said land, in those counts respectively mentioned, with full power, liberty and authority for the said lessees, their executors, administrators and assigns, and their agents, colliers, servants and workmen, to get the coal, ironstone and other stone and other minerals, out of all pits already sunk or open, and like power, liberty and authority for them, him or her, to bore, dig, delve and sink as many other pits as they should think necessary, and also to erect gins and engines, and to drive and make soughs, levels and drains, or to amend and repair all such soughs, levels and drains so to be made, and to amend

and repair all such soughs, levels and drains as were already made, which were out of repair and wanted amendment, and as often as the same should be out of repair and want amendment, and to do and cause to be done everything else that might be necessary and needful for the discovering and getting the said coals, ironstone and other stone and other minerals, and to place, stack and lay such coal, ironstone and other stone and minerals, and the rubbish and earth, by raising, digging for and getting the said coals, ironstone and minerals upon the enclosed lands or waste lands of the said lessors, or either of them, from, out of or under which the mines and minerals thereby demised should be gotten, and full liberty, power and authority for the said lessees, their executors, administrators and assigns, to sell, use and consume the said coal, ironstone and other stone and minerals, and to convert the said coal, or such part thereof as they should think proper, into charcoal, they, the said lessees, their executors, administrators and assigns, from and after the expiration of the said lease of the 1st of April, 1779, making reasonable satisfaction to the said lessors, their heirs and assigns, and their tenant and tenants, for the damage done to them respectively by the surface of their land being covered with rubbish or otherwise injured, or as he or they should or might sustain as well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, and converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said lessors, by getting mines of coal, ironstone or other stone, or other minerals under or near to any of the dwelling-houses or other buildings of the said lessors, according to the covenant thereafter contained for that purpose, which covenant was and is in the words following, that is to say—

And, further, that in case any damage or injury during the term hereby granted shall happen to any of the dwelling-houses, cottages or other buildings already erected, or to any dwelling-houses, cottages or buildings to be hereafter erected on the

estate of the said Robert Slaney and Robert Aglionby Slaney, in the parish of Dawley aforesaid, in lieu and stead of any of the present erections or buildings, and not of greater value than the present buildings were when erected, by reason of any coals, ironstone or other minerals, being got under them or any of them, or so near to them or any of them as to occasion such injury or damage, that then the said Sarah Darby, &c., their executors, administrators and assigns, shall and will at their own costs and charges, on six days' notice to them given by the lessors, their heirs or assigns, or their respective tenants, rebuild, repair and find materials and carriage of materials for the building and repairing any such messuages, cottages and other buildings so damaged and injured by the means aforesaid, and put and make such messuages, cottages and other buildings in as good state, condition and repair as they were before such injury or damage was done or happened to them respectively. And further, that they, the lessees, their executors, administrators and assigns shall and will yearly and every year on the 25th of March in each year during the term hereby granted well and truly pay or cause to be paid unto the said Robert Slaney and his assigns during his life, and after his decease to the said Robert Aglionby Slaney, his heirs and assigns, over and besides the immediate damage or injury occasioned to the stock or crops of the tenant or occupier of the lands so to be damaged (which is to be paid for to the said tenant or occupier) a satisfaction for all damages and trespasses which shall be by them sustained, or which hereafter shall be done or committed by the lessees, their executors, administrators and assigns, agents, workmen, carriers or colliers, by getting the said mines and minerals, after the rate of forty shillings per acre per annum for and during the first five years from the commencement of such damage, and so in proportion for any greater or less quantity than an acre. And from and after the expiration of the said term of five years from the commencement of such damage shall and will well and truly pay or cause to be paid to the lessors such a price or value

for the land so to be damaged, as aforesaid, as shall be fixed thereon by two indifferent persons, one to be chosen by each party, and in case such two persons shall not agree, then such a price as shall be fixed by such one person as the two persons so to be appointed as aforesaid shall name as their umpire, whose determination shall be final, the value of each acre of the said land prior to such damage done being reckoned by the arbitrators or umpire at 60*l.* per acre; and on payment of such sum as such arbitrators or their umpire shall so fix, together with interest thereon, after the rate of 5*l.* per cent. per annum, after the expiration of the said term of five years, when the said damage rent of forty shillings per acre is wholly to cease, to the time of the actual payment of the said estimated damage, the lessees shall have the free use, possession and enjoyment of the land which shall be so damaged for the then residue of the said term of thirty-eight years or other further term to be granted as hereinafter mentioned without paying any further consideration for the same by way of rent or otherwise howsoever.

And afterwards, and during the existence of the term, all the estate and interest of the lessees became, and now is, vested in the defendants, and after the granting of the term and subject thereto, the plaintiff became possessed of the land, mill, cottage and other buildings in the different counts mentioned, and the defendants lawfully and properly worked the mines under and according to the terms of the indenture. And that the damage or injury to the land, mill, cottage and other buildings of the plaintiff in the different counts respectively mentioned and therein respectively complained of, happened and accrued by reason of the defendants so working the mines. And that at the time of the doing of the acts by the defendants, and of the accruing of the damage, they always were, and thence hitherto have been, always ready and willing to perform the covenant on their part, and to have the amount of compensation to which the plaintiff might be entitled settled as by the indenture provided and to pay the same, as the plaintiff well knew.

Eleventh plea, as to the fourth and fifth counts of the declaration, that after the granting of the term, and subject thereto, the reversion in the land, mill, cottage and other buildings in the said fourth and fifth counts respectively mentioned became vested in the plaintiff, and except as aforesaid, repeating the tenth plea.

Second replication to the third, tenth and eleventh pleas, that divers of the mill, cottage and buildings in each count of the declaration mentioned are buildings erected since the making of the lease in the pleas respectively mentioned and referred to, and were not erected in lieu or instead of any buildings erected on the land at the time of the making of the lease.

Third replication to the third, tenth and eleventh pleas, that the damage in the different counts of the declaration mentioned, to which the same pleas are pleaded, arose and accrued in consequence and by reason of the defendants after the erection of the mill, machinery, cottage and buildings in those counts mentioned, having excavated, gotten and removed the minerals under and near to the lands in those counts mentioned, while the plaintiff was possessed as in those counts mentioned, without leaving proper and sufficient support in that behalf, and the damage would not have happened or accrued if the defendants had left reasonable and proper support for the land in those counts mentioned.

Demurrers to the third, tenth and eleventh pleas, on the ground, amongst others, that the alleged lease upon which they were based did not expressly or impliedly deprive the plaintiff of the right to have his land supported, and that the covenants set out merely gave a cumulative remedy.

Demurrers to the second and third replications, on the ground, amongst others, that the defendants were authorised by the lease to work the minerals without leaving support to the land and buildings mentioned.

Dowdeswell (Shaw with him), for the plaintiff, cited *Harris v. Ryding* (1), *Hum-*

(1) 5 *Mec. & W.* 60; s. c. 8 *Law J. Rep.* (N.S.) Exch. 181.

phries v. Brogden (2), *Rowbotham v. Wilson* (3), *Smart v. Morton* (4), *Roberts v. Haines* (5), *Stroyan v. Knowles* (6), *Berkley v. Shafto* (7), *Dugdale v. Robertson* (8).

Bosanquet for the defendants, relied upon *Roberts v. Haines* (5) and *Rowbotham v. Wilson* (3).

Dowdeswell in reply.

BLACKBURN, J.—I think our judgment ought to be for the defendants. There can be no doubt the right of a grantee of minerals held as a separate tenement, with regard to the surface, is accurately laid down in *Rowbotham v. Wilson* (3) by Lord Wensleydale—"There is no doubt that, *prima facie*, the owner of the surface is entitled to the surface itself and all below it *ex jure naturæ*; and those who claim the property in the minerals below, or any interest in them, must do so by some grant from, or conveyance by, him, or it may be from the Crown, as suggested by Lord Campbell in the case of *Humphries v. Brogden* (2). The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Prima facie*, it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved as a necessary incident. It is one of the cases put by Shepherd (*Touchstone*, chap. 5, p. 89) in illustration of the maxim, *Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*, that by the grant of mines is granted the power to dig them. A similar presumption *prima facie* arises that the owner of the mines is not to injure the owner of the soil above by getting them, if it can be avoided. But it rarely hap-

pens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired; and then the only question would be as to the construction of that deed, which may vary in each case." In that case there had been separate allotments under an Inclosure Act, of land and the mines under it, and Pears, the allottee of the surface, had executed the award, which provided that the mines might be worked, and Lord Wensleydale held that this execution of the award would operate as a grant of the right to work the mines, saying, "Pears would still be bound by the deed which he executed, which would operate as a grant of the right to win the coals in such a manner as might injure the superjacent land."

I take it that this case, which is a decision of the highest Court, is binding upon us, and we have to find out, from the construction of the deed before us, whether the parties intended that the mines and right to work them should be granted absolutely, or only subject to the grantor's continued right of support. *Prima facie*, it must be assumed that the grantee of the minerals is to work them so as not to injure the surface, but the question is whether such a presumption is excluded by the present deed. Now, looking at this deed, does it sufficiently appear what the intention of the parties was? It appears that at the time of the grant there were houses on part of the surface, and the deed gives a power to work the mines, "making reasonable satisfaction to the lessors, their heirs and assigns, and their tenant or tenants, for the damage done to them respectively by the surface of their land being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, and converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling houses or other buildings of the said lessors, by getting mines of coal, ironstone, or other stone, or other minerals under or near to any of the dwelling houses or other buildings of the said lessors, according to the covenant thereafter con-

(2) 12 Q.B. Rep. 739; s. c. 20 Law J. Rep. (N.S.) Q.B. 10.

(3) 8 H.L. Cas. 348; s. c. 30 Law J. Rep. (N.S.) Q.B. 49.

(4) 5 E. & B. 30; s. c. 24 Law J. Rep. (N.S.) Q.B. 260.

(5) 6 E. & B. 643; s. c. 25 Law J. Rep. (N.S.) Q.B. 353. In error, 7 E. & B. 625; s. c. 27 Law J. Rep. (N.S.) Exch. 49.

(6) 6 Hurl. & N. 454; s. c. 30 Law J. Rep. (N.S.) Exch. 102.

(7) 15 Com. B. Rep. N.S. 79.

(8) 3 Kay & J. 695.

tained." Does this mean an absolute grant without provision as to support? Now, where there is a grant of minerals, whether this is a grant of the right to interfere with the surface is a question of intention, and *prima facie*, you are to work the minerals so as to support the surface. Here houses have been built on part of the surface, and the question is, does the deed say you may work the minerals absolutely? I think that nothing turns on the use of affirmative or negative words. If the owner of a horse say, "You may take the horse for 20l.," the person taking the horse and paying the money could not be sued for trespass in taking the horse, because it sufficiently appears that there was an intention to buy and sell the horse. So here, I think, it does sufficiently appear that the lessee of the minerals was to get them, though at the risk of injuring the surface. *Prima facie*, the words of the covenant mean that the lessor is to be compensated by the lessee for not leaving sufficient support for the houses on the surface. The award amounts to this—you have purchased coals on these terms, that if you take away coals which support you must pay compensation to the tenants, and a right to take away minerals damaging the surface is, if necessary, sold to the lessee, upon the terms that for five years he shall pay a fixed compensation. The grant is, you shall have the minerals, not on the usual terms, but with a right to take them absolutely, but if you do damage in taking them away you must pay compensation. I think, therefore, that the pleas are good and the replication bad.

MELLOR, J., concurred.

LUSH, J.—I am of the same opinion. It is well established by the cases that a grant of minerals is to be read as if it were a grant of all minerals that can be taken away without disturbing the surface. If compensation clauses are contained in the grant, they must be read as if they were confined to acts on the surface, the presumption being that the grantor did not intend to be deprived of the support for the surface soil. But the words here cannot be read so as to be limited to acts done on the surface. The grant is expressed in general terms, and the compensation clause is as follows—"making reasonable satis-

NEW SERIES, 42.—Q.B.

faction for injury to the lands of the lessors," &c. Had it stopped there I should have agreed with Mr. Dowdswell that the words might have been confined to injury done on the surface; but the words which follow as to injury to dwelling houses or buildings cannot be so limited. The parties clearly contemplated that the mining operations authorised by the lease might result in injury to the surface and the houses upon it. Taking the whole of the deed together, I think that it is clear that what the parties meant was that the lessees should have a right to remove the minerals, even to the extent of injuring the surface, provided they made compensation according to the grant.

Judgment for the defendants.

Attorneys—C. J. Holmes, for plaintiff; W. Potts, agent for Potts & Son, Broseley, for defendants.

1873. }
Jan. 22. }

BAILEY, *appellant v.*
WILLIAMSON, *respondent.*

Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), ss. 4, 9, Sch. 1, Regulations 8 & 19—Rules not laid before Parliament—Right of Meeting in Royal Parks.

By the Parks Regulation Act, 1872, 35 & 36 Vict. c. 15 (passed June 27, 1872), s. 4, "If any person does any act in contravention of any regulation contained in the first schedule annexed hereto, he shall, on conviction by a Court of summary jurisdiction, be liable to a penalty not exceeding five pounds; but the regulations contained in the said schedule shall not take effect until the expiration of one calendar month after the passing of this Act." By sec. 9, "Any rule made in pursuance of the first schedule to this Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament; and if any such rules shall be disapproved of by either House of Parliament within one month after the same shall have been so laid before Parliament, such rules, or such parts thereof as shall be

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disapproved of, shall not be enforced." By Regulation 8 in schedule 1, "No person shall deliver, or invite any person to deliver, any public address in a park, except in accordance with the rules of the park;" and by Regulation 19, "Rules of the Park" mean rules made by the Ranger as to matters within his jurisdiction, and as to other matters, rules made by the Commissioners of Works and Public Buildings.

Rules for Hyde Park were made and published on the 1st of October, 1872, signed by the Ranger and under the seal of the Commissioners of Works. By rule 11, "No public address may be delivered, except within forty yards of the notice-board on which this rule is inscribed." By rule 13, "No public address may be delivered unless a written notice of the intention to deliver the same, signed with the names and addresses of two householders residing in the metropolis, be left at the office of the Commissioners of Her Majesty's Works and Public Buildings, at least two clear days before: such notice must state the day and hour of intended delivery. After such a notice has been received, no other notice for the delivery of any other address on the same day will be valid."

The appellant, in the November following,

and before the meeting of Parliament, delivered a public address in Hyde Park, more than forty yards from a notice-board on which the rule above mentioned was inscribed, and having been summoned before a police magistrate was convicted and fined:—

Held, that the conviction was right, as it was the intention of the legislature that the rules should come into operation in the recess, and before the approval of Parliament had been obtained, and that in case Parliament should disapprove of them, they should cease to be further enforced; that the rules were sufficiently authenticated by having the signature of the Ranger and the seal of the Commissioner attached to the same copy; that they were within the jurisdiction of either the Ranger or the Commissioner; and that there was nothing in section 11 which prevented the appellant from being convicted, as at the date of the act there was no right of way or of holding public meetings in Hyde Park.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. p. 49.]

END OF HILARY TERM, 1873.

CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF QUEEN'S BENCH.

EASTER TERM, 36 VICTORIÆ.

1873. }
Jan. 17. }
April 22. } LAWRENCE v. JENKINS.

*Negligence—Obligation to repair Fence—
Escape of Cattle—Right to Notice of Fence
being out of Repair.*

The plaintiff and the defendant were the occupiers of adjoining closes of land separated by a fence, which was situated on the defendant's close, and was the property of the defendant. There was evidence that for more than forty years the fence had been repaired whenever repairs were necessary by the owner and occupiers of the defendant's land, and that on several occasions the fence had been repaired by the defendant and his predecessors in title upon notice from the occupier for the time being of the plaintiff's close. The defendant sold the fallage of the wood on his close to one H., who proceeded to fell the trees, and some of his servants felled a tree in so negligent a manner that it caused a gap in the fence, through which the plaintiff's cattle entered the defendant's close, and having eaten some of the foliage of a yew tree there, died in consequence. In an action in the County

Court the Judge found as a fact that there was an obligation on the part of the defendant to keep the fence in repair for the purpose of preventing cattle lawfully in the plaintiff's close from escaping into the defendant's close, and that the escape of the cattle was caused by the negligence of the servants of H., but that the defendant had not received notice that the fence was broken down. Upon these facts the Judge held that the defendant was not responsible for the injury to the plaintiff:—Held, that the decision was wrong, as it appeared from the evidence that the defendant was bound at his peril at all times to maintain the fence and without notice to repair it, and the damage done to the cattle was proximately due to the defective state of the fence.

This was an appeal from the judgment of the County Court Judge of Monmouthshire, holden at Newport.

The action was to recover 40*l.* damages against the defendant for the loss of two cows of the plaintiff under the circumstances hereinafter mentioned.

The plaintiff stated that the plaintiff claimed 40*l.*, the damages sustained by

reason of two of his cows being killed from eating the foliage of a yew tree which had been then recently felled in a wood of the defendant which adjoined the plaintiff's land, and into which wood the cows escaped from the plaintiff's land in consequence of the neglect of the defendant to repair a fence belonging to him dividing the wood and land, and which fence the defendant of right ought to maintain in repair.

During all the time hereinafter mentioned, the plaintiff was possessed of and occupied a close of land, part of a farm, and the defendant was possessed of and occupied another close of land (being woodland) adjoining the close of the plaintiff and separated therefrom by a fence which was situate on the defendant's close, and was the property of the defendant.

In October, 1871, the defendant sold the fallage of the wood on his close to one Higgins, who, accordingly, by his servants, felled the trees and underwood growing thereon; but the defendant did not part with any portion of the soil of his close, which he continued to occupy as aforesaid.

A short time before the 27th of December, 1871, some servants of Higgins felled a beech tree standing near the fence in such a manner that it fell over the fence and broke down a large part thereof. The beech tree was felled in a negligent manner.

Whilst the beech tree lay on the fence, the branches of the tree filled up the gap made by its fall; but a few days afterwards those branches were removed by some servants of Higgins, and after they were so removed, until the 27th of December, there was a considerable gap or opening in the fence sufficiently large for cattle to pass from one close to the other through the same; during all which time the fence was out of repair, but it was not brought to the knowledge of the defendant or his bailiff that the fence had been so broken.

On the 26th of December some servants of Higgins felled a certain yew tree, being a few yards from the fence, and near the spot where the beech tree had been felled. The yew tree was

allowed to remain during the night of the 26th in the place where it had been felled.

During the night of the 26th, the plaintiff's cows then being lawfully upon the plaintiff's close, escaped through the gap or opening in the fence out of the close of the plaintiff into that of the defendant, and in the morning of the 27th they were found on the close of the defendant near the yew tree.

About mid-day on the 27th the cows died, and the County Court Judge found that they died from eating some of the foliage of the yew tree, which, when eaten to excess, is destructive to cattle. At that time of the year there was very little verdure or green food in the fields, and the cows, from being foddered on dry food, were the more inclined to browse the green foliage.

Evidence was given that for more than forty years the fence had been repaired whenever repairs were necessary by the owner and occupiers of the defendant's wood, and also that on several occasions during the last nineteen years the fence had been repaired by the defendant and his predecessors in estate, upon notice being given to him or his bailiff by the occupier for the time being of the plaintiff's close; whenever the fence was so repaired it was for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of the same into the close of the defendant.

It was contended for the plaintiff, first, that the facts established an obligation on the part of the defendant to repair and keep in repair the fence for the purposes aforesaid; secondly, that the damage was not too remote to enable the plaintiff to maintain this action; thirdly, that the defendant was liable in this action. Each of these points was contested by or on behalf of the defendant, who also contended that the damage was attributable to the felling of the yew tree, relying on *Butler v. Hunter* (1).

The Judge found as a fact that there was an obligation on the part of the defendant to repair and keep in repair the

(1) 7 Hurl. & N. 826; s. c. 31 Law J. Rep. (N.S.) Exch. 214.

fence, for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of the same into the close of the defendant.

He also considered that the damage was not too remote to enable the plaintiff to maintain this action.

And he found as a fact that the escape of the cows from their own pasture was caused by the negligence of the servants of Higgins, either in not so felling the beech as to prevent its falling on the hedge, or, if that was not preventible, in not temporarily fencing round the gap until the tree could be moved, and the gap be properly stopped; and he was of opinion that it was the duty of Higgins to so cut and remove the wood as not to injure the rights of the plaintiff. He also found that neither defendant nor his bailiff, to whom the management of this woodland was entrusted, received notice of the fence having been broken down, and he held, on the authority of *Longmeid v. Holiday* (2), and *Butler v. Hunter* (1) that Mr. Higgins, and not the defendant, was responsible for the loss of the cows, as the result of his servants' negligence, and directed a nonsuit to be entered.

In case of this decision being reversed on appeal, he assessed the plaintiff's damages at 40*l.*

The question for the opinion of the Court of Queen's Bench was, whether the defendant was liable in this action.

Herschell (*Petheram* with him), for the appellant.—The nature of the defendant's obligation to repair the fence, as found by the County Court Judge, is described in *Gale on Easements*, 4th edit. p. 460, as "a spurious kind of easement, obliging an owner of land to keep his fences in a state of repair, not only sufficiently to restrain his own cattle within bounds, but also those of his neighbours, and rendering him liable for any injury which his neighbours' cattle may sustain in consequence of the non-repair of the fences, which, unless an easement had

been acquired, he clearly would not be." It is no excuse for the defendant that some person to whom he has conceded certain rights has allowed the fence to get out of repair. The defendant has his remedy over against Higgins, but the plaintiff had no control over any one in the defendant's close, and was unable to prevent the mischief. The case of *Fletcher v. Rylands* (3) is an authority to shew that if the defendant is bound to keep his close in such a condition as not to injure that of his neighbours, it is no defence that he has employed a competent contractor. It is unnecessary to raise any question as to whether Higgins and those whom he employed were the defendant's servants. He cited *Bullen and Leake's Precedents of Pleadings*, p. 329.

Michael, for the defendant.—It is true that the case finds that there was an obligation to repair the fence on the part of the defendant; but a defect in the fence caused by the mere collateral act of a stranger is no breach of this obligation. It is not found in the case that any reasonable time had elapsed between the injury to the fence and the accident to the plaintiff's cows. In *Hole v. The Sittingbourne and Sheerness Railway Company* (5) Pollock, C.B., says, where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorised that act, the remedy is against the person who did it.

[COCKBURN, C.J.—In what sense do you use the word "collateral?"]

The defendant merely sold the trees, which he had a perfect right to do. The breaking of the fence was collateral in this sense, that it was not incident to the engagement with Higgins. There is no proof that there was any reasonable opportunity of repairing the fence in the time between the removal of the branches and the entry of the cattle. He cited *Boyle v. Tamlyn* (6).

Herschell in reply.

Cur. adv. vult.

(2) 6 Exch. Rep. 761; s. c. 20 Law J. Rep. (N.S.) Exch. 430.

(3) 4 Hurl. & C. 263; s. c. 35 Law J. Rep. (N.S.) Exch. 154.

(5) 6 Hurl. & N. 497; s. c. 30 Law J. Rep. (N.S.) Exch. 81.

(6) 6 B. & C. 329.

The judgment of the Court (7) was, on April 22nd, read by—

MELLOR, J.—The only point in this case as to which we felt any degree of hesitation at the time of the argument was the question whether or not the defendant was entitled to a reasonable time to repair the fence after he might or ought to have had notice that it had been broken down. For, assuming that the obligation to which he was subject was to maintain at all times, and without notice to repair it, a sufficient fence for the benefit of the plaintiff's close, we had no doubt that the learned Judge of the County Court was wrong in holding that the defendant was not legally responsible for the loss of the plaintiff's cows. We concur in opinion with the learned Judge that the damage was not too remote, but we think that the cases cited by him—*Longmeid v. Holliday* (2) and *Bulter v. Hunter* (1)—are inapplicable; and without expressing any opinion as to the liability of Higgins, we are of opinion that if the obligation to maintain the fence be such as we have assumed, the defendant would be liable in this action. On further consideration we have come to the conclusion, upon the evidence set forth in the case, that the defendant was bound, at his peril, to maintain at all times, and without notice to repair it, a sufficient fence; and that, except in the case of damage by the act of God or *vis major*, he would be answerable for damage sustained by cattle escaping from the plaintiff's close by reason of the defective state of the fence, and proximately due to that cause. At common law the owners of adjoining closes are not bound to fence either against or for the benefit of each other; but in the absence of fences, each owner is bound to prevent his cattle or other animals from trespassing on his neighbour's premises. By prescription, however, a landowner may be bound to maintain a fence upon his land for the benefit of the occupier of the adjoining close. This obligation is described by Gale, in his work on Easements (4th edit. p. 460),

citing *Star v. Rookesby* (8) and *Boyle v. Tamlyn* (6), as in the nature of a spurious easement affecting the land of the party who is bound to maintain the fence. A party entitled by prescription to the benefit of the fence might formerly have compelled the adjoining owner to repair it by means of a writ of *de curia claudenda* (*Fitzherbert, Nat. Brev.* 127), and have recovered damages as well for the non-repair; and a plea in an action of trespass for injury done by cattle that the plaintiff is bound by prescription to fence against the defendant's cattle, is a good plea—*Nowel v. Smith* (9); the party bound by prescription to maintain the fence being answerable to the owner for whose benefit it is maintained for all damage reasonably attributable to its defective condition. It was held, therefore, in an *Anonymous Case* (10) that where a horse of the plaintiff escaped into the defendant's field through defect of a fence which the defendant was bound to maintain, and was killed by falling into a ditch in the field, that the defendant was liable; and in a later case, *Rooth v. Wilson* (11), that it made no difference that the plaintiff was only a gratuitous bailee of the horse which escaped and was killed. The same view of the law was acted upon in the case of *Powell v. Salisbury* (12), where the defendant was held liable for the loss of cattle which escaped from an adjoining field through a defective fence which he was bound to repair, and were killed on his premises by the falling of a hay-stack. In all these cases, however, the prescription to maintain and repair obviously implies the pre-existence of the fence, and the right consequently to have it always existing as a fence; in other words, in a condition sufficient both to prevent the cattle of the owner entitled to it from escaping out of his close and also to protect him from trespasses by his neighbour's cattle, and renders it, we think, incumbent on the party on whom the prescriptive obligation is imposed to re-

(8) 1 Salk. 335.

(9) Cro. Eliz. 709.

(10) 1 Vent. 264.

(11) 1 B. & Ald. 59.

(12) 2 You. & J. 391.

(7) Cockburn, C.J.; Mellor, J.; and Archibald, J.

pair it in time to prevent its becoming defective, and subjects him to all risks of injury that may be done to it by strangers and trespassers. We think, therefore, that as the true nature of the prescription is that the defendant was bound at his own risk to have a sufficient fence always existing, he was liable to the plaintiff notwithstanding he had no knowledge of the injury done to the fence, and consequently that the decision of the County Court should be reversed, and judgment given for the plaintiff.

Judgment for the plaintiff.

Attorneys—Jones & Starling, agents for Cathcart & Vaughan, Newport, Monmouthshire, for plaintiff; White & Sons, for defendant.

1873. { DIE ELBINGER ACTIEN GESELL-
April 18. { SCHAFT FÜR FABRICATION
VON EISENBAHN-MATERIEL v.
CLAYE.

Principal and Agent—Foreign Correspondent—Commission Merchant—Right of Principal against Third Person.

Where a foreign correspondent instructs his English agents to order goods for him in this country, the person contracting with the agent to supply such goods is not, in the absence of express agreement, although he knew for whom the goods were intended, liable to an action for breach of his contract at the suit of the principal.

Declaration by the plaintiffs, a German corporation, for breach of an agreement on the part of the defendant to deliver a number of Russian wheels and axles. Special damage that the plaintiffs were thereby prevented from fulfilling a contract with a Russian railway company, and incurred penalties, &c.

Second plea—denial of the agreement. Joinder of issue.

At the trial before Mellor, J., at the London Sittings after Hilary Term,

1872, it appeared that the plaintiffs were a German company, formed for the manufacturing of railway carriages and rolling stock, and in December, 1872, entered into a contract with a Russian railway company for the supply to them of 1,000 covered railway waggons. Five hundred of the waggons were to be delivered before the 1st of May (old style), and the plaintiffs agreed to pay two roubles per day for each waggon not delivered by the stipulated time. In order to fulfil their contract they instructed Messrs. Seebeck, Wolff & Co., their London agents, to procure the wheels and axles from ironfounders in England. In January, 1872, Mr. Hambruck, one of the directors of the plaintiffs' company, came to England, and was present at an interview between Mr. Seebeck and the defendant, which ended in the defendant writing different memoranda, one of which was as follows:

"Mr. Claye also offers to supply 150 sets of feet Russian wheels and axles, five feet gauge, with iron tyres and axles, but cast-iron bosses, to be delivered during February and March this year, at the price of 31*l.* per set of four wheels and two axles, delivered f.o.b. in Hull, less 2½ per cent. commission, payment in three months, banker's bill (at par), or 1½ per cent. discount for cash payment fourteen days after shipment from Hull.

"Three years' guarantee.

"S. J. Claye.

"This offer to remain open until Saturday, the 3rd of February."

The defendant was informed at this interview of the Russian contract and of the penalties to which the plaintiffs would be liable if it were not fulfilled.

On the 3rd of February Seebeck & Co. telegraphed to defendant—

"We confirm order for 150 sets of wheels and axles (Russian pattern), with cast-iron bosses, at your price of 31*l.*, less 2½ and 1½, delivered f.o.b. in Hull during February and March this year, with your guarantee for the wheels and axles of three years.

"Seebeck, Wolff & Co."

And on the same day they wrote a letter to the defendant confirming the telegram. The defendant did not deliver the wheels

and axles at the time appointed, and owing to the delay, the plaintiffs were compelled to pay a large sum in respect of the penalties under the Russian contract. At the close of the plaintiffs' case it was objected that there was no proof of a contract between them and the defendant.

The learned Judge left to the jury the question whether the defendant's contract was made with Seebeck & Co. or the plaintiffs.

The jury found a verdict for the defendant.

Butt (Cohen with him), now moved for a new trial on the ground of misdirection, and that the verdict was against the weight of evidence. It is not disputed that Seebeck & Co. might have sued the defendant, but the plaintiffs as principals were also at liberty to sue him, and the learned Judge ought to have directed the jury that either the plaintiffs or Seebeck & Co. might have maintained this action. In *Railton v. Hodgson* in a note to *Addison v. Gandasequi* (1), Mansfield, C.J., is reported to have said—"Suppose a principal authorises a factor to sell goods, and he sells in his own name, the principal may call upon the vendee for payment."

[BLACKBURN, J.—This was a contract between the defendant and Seebeck & Co. who were commission agents acting for a foreign correspondent. Seebeck & Co. had no authority to pledge the credit of the plaintiffs, and there was no actual privity between the plaintiffs and the defendant.]

In *Armstrong v. Stokes* (2), Blackburn, J., thus states the law—"It is we think too firmly established to be now questioned, that where a person employs another to make a contract of purchase for him, he as principal is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal though in fact he was not." It follows that the plaintiffs, if they had failed to pay the defendant for his goods might have been sued directly by

him and by a parity of reasoning they are entitled to sue him for the non-delivery of these goods.

BLACKBURN, J.—I think that no sufficient case has been made out for granting this rule. The facts of the case are that Seebeck & Co. received instructions from the plaintiffs, their foreign correspondents, to order a quantity of wheels and axles in England. The defendant offered to execute this order, and Seebeck & Co. themselves accept this offer. Mr. Butt has contended that an agent may enter into a contract binding both him and his principal, and there can be no doubt that this is so, but it has been long settled that where a foreign principal instructs a commission merchant to execute an order for him in this country, that there is a usage so prevalent as to amount to law, by which no privity of contract is established between the foreign correspondent and the persons contracting with his agent. This is distinctly pointed out in *Armstrong v. Stokes* (2). So far, therefore, from thinking that my brother Mellor was wrong in leaving the question of contract or no contract to the jury, my only doubt is whether he ought not to have directed them that there was no evidence of any such contract. It is therefore impossible to say that the verdict was wrong.

MELLOR, J., and LUSH, J., concurred.

Rule refused.

Upon a subsequent day application was made for leave to appeal, but this was refused, Blackburn, J., saying that the law was now well settled.

Attorneys—Thomas & Hollams, for plaintiffs;
F. T. Dubois, for defendant.

(1) 4 Taunt. 576.

(2) 41 Law J. Rep. (N.S.) Q.B. 253, 256.

[IN THE HOUSE OF LORDS.]

1873. } THE TAFF VALE RAILWAY COMPANY
May 12. } V. MACNABB.

Covenant—Construction—Limitation of Covenant in its Terms General—What is a Branch of a Railway—Leased Line.

The Taff Vale Railway obtained a lease from the trustees of the Bute Docks at Cardiff of land which they required for the purposes of their railway. The lease was for 250 years. With a view to securing that the proposed railway should not be used so as to take custom from the docks in which they were interested, the trustees inserted a covenant in the lease, on the part of the railway, that the company, so far as they were able, should cause all minerals which should be conveyed upon their line, or any part or branch of it, for shipment, to be shipped into vessels in the Bute ship canal (West Bute Dock), or in some basin or cut thereto belonging. Also, that when any minerals, &c., which should have been conveyed along the Taff Vale Railway, or any part or branch thereof, should be shipped into any vessel in any dock or basin whatsoever other than the said Bute ship canal (West Bute Dock), or in some dock, basin, or cut belonging thereto, the Taff Vale Railway Company should pay to the owners of the said Bute Ship Canal for the time being the same wharfage dues in respect of such minerals as would have been payable for the same if such minerals had been shipped at the said Bute Ship Canal; also the same lockage dues in respect of every vessel which should enter into such other dock or basin as would have been payable by the owner of such vessel if it had entered into or passed out of the Bute Ship Canal. The covenant extended as well to minerals imported as to those exported. After the line of railway had been constructed on the land so leased to the Taff Vale Railway Company, the company took a lease of another line (the Penarth Railway) which terminated at Penarth Docks on the south-west side of the river Ely, the Bute Docks being on the north-east side of that river. The Penarth Docks and the Penarth Railway were one concern; the whole was leased by the Taff Vale Railway Company. The two were connected at a station on the Taff Vale Railway:—Held, that the Penarth Railway

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was not a part or branch of the Taff Vale Railway; that the words in the covenant, "any dock or basin whatsoever," must be controlled by some limitation, and so controlled, the covenant must be confined to any dock or basin in connection with the Taff Vale Railway or some part or branch of it terminating in or at a dock or basin, and that as the Penarth Railway was not a part or branch of the Taff Vale Railway, the covenant did not apply to minerals shipped or unshipped at Penarth Harbour, though they were carried for a certain distance along the Taff Vale Railway.

This was an appeal, on a joint case, from a judgment of the Exchequer Chamber reversing one of the Court of Queen's Bench. The action was brought in the names of the trustees of the will of the late Marquis of Bute to recover damages for alleged breaches of covenants contained in an indenture of lease made to the appellant company in 1847 for a term of 250 years of certain land, on which the appellant company afterwards constructed a line of railway, and which land was situate at Cardiff, on the east side of a dock belonging to the Marquis of Bute, called the West Bute Dock. The following are the material facts of the case as stated in the Special Case agreed upon between the parties.

In 1840 the Marquis of Bute constructed, under the powers of divers Acts of Parliament, the Bute Dock at Cardiff. By these Acts the Marquis was authorised to receive rates and duties upon vessels passing into or out of the dock, and also to construct wharves, quays and landing places, and to receive additional rates and charges in respect of minerals, merchandise or other goods landed or loaded upon or from such wharves, quays and landing places. The appellants in 1836 were empowered by Act of Parliament to make a railway from Merthyr Tydfil to Cardiff, terminating near the west side of Bute Dock, together with a branch to a place called Cogan Pïl, on the west bank of the river Ely. At the time of the date of the lease upon which the questions arose, the Taff Vale Company had a small dock near to their terminus. The Taff Vale Company intended to construct shipping

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paces at or near to Cogan Pill, which would probably have diverted some of the traffic from the Bute West Dock. They were desirous of forming a branch railway to the east side of the Bute West Dock, and of obtaining on this side of the dock wharfage and other accommodation there for shipping and unshipping goods and minerals conveyed by or along their railway. In this state of circumstances an agreement was entered into between the Marquis of Bute and the Taff Vale Company, by which the company agreed to abandon the formation of the Cogan Pill branch of their railway, and the Marquis agreed to grant to the company a lease, which was afterwards effected by an indenture of the 1st December, 1849. The agreement contained the following clause—"The Taff Vale Railway Company to bind themselves to ship all goods coming or going by the railway as far as they shall be enabled at the Bute Docks, but under any circumstances the company are to include, in calculating the amount payable to Lord Bute, wharfage and lockage dues on all goods exported or imported at the railway dock adjoining or in the terminus at the same rates as on goods exported or imported at the Bute Docks, whether the Taff Vale Railway charge such rate or not."

In 1848 the Marquis of Bute died, and in the following year a lease purporting to carry out the above agreement was executed between the trustees of the will of the late Marquis and the company.

The lease was granted under the authority of an Act of Parliament, 9 & 10 Vict. c. cccxciii. It was for a term of 250 years of certain lands on the east side of the West Bute Docks, and of certain wharves and quays there, with a reddendum (amongst other things) of a rent or royalty of the yearly sum of 15*l.* lawful money of Great Britain for every 10,000 tons of minerals, goods and merchandise which should, beyond or exceeding 100,000 tons for that particular year, be in each or any year conveyed along or upon any part of the branch railway to be constructed and maintained upon the said piece of land and premises therein described and demised, and whether such minerals, goods or merchandise be conveyed to or

from the said Bute Ship Canal or the wharves therein. The lease contained the following covenants on the part of the railway company, viz., that the company and their successors should from time to time, and at all times during the continuance of the demise, "cause and procure, so far as they should be able, all minerals, merchandise and other goods which shall be conveyed upon or along the Taff Vale Railway, or any part or branch thereof, for the purpose of being brought to sea coast for shipment to be shipped into vessels in the Bute Ship Canal (West Bute Dock), or in some dock, basin or cut belonging thereto." Then follows the covenant upon which this litigation arose: "And also that when and so often from time to time during the continuance of the said term as any minerals, merchandise or other goods which shall be or have been conveyed or transported upon or along the said Taff Railway, or any part or branch thereof, shall be shipped or unshipped, loaded or unloaded into, upon or out of any ship, boat, barge, craft or other vessel in the dock or basin now belonging to the said railway company, situate at or adjoining their terminus, or in any basin, dock, canal or cut whatsoever other than the said Bute Ship Canal (West Bute Dock), or some dock, basin or cut belonging thereto, they, the said Taff Vale Railway Company and their successors, shall and will, nevertheless, pay or cause to be paid to the said Onesiphorus Tyndall Bruce and James Munro Macnabb, their executors, administrators, or assigns, or other the owner or owners for the time being of the said Bute Ship Canal, the same aforesaid several wharfage dues for and in respect of all and every such minerals, merchandise and other goods as would have been payable for the same respectively under the covenants in that behalf hereinbefore contained if such minerals, merchandise or other goods had been actually shipped or unshipped, loaded or unloaded in or at the said Bute Ship Canal, and also the same lockage dues for in respect of every ship, boat, barge, craft or other vessel which shall enter into or pass out of the said railway dock or such other basin, dock, canal, or cut as aforesaid as

would have been payable by the owner or owners of such ship, boat, barge, craft or other vessel if the same had entered into or passed out of the said Bute Ship Canal."

By an Act of Parliament passed in the year 1856, the Ely Tidal Harbour and Railway Company was empowered to make a railway from the Taff Vale Railway, $5\frac{1}{4}$ miles from Cardiff, terminating on the north-east bank of the river Ely, and to convert part of the river Ely into a tidal harbour. By a subsequent Act, the Ely Company was changed to the "Penarth Harbour, Dock and Railway Company," and they were empowered to construct certain railways and a dock on the river Ely between Cogan Pill and Penarth Head Inn. Under these Acts a dock called the Penarth Dock, and the railways thereby authorised, were constructed by the Penarth Company. The railways consist of a main line and two branches, one of which leads from the Penarth Dock and the other from the Penarth Tidal Harbour. By an Act of Parliament passed in 1863, the Penarth Company were empowered to grant, and the Taff Vale Company to accept, a lease of the undertaking of the Penarth Company, in conformity with an agreement scheduled in the Act. The Taff Vale Company accordingly took a lease of the undertaking of the Penarth Company for 999 years. Since this lease the Taff Vale Company had been conveying minerals and other goods along the Taff Vale Railway to and upon the main line of the Penarth Railway and upon the branches of the Penarth Dock and the Harbour. The main question raised by the action and argued on this appeal was, whether minerals and other goods conveyed to the Penarth Dock and Harbour, partly over the Penarth line, though principally over the Taff Vale Railway, could be held to be minerals and goods conveyed or transported upon or along the Taff Vale Railway, or any part or branch thereof, to be shipped or unshipped, &c., in the dock or harbour now belonging to the railway company, or in any basin, dock, canal or cut whatsoever other than the said Bute Ship Canal, or some dock, &c., belonging thereto.

The Court of Queen's Bench (1) had given judgment in favour of the railway company on the ground that as to the covenant that the company would, so far as they should be able, cause or procure minerals, &c., conveyed for shipment along their line to be shipped at the Bute Dock, there was no evidence as to the company's ability; and as to the covenant that the company would pay wharfage and lockage dues in respect of goods conveyed along any part or branch of their line for shipment, although such goods might be shipped at some dock other than the Bute Dock, the Court was of opinion that the only basin or dock to which the covenant was applicable was the small dock belonging to the company; because if it was extended to every dock in the kingdom, it would be too general, and there was no other alternative mode of construction which would not require the introduction of words which were not in the covenant; such as "adjacent" or "near to Cardiff."

On error to the Exchequer Chamber, that Court (2) reversed the judgment of the Court of Queen's Bench, but Cleasby, B., and Bramwell, B., dissented, and were of opinion that the judgment appealed from should be affirmed.

On appeal to this House,

Sir John Karlake, H. Matthews and Charles Hall appeared for the appellants.

The Solicitor-General (Sir George Jessel), Hardinge Giffard, Henry James, and Edward Clarke appeared for the defendants.

The arguments of the learned counsel sufficiently appear from the following opinions of their Lordships.

LORD CHELMSFORD, after stating the nature of the case and the facts, and reading the covenants above set forth, said—Before considering the question of the covenants it will be proper to advert to some objections which were urged in argument against the validity of the lease itself. It was argued that the taking of the lease upon the terms agreed

(1) *Coram Blackburn, J.; Mellor, J.; and Hannen, J.*

(2) *Kelly, C.B.; Willes, J.; Keating, J.; Smith, J.; Brett, J.; Bramwell, B.; and Cleasby, B.*

upon was *ultra vires* of the directors of the Taff Vale Company. By the Act empowering the Taff Vale Company to take a lease they were required to assume all the obligations of the Penarth Company. Under their Act that company are bound to apply the harbour rate entirely to preserving, maintaining and improving the harbour and the navigation. The Board of Trade may reduce the harbour rate, but cannot increase it. If, then, the Taff Vale Company are, under the lease from the Bute Trustees, bound, as contended, to pay to them for all the traffic taken to Penarth Dock, the wharfage, &c., which would have been payable if it had been brought to Bute Dock, they have a lease without an income. But there is some confusion in this argument. The lease from the Bute Trustees was made in 1849, many years before the lease of the Penarth undertaking. It was made upon conditions and stipulations which were sanctioned by Act of Parliament, and was therefore within the power of the Directors of the Taff Vale Company to accept. The question of *ultra vires* must apply, if at all, to the taking the lease of the Penarth undertaking, with a knowledge of the conditions of the lease, from the Marquis, which compelled the company to pay for the whole of the traffic brought to Penarth Harbour without deriving the smallest advantage from it. How this can affect the validity of the lease taken from the Bute Trustees I am at a loss to imagine.

It was contended that the covenant, for the breach of which the action was brought, was void as being in restraint of trade. No doubt if a person is without consideration prohibited from carrying on trade, either absolutely or within an unreasonable distance from another, the prohibition is against public policy and void. But I cannot see how the covenant in question falls within that principle. The trustees lease to the company land on the east side of the Bute Dock, to enable them to use the dock for the shipping and unshipping of the traffic conveyed to and from their railway. The trustees grant to them the privilege of using the dock and the land leased, and afford them facilities for the use upon a payment to

be made in a particular mode. It may be that this mode of payment is not a desirable one, and that more is exacted in the way of consideration than ought in prudence to have been agreed to, but how it can be considered to be in restraint of trade I cannot conceive. It is not a prohibition but a permission to carry on trade. The company tie their hands only by saying that in consideration of the advantages they will enjoy by the use of the dock, if they carry their goods anywhere else they will pay as if they had used the dock. We now come to the main, indeed in my view, the only question in the cause, viz., whether the taking of the lease of the Penarth undertaking by the Taff Vale Company, and carrying the minerals and goods to Penarth Dock and Harbour for shipment and receiving them after unshipment in the docks, and carrying them along the Penarth Railway on to the Taff Vale line and conveying them to their destination, is a breach of the covenant. I think there can be no doubt that the object of the covenant was to prevent the use by the Taff Vale Company of any dock other than the Bute Dock. The Taff Vale Company had proposed to construct shipping places at Cogan Pill, which would probably have drawn off some of the traffic from the Bute Dock. The abandonment of this intended branch of their railway by the Taff Vale Company seems to have been one of the inducements to granting the lease by the trustees. But another branch might have been made which would have been equally prejudicial to them, and, therefore, they determined to require a covenant from the company not only to restrain them from using the small dock which then belonged to them but also to prevent their constructing any other which might become a rival to the Bute Dock. The covenant was accordingly made to apply not only to the dock or basin "now belonging to the company," but in the most general and extensive terms to "any basin, dock, canal or cut whatsoever, other than the Bute ship canal, or some dock, basin or cut belonging thereto." If these words alone are regarded, the covenant would seem to extend to any dock, however distant from

the Bute Dock, although it could not possibly interfere with traffic that would find its way to the Bute Dock. But a limit is placed upon the words by the previous part of the covenant, which confines its provisions to minerals or other goods which shall have been conveyed or transported upon or along the Taff Vale Railway, or any part or branch thereof, to be shipped or unshipped in the dock now belonging to the company, or in any dock, &c., whatsoever, other than the Bute Dock. It would appear, therefore, that the large words "dock, &c., whatsoever," must refer to some dock which is within the range of the line of the Taff Vale Railway in its communication with some place of shipment or unshipment. But assuming that the language of this part of the covenant has a more extensive meaning than I have attributed to it, has the Taff Vale Company broken the covenant by their conveyance of minerals to the Penarth Dock and Harbour for shipment? In other words, has the Penarth line, by the lease of it to the Taff Vale Company, become part of the Taff Vale Railway? It was argued by Sir John Karslake that if the Taff Vale Company had made a new branch, and conveyed goods for shipment to some other dock than the Bute Dock, it would not have been a breach of covenant. But I cannot agree in this view of the covenant. Whatever doubt may be suggested as to its proper construction, there can be none upon this point—that its object was to restrain the company from using their own dock, and from making a branch to communicate with any other. It is impossible to avoid the impression that the lease was taken by the Taff Vale Company as the means by which they proposed to extricate themselves from a covenant which they may have thought pressed too hardly upon them. But whatever their motive may have been, it cannot affect the construction of the covenant. I cannot consider the Penarth Railway as a part of the Taff Vale Railway; and, therefore, as the shipments and unshipments must, to come within the covenant, be from or to the Taff Vale Railway, I think, upon the proper construction of the covenant, there has been no breach of it by the

appellants, and that the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD COLONSAY.—The difficulty in this case arises upon the construction of the covenant, and especially that section of it which has reference to the conveyance of minerals and other goods, and the particular limitation which is to be put upon the broad terms of that covenant. That there must be some limitation put upon them I think is unquestionable, and I do not find that that is doubted by any of the Judges in either of the courts below who have expressed their opinions in this case. The words as they stand, if read in their full and broad sense, would lead to very extraordinary results. They would come to this: That so often as any minerals, or other goods, which shall be conveyed or transported upon or along the said Taff Vale Railway, or any part or branch thereof, shall be shipped or unshipped, loaded or unloaded, into, upon or out of "any vessel in the dock or basin now belonging to the railway company, or in any basin, dock, canal or cut whatsoever other than the said Bute Ship Canal," or one of the docks, basins, or cuts connected with it, the railway company shall pay all the dues as if those goods had been shipped in the dock or ship canal of the respondents in this case. Now, if that were to be the construction, what would it lead to? The words are, "upon or along the said Taff Vale Railway, or any part or branch thereof." It is part of the case as it is put before us that the "railway is in communication at different points thereof with the Newport, Abergavenny and Hereford Railway, the Brecon and Merthyr Tydfil Railway, and with the South Wales Railway, as well as with the Rhymney Railway, and the defendants have received for carriage and transmission large quantities of goods, which, after having been conveyed by the defendants along some part of the said Taff Vale Railway, have been, by means of one or other of the said railways, and of the other railways with which they are connected, conveyed to Milford Haven, Swansea, Birkenhead, Newport, Southampton, and other places

on the sea coast for shipment, and have been there shipped and loaded in ships and vessels in various docks or cuts other than the said Bute West Dock. The defendants have never paid any dues upon those goods. I think it is impossible to suppose that the words I have read from the covenant were intended to cover such cases as are here mentioned. If they were held to do so, it would lead to very extravagant results with regard to the traffic interchanged with other railways. And there is also another extravagant result to which it would lead. Suppose goods were carried even into Cardiff which were not at the time intended to be shipped, but which the parties who had possession of them and who had stored them there, afterwards chose to ship, changing their views as to the disposal of the goods, perhaps after an interval of twelve months; those words are wide enough, if read in their broad sense, to subject the Railway Company to dues upon those goods. All of these are extravagant propositions, and I am led to the conclusion that it is necessary to put some limit upon this covenant. What the limit to be put upon the covenant is to be is the difficulty. Upon that point I find that the Judges in the Court below have varied very much in their opinions. The limit put upon this covenant by the Judges in the Court of Queen's Bench is different from those put upon it by some of the Judges in the Court of Exchequer Chamber; and the Judges in the Court of Exchequer Chamber disagreed as to the limit that was to be put upon it. Therefore it is, and must be, a matter of considerable difficulty to know what is the proper limit to put upon it, and the proper construction to be given to the covenant. It appears to me that the true construction is very much that which has been put upon the covenant by the Court of Queen's Bench and by Mr. Baron Bramwell, which constructions practically come to the same result, although they are differently expressed, with that which has been put on it by my noble and learned friend who has just spoken. Mr. Baron Channell has suggested various difficulties connected with this covenant. He says, 'This provision of the deed is cer-

tainly most unskilfully framed, as it would include cases which it never could have been intended to include." Then he put illustrations such as those I have mentioned, and then he suggests a different construction. He says that he thinks if the construction adopted by the Court of Queen's Bench were given to these words it would be favourable to the plaintiffs, although they made it the basis of their judgment for the defendants. Again he says, "There is, however, a good deal to be said in favour of interpreting it to refer to the docks belonging to or under the control of the defendants, remembering that the Taff Vale Dock was the only one belonging to the defendants at the time." Then he illustrates that, but he says, "I do not say this is the true interpretation of the covenant, but I think that it would not be an unreasonable one." Then he says, "Indeed the covenant is so drawn that it is difficult, if not impossible, to say what it does mean," and finally, "I think that at all events it does include docks at or near the port of Cardiff, belonging to the defendants, under their control and directly connected with their line of railway." I quote this to shew what a great difficulty there is in fixing any particular construction upon this covenant. We must endeavour to get at the true construction by looking at what was the condition of matters at the time when the covenant was entered into, what were the prospects of the parties in regard to it, and what were the particular objects sought to be attained by the different provisions which were introduced into it. Now, excluding the idea that goods which have passed along any part of the Taff Vale Railway, wherever destined to, if they are to reach the sea coast, are within this covenant, I think it is pretty clear that it was intended to meet the case of the Taff Vale Railway Company conveying goods by a part of their own main line, or a branch of it, to a place where they might be shipped at a dock of their own, and shipping them there instead of in these Bute Docks. If they had a dock themselves near, it is excluded, and any other dock or basin whatsoever is also excluded for the same reason. I think

that is the reasonable limit that can be put upon these words. If the Taff Vale Railway Company had extended their branches so as to go to any other port which would have been injurious to the objects which the plaintiffs sought to secure by this covenant, that case might have come within the covenant; but that the covenant did not contemplate the case of goods going over some part of the Taff Vale Railway, and then passing to another railway, and going by that other railway to another port or place, I think, is clear. I think the covenant as to the keeping of books and accounts makes that very clear. That covenant provides that the railway company are to keep accounts of all the goods shipped and "the tonnage measurement of all and every such ships, boats, barges, craft and other vessels upon, or into or out of, or from which" any minerals, merchandise or other goods shall be shipped, or from which they shall be unloaded. They are to keep such books and accounts at Cardiff. How could they keep such books and accounts with reference to goods with which they have had nothing to do, beyond passing them along part of their railway, and which have gone thence on to another railway, and so on to the port of shipment, or which have come by another railway in order to pass on to this port? But further, I think the covenant requiring the defendants to use their endeavours to have traffic brought to the Bute Ship Canal or Docks at Cardiff has also a bearing upon this point. If the railway company were liable for the whole of the dues upon goods that are within this main provision that we have been talking of—if they were liable for the whole rates upon these goods, whether they were shipped in the Bute Ship Canal or not, I do not see any advantage in requiring that they shall bring traffic there. This clause, however, provides that they shall "cause and procure, so far as they shall be able, all merchandise and other goods which shall be unshipped at or near the port of Cardiff, and carried or transported to, or conveyed upon or along the said Taff Vale Railway, or any part or branch thereof, to be unshipped in the said Bute Ship Canal, or in some dock, basin or cut belonging thereto." "The

Port of Cardiff" is said to be a wide term; it comprehends Penarth, and therefore it is said they are evading the covenant here, and evading the other one also, by shipping goods or letting goods be shipped or landed and conveyed from Penarth. But if this covenant is meant to apply to goods for the dues of which the railway company are not made liable, then it is clear that there is some place or other upon the sea coast, and some place which may be truly described as "at or near the port of Cardiff," for shipment, at which they were not to be liable for dues. They were only by this covenant to use their endeavours to get the traffic carried to the Bute Docks; and, therefore, the question comes to be, whether this condition of matters, which has now arisen at Penarth, is that condition of matters which subjects them to the provision as to the liability for dues? What is the reason why they should be liable for dues under one of these covenants, and only bound to use their endeavours under another? It must be that that other covenant has reference to some other place than one to which they have a branch or main line. That being so, I think it follows that unless it can be made out that they have now a line or branch to Penarth the plaintiffs cannot succeed. The judgment of the majority of the Judges in the Court of Exchequer Chamber assumes that for the purposes of this case the Penarth Railway is truly a branch of the Taff Vale Railway. Now that is a view which I cannot hold. The only reason why they say so is, I suppose, that the Taff Vale Company have taken a lease of it. I fancy that is the only ground upon which they go. But it is not the same railway. The Penarth Railway is a Parliamentary entity of itself. The Taff Vale Railway is another. They are two separate things. The Penarth Railway cannot be a branch of the Taff Vale Railway. You could have no branch of the Taff Vale Railway except what was made such by authority of Parliament. Therefore the two are totally distinct railways, and I cannot hold to the view that because the Taff Vale Railway Company have taken a lease of the Penarth Railway, and because that lease extends over a long period, therefore the Penarth Rail-

way has become a part of the Taff Vale Railway. I do not see that it is contended that it would have been so if it had been a short lease; and I do not see that the fact of its being a long lease makes any difference. As I have said, they are two separate entities, and I therefore hold that this Penarth Railway is not any "part of the Taff Vale Railway or branch thereof." It is said, however, that it is under the control of the Taff Vale Company, and that they are diverting the traffic and not complying with the covenant they have entered into, which provides that they shall use their endeavours to get the traffic brought to the Bute Ship Canal or Docks. We have no materials for dealing with that question. It is scarcely before us. It is a part of the case before us that the traffic passing over the Taff Vale Railway has so increased, and is now so large, as to be more than sufficient for the Bute West Dock. We have no materials before us to enable us to determine this. It may be an element for consideration if the question be raised in another place. I have therefore been unable to bring myself to the conclusion that this Penarth Railway is a part of the Taff Vale Railway, or that the covenant extends to goods carried for shipment by a railway which is not a part or branch of that Taff Vale Railway. The words, "any goods carried on part of the Taff Vale Railway," would be satisfied by this. But goods coming from Cardiff into the Bute West Dock, or apparently to be shipped at the Bute West Dock, though not shipped or put on the railway at the main western extremity of the line, but put upon a branch of it, would be within the covenant. That would satisfy the words of the covenant. Upon the whole, I do not think that there are sufficient grounds here for holding the railway company liable for the demand now made.

LORD CAIRNS.—This case is one of very great importance to the interests involved in it, and it is unnecessary to say that it is one which appears to me to be of very considerable difficulty. I say it is unnecessary to say that the case is one of difficulty, because it has already undergone the scrutiny of eleven learned judges, and

of those eleven five have been in favour of the appellants at your Lordships' bar, and six, as I reckon, have been in favour of the respondents. Not only is there a difference of opinion among the learned Judges as to the parties for whom judgment should be entered in the action, but there is a greater divergence of opinion as to the construction of this covenant, not merely between the Judges who take different views of the result, but among those who agree in their views as to the result of this action, than I ever remember to have seen in any former case. I do not propose to read the covenants at length, but I would comment upon the various constructions which have been put upon the third covenant, which is the one that presents the principal difficulty in the case. There is one construction by which, if you read that covenant, it would imply that if goods carried over any part, however small, of the Taff Vale Railway, should be afterwards shipped in any dock whatsoever, the dues shall become payable, that is to say, if the goods passed over half a mile, or any portion through the whole length of the Taff Vale Railway, and if they afterwards were shipped in any dock whatsoever in the kingdom, the dues should become payable. As to this construction, I may mention, none of the learned Judges to whom I have referred have adopted it. It was put forward, as I understood, by the Solicitor-General in his argument at the bar; and your Lordships will observe that if this were adopted it would get rid altogether of any question whatever of limit of the covenant, and make it absolutely and entirely unlimited. If this were to be adopted as the construction of the covenant, I own that it appears to me that it would raise in a very grave form the question of the validity of the covenant, having regard to the Parliamentary power which was given to the railway company (a body otherwise not possessing the power) to take a lease of the Bute Docks. But as I read that Parliamentary power it appears to me that a covenant so wide, so extensive, so unconnected with the Bute Docks, so unnecessary for the purpose for which the Parliamentary power was given, would, to say the least of it, be questionable as to whether it was *ultra* or

intra vires thus given to the railway company. But I do not dwell longer upon that, because it appears to me that this is a construction which cannot be adopted, as virtually it would reduce not only this covenant, but one of the other covenants, to what would be an utter impossibility. Neither the Railway Company nor the Bute Trustees could ever tell whether goods which had passed over some portion of their railway would afterwards come to be shipped at some of the remote and distant ports of the kingdom. They never could tell how many goods were so shipped, or what were the dues that were to be payable in respect of them. They never could ear-mark the goods, or follow them, or trace their history as they, passed through the different ramifications of the various railways of the kingdom. The question would arise "shipped at any dock," at what time? at any period, however remote from the period of their transit over the railway? or how far must the two things be connected together—the transit over a portion of the railway and their shipment in the dock. The company is required by a later covenant to keep an account at Cardiff of the goods "shipped in any other dock, basin, canal or cut as aforesaid," referring to the former covenant. How would it be possible for the company to keep at Cardiff an account of the goods which might pass over some small portion of their railway, and which might afterwards be shipped at some remote dock or docks in the kingdom? The covenant would be in point of fact impossible, and the construction is one so unwarranted that I do not wonder that none of the learned Judges in the court below adopted it. Passing therefore from this general and unbridled construction of the covenant, you are driven to find a limit for the general words of the covenant in some other way. Now, what are the limits of construction of the covenant that are proposed? I will take first the limits that are proposed by the learned Judges who are in favour of the appellants, and who think that the judgment should be entered for them. Mr. Justice Blackburn, as I understand his judgment, proposes that the covenant should in sub-

stance be construed thus—that it should mean "any other dock close by the Bute Dock and of the same kind." Upon that construction, I ask, what is the meaning of "close by?" Who is to determine it? If those words had been expressed in the covenant, would it have been possible to give them an intelligible and definite meaning? Then, who again is to say whether the dock is of the same kind, and to what extent, and in what respect is it to be the same? But with regard to all, I observe the words of the covenant are "any other dock," and by what authority are we to introduce those other words, "any other dock close by and of the same kind?" Turning from the suggestion of Mr. Justice Blackburn to that of Mr. Justice Mellor, I find still more difficulty in adopting Mr. Justice Mellor's construction. He proposes that the general words, "any dock," should be read as if they meant this—"any new dock constructed by the Taff Vale Railway Company" so as to be an evasion of the covenant. Anything more ambiguous, anything more unlike the reducing of a covenant to precision I cannot imagine, and I may observe that, introducing the element that the dock must be constructed by the Taff Vale Railway Company, might, in a case which clearly would come within the spirit of the covenant, altogether defeat its operation; but it is sufficient for me to say that there are no such words as these to be found in the covenant, and I find no authority for introducing them. Then, Mr. Baron Cleasby proposes to limit the covenant thus: He proposes to read the words, "at Cardiff town"—at Cardiff proper—that is to say, not at Cardiff port, but at Cardiff town—so that the words would run, "any dock at Cardiff town;" but, I say, you cannot find any principle for the introduction of these words any more than for the introduction of the other words I have referred to. Those constructions would not, any of them, suit the contest of the respondents, but I have adverted to them for the purpose of saying that I am unable to adopt them as the *ratio decidendi* in the present case. Passing over for the moment the opinion of Mr. Baron Bramwell, and turning to the opinions of the learned Judges who think

that the judgment ought to be entered for the respondents, I find the judgment of Mr. Baron Channell is this: He proposes that the words, "any other docks," should be modified thus: "Any other dock at or near Cardiff under the control of the Taff Vale Railway Company." Now, here again I ask, who is to say what is a dock near Cardiff? Would it be possible that such a covenant could have effect given to it? Again, what is to justify the introduction of the words, "under the control of the Taff Vale Railway Company?" The Chief Baron and the learned Judges whose opinions coincided with his, read, as I understand the covenant, as if the words, "shipped or unshipped," were followed by these words, "at or near the port of Cardiff," so that the covenant would be limited thus, "goods shipped or unshipped at or near the port of Cardiff." But here again we have the ambiguity occasioned by the introduction of the word "near," and we have the introduction of the words, "Port of Cardiff," for which, as it seems to me, there is, in point of construction, no authority whatever. We have thus a general and unlimited construction, to which I in the first instance referred, and we have five other constructions, which I have endeavoured to enumerate. I am unable to adopt any one of those six constructions, and I come to the only other construction to which I have referred, and which, in my opinion, is the proper construction to be put on this covenant. In my opinion this covenant is intended to describe a continuous operation; it is intended to describe the case of goods conveyed along the Taff Vale Railway, that is to say, conveyed along the whole length of the railway, or conveyed on any part of the railway, that is, on any part ending in shipment, and then shipped in any dock whatever, so that the generality of the word dock is limited by the fact that it must be a dock in connection with some part of the Taff Vale Railway. It appears to me that the parties, at the time they entered into this covenant, thought, as events have proved, incorrectly, that this would be a sufficient and practical limit to give to the covenant, that they looked upon the Taff Vale Railway as the railway with which they were dealing, as the railway

which had one outlet, and might have more, to the seaboard; and if they provided that goods, which thus by means of the Taff Vale Railway reached the seaboard, were intercepted and made to pay dues, that would accomplish their object. This is the construction adopted by Mr. Baron Bramwell, in which I own I entirely agree. Your Lordships will observe that it is—I do not say the correct, but the requisite construction—that it complies with the rule of construction, which forbids you to introduce words unless you are absolutely compelled by the context. It takes the words as it finds them. It leaves the words, "any dock," perfectly general, but it controls them, describing the continuous operation to which I have referred.

The question then remains, is the Penarth Railway, under the circumstances under which it was made, and the circumstances under which it was worked, the Taff Vale Railway, "or any part or branch thereof," within the meaning of that covenant? I do not adopt the view of Sir John Karslake, who contended that the words, "any branch," would only apply to the branches then existing, and would not include future branches of the Taff Vale Railway. In my opinion, the words, "the Taff Vale Railway or any part or branch thereof," would include any future branch, or any future extension or any future addition to the Taff Vale Railway; but it appears to me that the Penarth Railway is neither a part nor a branch of, nor addition to, the Taff Vale Railway. No doubt it is worked by the Taff Vale Railway Company, but the words, "the Taff Vale Railway," speak of a thing in hand, capable of ascertainment as the proper and legitimate description of that which has a legal existence, and a proper legal definition. I think that your Lordships have no right to depart from that which is the just and natural meaning of the term, "the Taff Vale Railway," and to hold it is equivalent to a denoting of the loose and popular expression, "Railways in connection with, or worked by, the Taff Vale Railway Company." The result is, that in my opinion judgment must be entered for the appellants in the case. I cannot help

feeling some regret at the result at which I am obliged to arrive. It appears to me that if the parties to the arrangement which terminated in the lease had foreseen the events which have since happened, it would have been required on the part of the Bute Trustees, that the covenant should extend and be made to cover those places; and that such requirement would at that time have been willingly acceded to by the Taff Vale Railway Company. It appears to me, by what has been done, the Taff Vale Railway Company have departed in a clear and striking manner from the good faith of the arrangement which was made by this lease, and from the good faith of the covenants contained in it; but they have, in my opinion, kept themselves free from the obligation of the letter of the covenants, and that is all your Lordships have to deal with; and, therefore, in my opinion judgment must be entered for the appellants.

Judgment appealed from reversed, and judgment to be entered for the plaintiffs in error, defendants in the original action.

Attorneys—Field, Roscoe & Co., agents for Benjamin Mathews, Cardiff, for plaintiffs in error;
F. S. Gooling, agent for Luard & Sherley, Cardiff, for defendants in error.

1873. } HAWTREY AND ANOTHER v.
April 22. } BUTLIN AND ANOTHER.

Interpleader—Mortgage of Trade Fixtures—Registration under Bills of Sale Act—17 & 18 Vict. c. 36.

An indenture of lease, for a term of which about sixteen years were to run, was assigned in the year 1868 to H., and by the indenture of assignment the trade fixtures upon the premises were absolutely assigned to him. By an indenture of mortgage, dated 20th March, 1872, H. demised the premises to the plaintiffs for the residue of the said term except the last two days, and also assigned

to them the trade fixtures, subject to redemption on payment of the amount of mortgage debt and interest. The indenture of mortgage was not registered under the Bills of Sale Act. A judgment having been obtained against H., the sheriff, on 14th April, 1872, by virtue of a fi. fa. seized the said trade fixtures, as well as the moveable and unfixed machinery and effects, all of which were at the time of the seizure in the apparent possession of H. The plaintiffs thereupon claimed the trade fixtures as being their property:—Held, upon an interpleader issue, that the indenture of mortgage of 20th March, 1872, ought to have been registered under 17 & 18 Vict. c. 36, and that the plaintiffs were not entitled to claim the trade fixtures which had been assigned to him.

This was a CASE stated by order of a Judge, bearing date the 11th day of October, 1872, on the hearing of an interpleader summons issued by the Sheriff of Middlesex.

1. The defendants recovered judgment against one Frederick Hamilton, on the 14th day of September, 1872, for the sum of 25*l.* 5*s.* 8*d.*, and 3*l.* 8*s.* costs of suit, making together the sum of 28*l.* 13*s.* 8*d.*

2. On the same day on which judgment was signed a writ of *fi. facias* was issued by the said defendants against the said Frederick Hamilton, indorsed to levy the said total sum of 28*l.* 13*s.* 8*d.*, and 1*l.* 5*s.* costs of the said writ of *fi. fa.*

3. The said Frederick Hamilton was, at the time of the issuing of the said writ, an ironfounder carrying on his business at the Hercules Foundry, Golden Lane, in the county of Middlesex, which said premises were held by the said Frederick Hamilton under an indenture of lease for a term of which about sixteen years are unexpired, which indenture of lease was assigned to the said Frederick Hamilton by indenture in the year 1868, and by which indenture of assignment the fixed and moveable machinery, plant, fixtures, implements, utensils and effects fixed to or placed upon or used in the said premises were absolutely assigned to the said Frederick Hamilton.

4. By an indenture of mortgage, bearing date the 20th day of March, 1872,

the said Frederick Hamilton demised to the above named plaintiffs the said premises for the residue of the said term except the last two days, and assigned to the above named plaintiffs "all and singular the fixed and moveable machinery, plant, fixtures, implements, utensils and effects then or thereafter to be fixed to or placed upon or used in or about the said premises, and then or thereafter belonging to the said Frederick Hamilton, subject to redemption on payment of the amount of mortgage debt and interest in the said indenture mentioned.

5. The said fixed machinery, plant and fixtures assigned by the said indenture of assignment of the year 1868, and by the said indenture of mortgage of March, 1872, consisted solely of such articles as are known as trade fixtures.

6. The mortgage debt, with interest, is still owing to the plaintiffs.

7. The indenture of mortgage referred to in paragraph 4 has not been registered under the Bills of Sale Act.

8. On or about the said 14th day of April, 1872, the Sheriff of Middlesex, by virtue of the writ of *fi. fa.* referred to in paragraph 2, seized the fixed machinery, plant, fixtures and effects, as well as the moveable or unfixed machinery and effects, all of which were at the time of such seizure in the apparent possession of the said Frederick Hamilton, and the plaintiffs thereupon duly claimed the fixed articles as their property under the indenture of mortgage referred to in paragraph 4. After the sheriff had issued the interpleader summons the plaintiffs paid into Court the sum of 36*l.*, under the said order of 11th October, 1872, to abide the decision of this Court upon this case.

9. The above-named plaintiffs contend that registration under the Bills of Sale Act of their said indenture of mortgage is unnecessary in respect to the fixed machinery, plant and fixtures, and that the same became duly vested in them by the said indenture of mortgage, and are not liable to seizure for a debt of the said Frederick Hamilton.

10. The above-named defendants contend that, in consequence of the non-

registration under the Bills of Sale Act of the indenture of mortgage referred to in paragraph 4, the fixed machinery, plant and fixtures are liable to be seized under the said writ of *fi. fa.*

11. The question for the opinion of the Court is, whether the above-named plaintiffs are entitled, under the said indenture of mortgage, to the said fixed machinery, plant and fixtures, or whether the defendants are entitled to them under the said writ of *fi. fa.*

12. If the Court is of opinion in favour of the plaintiffs, then a rule or order of this Court is to be drawn up entitling them to the repayment of the sum of 36*l.* paid into Court to abide the decision of the Court.

13. If the Court is of a contrary opinion, then a rule or order of this Court is to be drawn up entitling the defendants to the payment of the said sum of 36*l.*

14. And in either event the costs of and relating to this Special Case, and all other costs, are to be in the discretion of the Court.

The following portions of the indenture of mortgage of the 20th of March, 1872, are material—

"And this indenture also witnesseth that in further pursuance of the said agreement and for the consideration aforesaid, he, the said Joseph Greenhow, by the direction of the said F. Hamilton, testified by his execution hereof, doth hereby assign, so far as he lawfully can, and he, the said F. Hamilton, doth hereby demise and confirm unto the said William Hawtrey and Walter Hawtrey, their executors, administrators and assigns, all that the said piece or parcel of ground, messuages or tenements, hereditaments and other the premises comprised in and expressed to be demised by the hereinbefore recited indenture of lease of the 24th day of January, 1828, and the rights, easements and appurtenances thereto belonging. To have and to hold all the said premises unto the said William Hawtrey and Walter Hawtrey, their executors, administrators and assigns, for the residue of the said term of 63½ years granted by the said indenture of lease, except the last two days of such term, discharged from the mortgage of the 26th day of May,

1868, and all moneys intended to be secured thereby, but subject to the proviso for redemption hereinafter contained, and subject to the under-leases dated the 30th day of November, 1829, and the 15th day of June, 1863, as to the premises comprised in such under-leases respectively. And this indenture also witnesseth that in further pursuance of the said agreement, and for the consideration aforesaid, he, the said Joseph Greenhow, by the direction of the said F. Hamilton, testified by his execution hereof, doth hereby, so far as he lawfully can, assign, and he, the said F. Hamilton, doth hereby assign and confirm unto the said William Hawtrey and Walter Hawtrey, their executors, administrators and assigns, all and singular the fixed and moveable machinery, plant, fixtures, implements, utensils and effects, now or hereafter to be fixed or placed upon, or used in or about the said demised hereditaments, messuages, or tenements and premises, and now or from time to time hereafter belonging to the said F. Hamilton, his executors, administrators or assigns, and all the estate, right, title, interest, claim and demand of him, the said F. Hamilton, in, to and upon the same premises. To hold the same unto the said William Hawtrey and Walter Hawtrey, their executors, administrators and assigns, absolutely discharged from the said mortgage of the 26th day of May, 1868, and all moneys intended to be secured thereby, but subject to the proviso of redemption hereinafter contained."

Pearce, for the plaintiffs.—The question is whether the mortgage ought to have been registered under the 17 & 18 Vict. c. 36 (1). It is contended that registration

was not necessary, and that the plaintiffs are entitled to succeed.

[BLACKBURN, J.—Is not the question

of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docket and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed); otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any portion of them are comprised in such bill of sale under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of law or equity authorising the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, as far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which, at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be."

Section 7 enacts, "In construing this Act the following words and expressions shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such constructions (that is to say), the expression 'personal chattels' shall mean goods, furni-

(1) Section 1 enacts, "Every bill of sale of personal chattels made after the passing of this Act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale; and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation

answered by *Holland v. Hodgson* (2), where the Court of Exchequer Chamber thought that a deed transferring the fixtures as part of the land did not require registration?]

That case is in favour of the plaintiffs.

Wilberforce contra.—*Holland v. Hodgson* (1) was a different case in this respect, that there the mortgagor was the owner in fee, as well as occupier of the mill, and he mortgaged in fee to the plaintiffs the mill and the fixtures affixed to the premises. But here the mortgagor was only a leaseholder. In *Holland v. Hodgson* (2), Blackburn, J., in delivering the considered judgment of the Court, said, "We wish to guard ourselves, by stating that our decision (so far as regards the registration) is confined to the case before us, where the mortgagor was owner to the same extent of the fixtures and of the land. If a tenant, having only a limited interest in the land, and an absolute interest in the fixtures, were to convey not only his limited interest in the land, and his right to enjoy the fixtures during the term so long as they continued a part of the land, but also his power to sever those fixtures and dispose of them absolutely, a very different question would have to be considered. As it does not

ture, fixtures and other articles capable of complete transfer by delivery, and shall not include chattel interest in real estate, or shares or interest in the stocks, funds or securities of any government, or in the capital or property of any incorporated or joint-stock company, nor *choses in action*, nor any stock or produce upon any farm or land which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making of such bill of sale.

"Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving the bill of sale, so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

(2) 41 Law J. Rep. (N.S.) C.P. 146; s. c. Law Rep. 7 C.P. 328.

arise, we decide nothing as to this. We are not to be understood as expressing dissent from what appears to have been the opinion of Wood, V.C., in *Boyd v. Shorrock* (3), but merely as guarding against being supposed to confirm it." But further, *Boyd v. Shorrock* (3) was dissented from by Malins, V.C., in *Begbie v. Fenwick* (4), in which the deed was almost exactly the same as the present deed, having two witnessing parts, one conveying the land and the other the fixtures. In *Boyd v. Shorrock* (3) there was not an absolute assignment of the fixtures. In *Begbie v. Fenwick* (4) Malins, V.C., said, "The deed of 1858 is in the same form as the subsequent deeds; there are two separate witnessing parts, by one of which the leasehold property is assigned with its appurtenances for the residue of the term, and by the other all machinery of every description was assigned. I apprehend that the proper construction of this deed is that the fixtures did not pass by the first witnessing part. The mortgagee does not get them because they are annexed to the freehold, and cannot be severed without his consent. He gets them by a totally different assignment, a separate contract. The deed gives him two things, the leasehold property first, and secondly all the machinery of every description. Where they pass by one witnessing part the case of *Boyd v. Shorrock* (3) would apply. There Wood, V.C.—although I must confess I do not understand the ground of his decision—decided not only that fixtures passed under the assignment in that case, but that the assignment was good against assignees in bankruptcy, although it was not registered under 17 & 18 Vict. c. 36." The Vice-Chancellor then referred to *Waterfall v. Penistone* (5), as shewing that the assignment ought to be registered in order that the goods might be taken out of the order and disposition of the trader, and prevent them passing to his assignees, and then continued—

(3) 37 Law J. Rep. (N.S.) Chanc. 144; s. c. Law Rep. 5 Eq. 72.

(4) 24 Law Times N.S. 59.

(5) 6 E. & B. 876; s. c. 26 Law J. Rep. (N.S.) Q.B. 100.

"This case, therefore, is, in my opinion, in complete opposition to the decision of Wood, V.C., in the case of *Boyd v. Shorrock* (3), where he held that where machinery affixed for the purposes of trade was assigned, and loose machinery also, it was void as to the loose machinery because it was not registered, but that the registration was not necessary as to the other. I cannot think that Wood, V.C., would have come to that conclusion if he had adverted to *Waterfall v. Penistone* (5), unless he was prepared to overrule it. It is a remarkable thing that in *Boyd v. Shorrock* (3) the very ground stated for the non-registration of the deed is that the mortgagor said it would injure his credit; that is, his compliance with the law by registering the assignment of mere personal chattels would injure his credit, when the very object of the Act is to prevent persons who had done so, obtaining false credit upon that which has been actually assigned. The point, however, in *Waterfall v. Penistone* (5), upon which my decision turns, is this: that where freehold or leasehold property is made the subject of one contract, and fixtures are the subject of another, the assignment must be registered. In my opinion, in the present case, the deeds most distinctly shew that the leasehold property was one subject of security, and this machinery another. The deeds being mere bills of sale with regard to this machinery, did in my opinion require registration." In *Wulff v. Jay* (6) the deed was identical with the present deed, and the Court thought that the omission to register it constituted such laches as would release a surety from liability.

[LUSH, J.—Suppose, in the present case, there had been simply a mortgage of the fixtures; would not registration have been necessary? If so, inasmuch as the case states that the things in question were trade fixtures, it is difficult to see how registration could be dispensed with.]

Yes, and the Court will adopt that view, and will follow the decision in

Begbie v. Fenwick (4), which appears to be precisely a case in point.

Pearce, in reply, referred to *Mather v. Frazer* (7).

BLACKBURN, J.—I think that our judgment ought to be for the defendants, on the ground that the indenture of mortgage is a bill of sale of fixtures within the meaning of 17 & 18 Vict. c. 36, and consequently is void in consequence of not having been registered. The interpretation clause in section 7 states that the expression "personal chattels," used in the enacting clause, "shall mean goods, furniture, fixtures and other articles capable of complete transfer by delivery, and shall not include chattel interests in real estate," &c. The things which have been seized in the present case are found to be "trade fixtures," and are therefore personal chattels. The legislature provides that every bill of sale of personal chattels shall be filed, otherwise such bill of sale shall, as against assignees in bankruptcy, and as against sheriff's officers and every person on whose behalf process shall have been issued, be null and void so far as regards the property in the personal chattels comprised in such bill of sale, which shall be in the possession or apparent possession of the person making such bill of sale, &c. There have been several cases in which the question has been discussed, as *Holland v. Hodgson* (2), in which I prepared the judgment of the Court, and *Mather v. Frazer* (7), which, in my opinion, was correctly decided. In *Holland v. Hodgson* (2), *Boyd v. Shorrock* (3) was referred to, and we guarded ourselves against being supposed to confirm it. I think that under the circumstances of that case, the mortgage deed would require registration. [His Lordship stated those circumstances.] The deed was not registered because the mortgagor feared that it might injure his credit. Upon this point Malins, V.C., said in *Begbie v. Fenwick* (4) that it was "a remarkable thing that the very ground stated for the non-registration of the deed is, that the mortgagor said it would injure his credit,

(6) 41 Law J. Rep. (N.S.) Q.B. 322; s. c. Law Rep. 7 Q.B. 766.

(7) 2 Kay & J. 536; s. c. 25 Law J. Rep. (N.S.) Chanc. 361.

that is, his compliance with the law by registering the assignment of mere personal chattels, would injure his credit; when the very object of the Act is to prevent persons who had done so, from obtaining false credit upon that which has been actually assigned." In *Boyd v. Shorrocks* (3) the mortgagors became bankrupt, and the question arose as to the effect of the mortgage deed, and whether certain looms passed to the mortgagees. The attention of Wood, V.C., seems to have been principally directed to the question of whether the looms were fixed to the land or not, and he held that they were fixtures which passed with the property, and therefore did not require a bill of sale. I rather agree with Malins, V.C., in *Begbie v. Fenwick* (4) that it is difficult to follow that course of reasoning. *Begbie v. Fenwick* (4) appears to have been carefully considered, and the Vice-Chancellor arrived at a different conclusion from that which Wood, V.C., had arrived at, and held that the deeds, being mere bills of sale with regard to the machinery, did require registration. I think that he was right, and that in this case there must be judgment for the defendants, the mortgage deed requiring registration.

MELLOR, J.—I am of the same opinion. I think that the policy of the Bills of Sale Act is carried out by the construction which we put upon this case. That Act provides that every bill of sale of personal chattels made after the passing of the Act shall be filed, &c. Then the words "personal chattels" are by the interpretation clause to mean fixtures which would not necessarily pass upon the conveyance or assignment of real estate. The Special Case finds that the things in question are "trade fixtures," and if these alone had been assigned, the deed would require registration, and I think that the fact of the assignment being part of another transaction by which the real estate also is mortgaged makes no difference. I think that the case is within the policy of the Act, and that the things assigned are expressly within the enacting and interpretation clauses. In *Boyd v. Shorrocks* (3) the attention of Wood, V.C., does not seem to have been called to the interpretation clause, and although I am

prepared to treat his decision with the utmost respect, when I find that it has been already dissented from by another Vice-Chancellor, who seems to me to have adopted a construction more in accordance with the Act, I think that we are quite in a condition to decide the case in the manner which seems to us to be correct.

LUSH, J.—I am of the same opinion. The question which we have to determine is, whether this mortgage is or contains anything which amounts to a bill of sale of "personal chattels," which expression we learn from the interpretation clause is to mean among other things "fixtures." It is a mortgage of the residue of a term of sixteen years, but it goes on to assign the absolute property in the goods to the mortgagee, and that comes expressly within the enacting part of the Act. It contains what would not pass by the conveyance of the term. I accept the ruling of Malins, V.C., as being the sound interpretation of the statute rather than that of Wood, V.C., and I think that the defendants are entitled to judgment.

Judgment for the defendants.

Attorneys—N. S. E. Steinborg, for plaintiff;
J. W. Sykes, for defendant.

1873. } BURTON (*appellant*) v. EYDEN
April 23. } (*respondent*).

Friendly Society — Sickness entitling Member to Relief—Insanity.

By the rules of a friendly society established under 18 & 19 Vict. c. 63. s. 9, a member under certain conditions was entitled to receive eight shillings a week during any sickness or accident that might befall him, unless by rioting or drunkenness, &c. :—Held, in the absence of words shewing a different intention, that insanity was a sickness which entitled a member to relief under the above rule.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 115.]

1873. { THE QUEEN on the prosecution
 April 28. { of *Henrietta Fraser v. THE*
 { CARNATIC RAILWAY COMPANY
 { (LIMITED).

Married Woman's Property Act, 1870, 33 & 34 Vict. c. 93. ss. 4, 9—Registration of Stock in Name of Married Woman—Title.

Upon the application of a married woman under the Married Woman's Property Act, 1870, s. 4, that shares in a joint stock company may be registered in her name as a married woman entitled to her separate use, it is the duty of the company to investigate and recognise her title, and a mandamus to enforce the performance of this duty will be granted by the Court.

This was a rule calling upon the Carnatic Railway Company (Limited), to shew cause why a *mandamus* should not issue directed to them, commanding them to register in the books of the company, in the name of *Henrietta Fraser*, as a married woman, entitled to her separate use, pursuant to the stat. 33 & 34 Vict. c. 93. s. 4 (1), certain guaranteed five per cent.

(1) The 33 & 34 Vict. c. 93. s. 4, enacts that—"Any married woman, or any woman about to be married, may apply, in writing, to the directors or managers of any incorporated or joint stock company, that any fully paid up shares, or any debenture or debenture stock, or any stock of such company to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use; and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred, and the dividends and profits paid as if she were an unmarried woman; provided that if any such investment as last mentioned is made by a married woman, by means of moneys of her husband, without his consent, the Court may, upon application, under section 9 of this Act, order such investment, and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband."

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stock numbered 863 in the company's register, of the nominal value of 1,225*l.*, to which the said *Henrietta Fraser* is entitled.

It appeared from the affidavits that previous to 1872 *R. S. Fraser* was the registered owner of the stock described in the rule. On the 13th of April, 1872, a transfer of the stock in the usual form by him to *Henrietta Fraser*, was presented to the company. It was objected that the proposed transferee was not described, and in April the same transfer was again presented with the following description after the name *Henrietta Fraser*, "wife of the above *R. S. Fraser*." The transfer was then registered. It also appeared that in March, 1872, *Mr. Fraser* executed a post-nuptial settlement of certain securities, including the stock in question. The stock was by this settlement assigned to trustees upon trust to pay the income to *Mrs. Fraser* during the joint lives of herself and her husband for her separate use, to the wife if she survived and afterwards to her husband. This settlement was duly executed, but the stock was never transferred into the names of the trustees. In April, 1872, the husband and wife executed a deed reciting the previous settlement, and that the parties were desirous of putting an end to the trust, and that the shares, &c., should be vested in the wife, and declaring and agreeing that the trustees should re-assign the property comprised in the

By section 9—"In any question between husband and wife as to property declared by this Act to be the separate property of the wife, either party may apply by summons or motion in a summary way, either to the Court of Chancery in England or Ireland, according as such property is in England or Ireland, or in England (irrespective of the value of the property) to the judge of the County Court of the district in which either party resides; and thereupon the judge may make such order, direct such inquiry, and award such costs as he shall think fit, provided that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit, or on an equitable plaint would have been; and the judge may, if either party so require, hear the application in his private room."

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trust to Mrs. Fraser, and that in the meantime and until such re-assignment the trustees should hold the property for her separate use. The trustees were not parties to this deed. It was after the execution of the deed that the transfer of the shares by the husband to the wife, previously mentioned, was made. Mrs. Fraser afterwards agreed to sell the stock, but the company refused to register a transfer from her without the concurrence of her husband, which was refused. The company also declined to register the wife according to the terms of the rule.

Watkin Williams (C. Bowen with him) shewed cause.—The company ought not to be compelled to register Mrs. Fraser in the manner proposed. If it should turn out that she is not entitled to dispose of the stock, the company by recognising her as absolute owner may expose themselves to the risk of being compelled to give compensation to those who purchase the stock—*In re The Bahia and San Francisco Railway Company* (2). It cannot be said that she has furnished the company with sufficient proof of her title, for it appears that her husband has refused to sanction any dealings by her with the stock.

[BLACKBURN, J.—Your argument is rather against the enactment. It is the duty of the company to ascertain whether Mrs. Fraser is really entitled to the stock.]

It has not been shewn that she is entitled to the stock, the deed re-assigning it was never executed by the trustees.

[BLACKBURN, J.—The only transfer of this stock was by Mr. Fraser to his wife. It was never transferred to the trustees, and, as the company are not bound to recognise trusts, they are quite safe in acting on the transfer.]

Secondly, a *mandamus* is not the proper remedy. The dispute between Mrs. Fraser and the company is one which ought to have been settled under section 9.

Witt, in support of the rule, was not heard.

BLACKBURN, J.—Before the passing of
(2) 9 B. & S. 844; s. c. 37 Law J. Rep. (N.S.) Q.B. 176.

this Act the company would have been right in refusing to register a transfer of this stock by Mrs. Fraser without her husband's assent, but nothing can be clearer than that the Act has thrown a burden on companies which they did not bear under the previous law. It has now become their duty to investigate a married woman's title to shares, and if it is made out, they are bound to register her as the owner. As the defendants fail to shew that Mrs. Fraser is not entitled to the stock, the rule for a *mandamus* must be made absolute.

QUAIN, J., and ARCHIBALD, J., concurred.

Rule absolute.

Attorneys—Pritchard & Sons, for prosecution;
Freshfields, for defendants.

1873. } THE QUEEN v. THE JUSTICES OF
May 1. } KENT.

Quarter Sessions—Notice of Appeal—
Signature to Notice—12 & 13 Vict. c. 45.
s. 1.

By 12 & 13 Vict. c. 45. s. 1, in every case of appeal (except as thereafter mentioned) to the General or Quarter Sessions of the Peace, the notice of appeal "shall be in writing signed by the person or persons giving the same, or by his, her or their attorney, on his, her or their behalf," &c.:—Held, that a notice of appeal signed, in the name of the appellant, by a clerk to the appellant's attorney, by the authority of the appellant, and afterwards acknowledged by him, was sufficiently signed.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 112.]

1873. } GREGG (appellant) v. SMITH
April 30. } (respondent).

Pedlars Act, 1871, 34 & 35 Vict. c. 96.
ss. 3 and 4—Carrying a Missionary Basket
—Trading.

The respondent and other ladies purchased materials, which they made into aprons, handkerchiefs and other articles of wearing apparel. These they carried from

door to door for sale in a basket, called the missionary basket, and applied the proceeds of the sale to missionary purposes:—Held, that the respondent did not come within the description of "pedlar" in the Pedlars Act, 1871, and did not require a certificate under that Act.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 121.]

1873. }
April 25. } HARRIS v. NICKERSON.

Auction and Auctioneer—Goods withdrawn from Sale—Liability—Indemnity.

The defendant advertised in newspapers that a sale by auction would take place on a particular day in a country town. He also circulated catalogues specifying the articles to be sold. The plaintiff attended the sale, intending to buy certain articles specified in the catalogue, but on the day of the sale they were withdrawn by the defendant:—Held, that there was no implied contract on the part of the defendant to indemnify the plaintiff against the expense and inconvenience which he had incurred.

Plaint to recover 2*l.* 16*s.* 6*d.*, consisting of the following items of account: For two days' loss of time by the plaintiff at request of the defendant, on his the plaintiff attending at a public sale by auction advertised by the defendant in the London newspapers, to be held at Bury St. Edmunds, Suffolk, on the 14th of August, 1872, for the disposal of certain goods and office fittings under bills of sale, and on the faith of which plaintiff duly attended and was ready to purchase in pursuance of such request and public notification, but the defendant in breach thereof at the time and place of sale so appointed, suddenly and without notice withdrew the goods and office fittings from the sale and competition, by which the plaintiff lost not only his two days' time and railway fare, but the additional expense of two days' board and lodging.

	£	s.	d.
First, to two days' loss of time . . .	1	1	0
Second, third class railway fare . .	0	14	6
Third, two days' board and lodging	1	1	0
	2	16	6

The cause came on for hearing on the 15th of November, 1872, when it was proved that the sale was advertised as stated by the plaintiff; and catalogues circulated and distributed. A copy of the catalogue is to be taken as forming part of this Case. It was also proved that the plaintiff had a commission to purchase at the sale the "office furniture" advertised to be sold.

The plaintiff went to Bury St. Edmunds and attended the sale and purchased lots other than those described in the catalogue as "office furniture."

The articles described as "office furniture" were not put up for sale but were withdrawn.

On these facts the County Court Judge gave judgment for the plaintiff; but at the request of the defendant gave him leave to appeal under the statute.

If the Court is of opinion that the plaintiff was not entitled to recover, the judgment is to be set aside and a nonsuit entered.

(The catalogue contained the usual conditions of sale by auction, one of which was to the effect that each article was to be sold to the highest bidder.)

Macrae Moir, for the appellant.—There was no contract to put these articles up for sale; the advertisements amounted merely to an offer to contract with persons making bids at the sale. *Warlow v. Harrison* (1) does not apply to the present case, for there the plaintiff actually made a bid for a mare advertised to be sold *without reserve*, and the owner bought her in. These the Exchequer Chamber held the defendant, the auctioneer, might have been liable on a declaration complaining of his breach of contract to sell *without reserve*. Lord Campbell, in delivering the judgment of the Queen's Bench, said, "*The case of Payne v. Cave* (2)

(1) 1 E. & E. 295; s. c. 28 Law J. Rep. (N.S.) Q.B. 18; s. c. 29 Law J. Rep. (N.S.) Q.B. 14.

(2) 3 Term Rep. 148.

has been considered good law for nearly seventy years. That case decided that a bidding at an auction, instead of being a conditional purchase, is a mere offer; that the auctioneer is the agent of the vendor; that the assent of both parties is necessary to the contract; that this assent is signified by knocking down the hammer; and that till then either party may retract."

[BLACKBURN, J., cited *Mainprice v. Westley* (3).]

There a sale by auction was advertised, and it was held that no contract on which the auctioneer could be sued personally was proved.

Warlow, for the plaintiff.—In *Warlow v. Harrison* (1) Martin, B., says, in delivering the judgment of the majority of the Court, "We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition (that the property shall be sold to the highest bidder) from the case of a loser of property offering a reward, or that of a railway company publishing a time-table stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him—*Denton v. The Great Northern Railway Company* (4). Upon the same principle, it seems to us that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve." In *Spencer v. Harding* (5) the defendants issued a circular which stated, "We are instructed to offer to the wholesale trade for sale by tender the stock-in-trade," &c., Willes, J., in his judgment said, "If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract."

[BLACKBURN, J.—Do you say that at an ordinary sale by auction, there is an implied undertaking to go on with the sale?]

(3) 6 B. & S. 420; s. c. 34 Law J. Rep. (N.S.) Q.B. 239.

(4) 5 E. & B. 860; s. c. 25 Law J. Rep. (N.S.) Q.B. 129.

(5) 39 Law J. Rep. (N.S.) C.P. 332; s. c. Law Rep. 5 C.P. 661.

The defendant ought at any rate to have given reasonable notice of the withdrawal of the goods from the sale.

BLACKBURN, J.—There can be no doubt but that our judgment must be for the appellant, and that the decision of the Judge in the Court below was wrong. It appears that a sale by auction had been advertised, and catalogues distributed, in which it was stated that certain classes of articles would be offered for sale. The plaintiff attended the sale, but it seems that the seller changed his mind, and that certain of the articles were withdrawn from the auction. The plaintiff now says, "As I attended the sale, I am entitled to recover damages for being deprived of the opportunity of purchasing these articles." It has been contended that there was a contract that they should actually be put up for sale, and that the plaintiff should have an opportunity of buying them. But it would be intolerably inconvenient if the law were that any shopkeeper who closed his shop without giving notice, or the proprietor of a theatre who closed the theatre, should be liable to an action at the suit of anyone who had been disappointed. It would be most inconvenient, and there is no authority to lead us to think that it is the law. As for the case of *Warlow v. Harrison* (1), I give no opinion as to whether the decision was right or wrong. It may plausibly be argued that where a sale has been advertised "without reserve," and the auctioneer says, in spite of the advertisement, "I will knock down the articles to their owner, notwithstanding your remonstrances," it may plausibly, I repeat, be argued that in such a case an action is maintainable. But this would not support the present action, unless we go further and extend the decision to a case where the sale is not "without reserve." I am clearly of opinion that the decision of the County Court Judge must be reversed.

QUAIN, J.—I am of the same opinion. To uphold the decision of the Judge in the Court below it would be necessary to go to this extent, that whenever a person advertises goods for sale he must be held to be not at liberty to withdraw from the sale, or to be liable to an action, even

though the person bringing it may have gone generally to the sale and bought other goods there. I think that to introduce such a principle, without strong authority for it, would be very mischievous. It is not according to the ordinary practice, because every one knows that at sales by auction it is common to find that some one of the articles advertised for sale has been withdrawn, or that it has already been disposed of by private contract. The case is quite different from those of advertisements offering a reward for information, &c. Here the articles were never put up for sale, there was never any bidding for them, and consequently there is no evidence of any contract. No authority has been cited which is really in favour of the plaintiff. *Warlow v. Harrison* (1) has not been considered a satisfactory decision, and *Spencer v. Harding* (5), so far as it goes, is an authority against the action. To decide in favour of the plaintiff would render every person offering goods for sale by auction liable to indemnify every one

attending the sale against the expenses of his attendance if one single article were withdrawn from the sale.

ARCHIBALD, J.—I am of the same opinion. I can quite understand that if a false and fraudulent representation were to be made that a sale had been fixed for a certain day, and persons were thereby induced to go to the place appointed, so as to lose their time, that they might be entitled to bring an action against the person making the representation. But here the proposition of the plaintiff is that the defendant is bound generally to indemnify anyone who has attended a sale from which some of the articles advertised are withdrawn. I do not think that any such contract of indemnity can be implied.

Judgment for the defendant.

Attorneys—H. Sydney, for plaintiff; Young, Jones, Roberts and Hale, for defendant.

END OF EASTER TERM, 1878.

CASES ARGUED AND DETERMINED

IN THE

Court of Queen's Bench

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF QUEEN'S BENCH.

TRINITY TERM, 36 VICTORIÆ.

1873. }
June 3. } KELLOCK v. ENTHOVEN.

Joint Stock Company—Winding up—Contributory—Transfer of Shares—Liability of Transferee—Implied Contract to indemnify Transferor—Bankruptcy—Inspectorship Deed—Bankrupt Act, 1861 (24 & 25 Vict. c. 134. s. 153).

On the 4th of September, 1865, the plaintiff sold to the defendant twenty shares in a joint-stock company. On the 8th he executed a transfer to the defendant, who paid the purchase money, and caused the transfer to be registered by the company on the 4th of December. On the 20th of March, 1866, the defendant transferred the shares to M. On the 18th of April, 1866, the company stopped payment, and on the 8th of May, 1866, was ordered to be wound up. On the 24th of July, 1866, M. was placed on the A. list of contributories, being the list of existing members. On the 30th of October, 1866, M. executed a deed of inspectorship. An order was made upon M. to pay a call of 40l. a share, but he did not pay, and the liquidators failed to get any payment

out of his estate. On the 6th of December, 1867, the plaintiff and defendant were placed in respect of the shares on B. list of contributories, being the list of past members. On the 27th of December, 1866, the defendant had executed a deed of inspectorship, under s. 192 of the Bankruptcy Act, 1861, which was registered on the 29th of December, 1867. On the 20th of March, 1869, the Court ordered the defendant to pay a call of 40l. a share, but he did not do so, and on the 10th of May the plaintiff, in pursuance of an agreement of compromise made between himself and the official liquidator, paid the sum of 15l. per share in respect of the twenty shares sold by him to the defendant:—Held, that he had a right to recover from the defendant the sums paid, upon an implied contract by the defendant to indemnify him against loss and liability upon the shares transferred.

SPECIAL CASE stated for the opinion of this Court.

In the summer of the year 1865, a banking company called "Barned's Banking Company, Limited," was formed, re-

gistered and incorporated under the Companies Act, 1862, with a capital of 2,000,000*l.*, divided into 40,000 shares of 50*l.* each, and with the liability of the members of the company limited to the amount of the shares respectively held by them.

4. The plaintiff became, and was the original holder, and a registered member of the said company, in respect of fifty shares in the company, which were allotted to him.

5. On the 4th of September, 1865, the plaintiff sold to the defendant twenty of the said shares, upon each of which the sum of 10*l.* had been paid, at the price of 12*l.* per share. And on the 8th of September, 1865, the defendant paid the purchase money to the plaintiff, and the plaintiff executed and delivered to the defendant a transfer of the said twenty shares, and the defendant having also executed the said transfer procured the same to be registered by the said company on the 4th of December, 1865, and his name to be entered in the register of members of the company as a registered member of the company in respect of the said twenty shares.

6. The said transfer was in the form prescribed by the regulations of the said company, and was in the usual form, transferring to the defendant the said shares to be held subject to the several conditions on which the plaintiff held them.

7. On the 20th of March, 1866, the defendant executed a transfer of the said twenty shares, together with 1,335 other shares in the said company, to one Lewin Barned Mozley, of Liverpool, who having also executed the said transfer on the same day procured the same to be registered by the said company, and his name to be entered in the register of members of the company, as a registered member in respect of the said twenty shares. The defendant was in fact the trustee and nominee of the said Lewin Barned Mozley, but he concealed this fact from the plaintiff, who was never informed or became aware of it.

8. The last mentioned transfer was also in the form prescribed by the regulations of the said company, and in the same form *mutatis mutandis* as that from the plaintiff to the defendant.

9. On the 18th of April, 1866, the said company stopped payment, and before the plaintiff had ceased to be a member of the company, in respect of any of the said fifty shares so allotted to him as aforesaid, for a period of one year, the company was, on the 8th of May, 1866, ordered by the Court of Chancery to be wound up compulsorily by the Court, under the provisions of the Companies Act, 1862.

10. At the time when the said company was ordered to be wound up as aforesaid, the said 10*l.* per share, and no more, had been paid or called up on the said twenty shares.

11. On the 24th of July, 1866, the said Lewin Barned Mozley was placed on the list of contributories of the said company settled by the said Court, being the list of existing members belonging to Class A., as an "existing member" of the company in respect of the said twenty shares and other shares of the company.

12. On the 30th of October, 1866, the said Lewin Barned Mozley, and his then late co-partner, executed an inspectorship deed under and in accordance with the provisions of the 192nd section of the "Bankruptcy Act, 1861," and the same having been assented to by the requisite majority of creditors (including the official liquidators of the said company), was duly registered on the 26th of November, 1866, and was and is binding on all the joint and separate creditors of the said Lewin Barned Mozley and his co-partner, the plaintiff not admitting that he or the defendant were or are such creditors (1).

13. On the 9th of February, 1867, the said Court made a call of 40*l.* per share upon the contributories in Class A., and made an order upon the said Lewin Barned Mozley, to pay the said call in respect of the said twenty shares, and the other shares in the said company held by him.

(1) It is not necessary to set out the deed of inspectorship, or the agreement of compromise referred to in the case. One of the pleas set out the inspectorship deed, and there were demurrers to be argued with the special case, but it was agreed by the respective counsel that the same points were involved, and that the judgment upon the Special Case should decide the demurrers.

14. The official liquidators of the said company proved under the said deed against the estate of the said Lewin Barned Mozley, but no part thereof has hitherto been paid by the said Lewin Barned Mozley out of his estate.

15. The "existing members" of the said company settled on the said list of contributories in Class A., were unable to satisfy the contributions which were required to be made by them as aforesaid, and the amount of the sums paid or recovered in respect of the said call was insufficient to pay the debts of the company, and this having been made manifest to the said Court by a certificate or order made and dated the 6th day of December, 1867, the said Court settled on the list of contributories of the said company, the "past members" of the company, that is to say, those persons who had not ceased to be members for a period of one year or upwards, prior to the date of the winding up of the company, including the defendant, who was placed on the said list of contributories as a past member of the company in respect of the said twenty shares, and other shares of the company which had been held by him, and also including the plaintiff who was placed thereon as a past member of the company in respect of the said twenty shares, and the other shares which had been allotted to him as aforesaid.

The list of past members was distinguished as Class B.

16. On the 27th of December, 1866, the defendant and his partners in business executed a deed of inspectorship under and in accordance with the provisions of the 192nd section of the Bankruptcy Act, 1861, which having been assented to by the requisite majority of creditors (including the official liquidators of the said company) was duly registered on the 29th of December, 1867, and was and is binding on all the joint and separate creditors of the defendant and his partners, the plaintiff not admitting that he or the said Lewin Barned Mozley were or are such creditors.

18. On the 20th of March, 1869, the Court ordered the defendant to pay a call of 40*l.* per share in respect of the said twenty shares, and the said official

liquidators proved for the amount of the said call against the estate of the defendant, but the same has not, nor has any part thereof, been paid by the defendant, nor realised out of his estate.

19. Negotiations took place between the plaintiff and the official liquidators of the company in reference to the liability of the plaintiff as a contributory in Class B., and before any order for a call had been made on the plaintiff, an agreement of compromise in reference to such liability was ultimately come to between them.

This agreement of compromise was afterwards approved of, and sanctioned by the Court of Chancery.

Such agreement was entered into between the plaintiff and the official liquidator of the company without the previous knowledge or consent of the defendant.

20. Accordingly on the 10th of May, 1870, the plaintiff paid to the official liquidators of the company, in pursuance of the said agreement, the sum of 15*l.* per share in respect of the said twenty shares sold and transferred by the plaintiff to the defendant as aforesaid.

21. The plaintiff claims to recover in this action the sum of 300*l.*, being the amount so paid by him as aforesaid in respect of the said twenty shares, together with interest thereon at the rate of five per cent. per annum, from the 10th day of May, 1871, the date of the said payment, until judgment.

22. There are debts and liabilities which were contracted by the said company before either the defendant or the plaintiff ceased to be a member of the company, in respect to the said twenty shares still outstanding and unsatisfied, the total assets of the company, including the whole amount recovered in respect of calls from the contributories in Class A. and Class B., having been sufficient to pay only 5*s.* in the pound to the creditors of the company.

23. The plaintiff had not, until after the making of the said agreement of compromise, notice that the defendant had executed a deed of inspectorship, or that he had transferred his said shares to the said Lewin Barned Mozley.

The question for the opinion of the

Court is, whether the plaintiff is entitled to recover against the defendant in this action.

Butt (Cohen with him), for the plaintiff. —First, is there, apart from the deed, any liability upon the defendant to save the transferor, the plaintiff, harmless from calls in respect of the shares transferred? *Moule v. Garrett* (2) was a case where there had been an assignment of a lease, and the plaintiff, the lessee, was sued by the lessor in respect of breaches of covenant committed while the defendants were assignees. He was compelled to pay, and the Court held that he was entitled to recover against the defendants. *Willes, J.*, said, "Where two parties have become bound, the one by contract and the other by estate, to perform the same covenant, the former is entitled to indemnity against the latter to the extent of his interest, although there is no immediate privity of contract between them." That principle applies to the present case; both plaintiff and defendant are upon the B list, and the defendant is bound to indemnify the plaintiff against calls. It must be taken that a contract existed between them in accordance with the provisions of the statute, see 25 & 26 Vict. c. 89. ss. 38, 102, 109, & 160. But further there is no substantial distinction between this case and *Roberts v. Crowe* (3). The only difference is that in *Roberts v. Crowe* (3) there was only one transfer, namely, from the plaintiff to the defendant, while in the present case the defendant had re-transferred the shares to Mozley, but such re-transfer cannot make any difference as to the liability of the defendant. If the defendant had paid the call of 40*l.* the plaintiff would not have been called upon, and would not have been driven to make a compromise with the liquidator.

[BLACKBURN, J.—The re-transfer can hardly make the defendant better off. You may at present assume that there is an implied contract between the transferor and the transferee.]

(2) 41 Law J. Rep. (N.S.) Exch. 62; s. c. Law Rep. 7 Exch. 104.

(3) 41 Law J. Rep. (N.S.) C.P. 198,
NEW SERIES, 42.—Q.B.

Next, the inspectorship deed may be taken to be good under s. 192 of the Bankrupt Act, 1861, but it does not follow that it can be set up as a defence to the present action. Both the transfers were made before the winding up order. The plaintiff and defendant were placed on the B list on the 6th of December, 1866. The deed was registered the 29th December, 1867. On the 20th of March, 1869, a call of 40*l.* was made on the persons on the B list. On the 10th of May, 1870, the plaintiff paid 15*l.*, carrying out the terms of the compromise which he had effected with the liquidator. *Roberts v. Crowe* (3) is decisive as to the validity of such compromise. The question then arises whether the plaintiff was such a creditor as under the Bankrupt Act, 1861 (24 & 25 Vict. c. 134), would be bound by the deed. The important section is the 153rd, which provides that if any bankrupt shall, at the time of adjudication, be liable by reason of any contract or promise to a demand in the nature of damages, which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the Court to direct such damages to be assessed by a jury, and the amount of damages, when assessed, shall be provable as if a debt due at the time of the bankruptcy. But the plaintiff could not avail himself of that provision; he had no claim against the defendant at the time of the registration of the deed. *Ex parte Mendel, in re Moor* (4) shews that the 153rd section applies only where there is a breach of contract previous to adjudication. In this case the registration of the deed may be taken to be the same as adjudication in a bankruptcy, and there was no breach of contract before the registration.

[QUAIN, J.—This cause of action would not arise until there had been actual damnification.]

No; it is clear that the plaintiff could not have proved under the deed—*Ex parte Wilmot, in re Thompson* (5), *Holmes v. Symons* (6).

(4) 33 Law J. Rep. (N.S.) Bankr. 14.

(5) 36 Law J. Rep. (N.S.) Bankr. 17; s. c. Law Rep. 2 Ch. Ap. 795.

(6) 41 Law J. Rep. (N.S.) Chanc. 59.
2 A

Charles Russell (*Herschell* and *Beresford* with him), for the defendant. — *Roberts v. Orowe* (3) differs from the present case in two points—first, that the defendant in *Roberts v. Orowe* (3) was the holder of the shares; and secondly, that the present defendant has executed a deed which has given to the company a statutory discharge. It is clear that there is no express contract to indemnify, and can one be implied in law? No such liability could have been contemplated at the time of the transfer. No liability could be incurred by the contributories upon List B till there had been a failure to pay the call upon the part of those on List A.

[*ARCHIBALD, J.*—It cannot be supposed that the plaintiffs transferred the whole benefit of the shares to the defendant, and yet that he was to remain liable to the burthens.]

But the defendant had parted with the shares. This distinction is pointed out by *Wightman, J.*, in delivering the judgment of the Court in *Walker v. Bartlett* (7), where he said, "It must be admitted that, in principle, no substantial distinction can be taken between that case and the present, except this, that in *Humble v. Langston* (8) the plaintiff claimed to be indemnified by the defendant against all future calls, even though made after the defendant had himself transferred the shares to other persons; and the Court of Exchequer, at the end of the judgment, observes that if there were any analogy in principle between the case of *Burnett v. Lynch* (9) and that before the Court, the defendants' implied promise would only be to indemnify against such calls as should be made whilst he was beneficially interested, whilst the plaintiff *Humble* claimed an indemnity against calls made after the defendant had parted with his interest. This, no doubt, is a very important distinction."

(7) 18 Com. B. Rep. 845; s. c. 25 Law J. Rep. (N.S.) C.P. 268.

(8) 7 Mees. & W. 517; s. c. 10 Law J. Rep. (N.S.) Exch. 442.

(9) 5 B. & C. 589; s. c. 4 Law J. Rep. (N.S.) K.B. 274.

Next, the deed is a defence, inasmuch as the plaintiff might have proved under it. The primary liability has been got rid of by the deed, and it would be strange if the secondary liability remained. The liquidator has proved under the deeds of the defendant and of *Mozley* for 20s. in the pound. The plaintiff might have proved (see ss. 74, 75, 77 of 25 & 26 Vict. c. 89); and under the circumstances there was great probability that there would be a call—*Re Pickering* (10). *Holmes v. Symons* (6) is no doubt against the defendant on the question of proof.

Butt was not called upon to reply.

BLACKBURN, J.—I think, even if *Roberts v. Orowe* (3) did not decide the matter, that it is perfectly clear upon the principle laid down in *Walker v. Bartlett* (7), and also upon general principles, that when these shares were transferred from the plaintiff to the defendant, and there was the contract to purchase the shares from the vendor, there was also a contract that the vendee would hold the vendor harmless from all the burdens of the property which he had purchased. The transferee was to get all the benefits of the property; he would have them as long as the possession of the property was beneficial, and I think that the law implies from that that he contracts to indemnify the transferor against all the burdens of the property which he, the transferee, has taken. "*Qui sentit commodum sentire debet et onus.*" That being so, I do not think that liability is got rid of by the person who has taken the property and entered into that contract, passing over the property to another who would enter into a similar contract of indemnity as between those two, and would consequently be liable. I do not see how that relieves the defendant from the contract to indemnify the plaintiff at all. Now here it turns out on the facts that the defendant having sold or transferred to another person, he cannot be on the A list. But as the year had not elapsed, both the plaintiff and the defendant are put, in respect of the same

(10) 38 Law J. Rep. (N.S.) Bankr. 1; s. c. Law Rep. 4 Chanc. App. 58.

shares, as far as the twenty shares are concerned, upon the B list. The effect of that is, that the defendant is the person first liable to pay the calls to the plaintiff, though they are both liable to pay them. I think, by the terms of the Act of Parliament, they are both debtors for the calls—debtors *in presenti*, though the time of the payment has not actually arisen.

In that state of things, if the defendant had paid the amount unpaid on the shares, which is the amount for which the call is made, to that amount the plaintiff could not be called on to pay. But the defendant did not pay, and consequently the plaintiff was liable to pay the 40l. a share. Then the plaintiff made an arrangement with the official liquidator, by which, instead of their exacting the 40l. a share from him, they were content to exact only 15l. a share. That diminishes the damages, and therefore on the twenty shares the sum claimed is 300l., instead of 800l. In respect of that amount he can recover, unless the deed made with the creditors, and which binds the creditors at that time, prevents it. The defendant has to shew that the plaintiff is one of the creditors. I think, in order to do that, the first step is to shew that, under the Bankrupt law in force at the time, the plaintiff was a person who could have proved at all. The legislature has in the different Bankruptcy Acts been enlarging the sphere of proof, and consequently they have enlarged the description of persons who are classed as creditors. But with regard to the Act of 1861, the only section which there is any pretence for saying has the effect contended for here, is the 153rd section, and upon the decisions that have been cited, and upon the words too, it is quite plain that does not apply in the present case. I look in vain for any such provision. The 153d section is, "If any bankrupt shall at the time of adjudication be liable by reason of any contract or promise to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained," then he may prove for it. In *Ex parte Mendell*; *in re Moor* (4), which was cited for Lord Westbury's judgment, the decision is

(which on looking at the words of the Act is pretty clear), that the breach of contract which gives rise to the unliquidated demand must accrue before the time of the adjudication. That is very much fortified by seeing that the 154th section makes a person a creditor, who may prove, provided he be liable to pay fixed sums of money, yearly or otherwise, payable at fixed times. That shews that the legislature was quite well aware that to meet the case of a contract not yet broken, it was necessary to say so in express words, but it confines it to cases of fixed sums. It seems, therefore, that this particular class of liabilities has not been made provable under the Bankrupt Act, and consequently this deed is no defence at all.

Mr. Russell has endeavoured to argue, that because the official liquidator is made to prove under this deed, though he may only have got a shilling in the pound, that we are to consider the debt as paid, and that therefore the plaintiff is to be treated as having been paid the debt by the defendant. But that is not so. The amount is unpaid in the sense that any creditor or debtor would understand it, that is, unpaid by actual payment. It does not mean that it shall be considered as paid if the person liable for it becomes bankrupt and has got a discharge. Even if there were not the decision of *Roberts v. Crowe* (3), I should have no hesitation in holding that the defendant fails on all the points, and that the plaintiff is entitled to judgment for the sum of 300l.

QUAIN, J.—I am of the same opinion. It is clearly established by a series of decisions, of which *Roberts v. Crowe* (3) is the last, that there is a contract to indemnify the transferor in respect of any liability that could arise afterwards, and that applies either when the transferor is put on the A List or the B List, and the cases shew it is the same thing when, as in the present case, both the transferor and transferee are put on the B List. Mr. Russell sought to point out a distinction in this case, from the fact that the defendant had transferred his shares to another. He says that the contract of indemnity is not to hold the transferee

harmless against any liabilities which he may incur as having been the holder of the shares within a year before the winding up, but that the liability is to be limited to the time during which the transferee is in the actual possession of the shares, and ceases when he transfers them. There is nothing in the cases, or the Act of Parliament, or the nature of things, which goes so to limit the liability, because the liability arises from the statute, which enacts that the transferor shall remain liable for twelve months after he has transferred the shares. That point did not exist in the case of *Burnett v. Lynch* (9), nor in the case of *Walker v. Bartlett* (7); there the liability ceased at once when the transfer took place, but here the statute expressly says that it shall not cease until twelve months afterwards. It is out of that that the liability arises, therefore, from the nature of things, there cannot be any such limitation of liability on the part of the defendant as Mr. Russell contends for.

Then the other point is whether this liability on the part of the defendant to the plaintiff was in existence at the date of the composition deed, or at the time of its registration. It seems on the authorities to be quite clear that, as between two creditors, that is not so, and that the debt did not arise until long after, and it was only then that the damages could arise in respect of this matter. It is clear that the plaintiff is not brought under the 153rd section, because, as Lord Westbury says, in *Ex parte Mendell* (4), there is no cause of action complete at the time; it did not arise until two years afterwards. Therefore we have to come back to the old question in these cases, which is, if the claim was proveable it is discharged, but if it was not proveable it is not discharged; there was no proveable debt here. For these reasons, I agree with my brother Blackburn that our judgment ought to be for the plaintiff.

ARCHIBALD, J.—The two questions in this case appear to be, what is the nature and extent of the liability incurred by way of indemnity, upon the transfer of the shares? and next, to what extent, if

at all, is the deed of inspectorship a defence? With regard to the first point, I think it is quite clear, upon the decided cases, that the contract of indemnity must extend to relieve the transferor, as between him and the transferee, entirely of the whole future burdens of the property. The very reason of the thing seems to be in accordance with that view, because the transferor, parting with the whole benefit of the shares, and transferring that to the transferee, as between him and the transferee, the only implication must be that the transferee is to hold the transferor harmless as regards all future calls. The legislature has left him liable to the company, primarily, for a year after the transfer, but that does not affect the question as between transferor and transferee. Therefore, both upon reason and as settled by the decided cases, the point is perfectly clear that though he has transferred to somebody else, he cannot by that means get rid of his liability to the transferor.

As regards the second point, as to the effect of the inspectorship deed, the question is whether there was a liability which could be proved under the deed by the plaintiff. I think, when we look at the language of the 153rd section, which says, "If any bankrupt shall, at the time of adjudication, be liable to a demand in the nature of damages," it is clear that it means a legal liability which has accrued at the time. That is the effect of the decision by Lord Westbury, and I confess, upon the language of the statute, I should think one can have very little doubt that that is the meaning of it; it means that a right of action must have accrued at the time, and unless that has taken place, there is no right to prove under the deed. Here the plaintiff had no right to prove under the deed, because, though the remedies on behalf of the company are much larger, so that, under some of the sections, they may prove against persons on the A list even before calls are made, when there is a liability, which is a liability to pay in the future, that makes no difference at all as regards a case of this kind. The liability being that of the transferee at the time the defendant executed the deed, the plaintiff

would have no right to prove at all. I think, on both these grounds, the defendant has failed here, and that our judgment must be for the plaintiff.

Judgment for the plaintiff.

Attorneys—Gregory & Co., agents for Duncan, Hill & Co., of Liverpool, for plaintiffs; Elmaley, Forsyth & Co., for defendants.

1878. } REYNOLDS AND ANOTHER
June 17. } v. HOWELL.

Staying Proceedings — Action brought without Authority.

If an attorney brings an action in the name of a person who has not given him any authority to do so, such person is entitled to have the proceedings stayed.

Rule calling upon the defendant upon notice of the rule to be given to his attorney, to shew cause why all proceedings in the action should not be stayed.

It appeared from the affidavits that, on the 24th of April, 1878, the defendant gave notice to the plaintiffs to proceed to the trial of the action. The attorney who had brought the action in the names of the plaintiffs was one M.

The plaintiffs were two sisters carrying on business in South Audley Street, and they swore in their affidavit, amongst other things, as follows—"We positively say that we never authorised the said Mr. M. to bring this action or any other action against the defendant, and that the same has been brought without our knowledge or authority. We were not aware of the action having been brought until the 3rd day of May instant, when we received from the said Mr. M. a notice to proceed to the trial of the cause which had been served on him on the part of the defendant."

Murphy shewed cause against the rule.—(He first urged that the affidavits were not sufficient to shew that the plaintiffs had not authorised the attorney to bring the action for them.) The rule ought to be discharged on the authority of the

case of *Mudry v. Newman* (1), where it was held to be no answer to a rule for judgment as in case of a nonsuit that the action was brought by an attorney without the knowledge or authority of the plaintiff. Parke, B., there said that he feared that the plaintiff's only remedy was against the attorney. *Hubbart v. Phillips* (2) was cited in moving for the rule, but that case is no authority in support of the present rule, the application having been made by the defendant.

[BLACKBURN, J.—That is so, but *Robson v. Eaton* (3) was cited by Parke, B., and is very strongly in favour of making the present rule absolute.]

It must be admitted that there is difficulty in distinguishing that case from the present.

Fullerton, in support of the rule.—The affidavit is sufficient, and *Robson v. Eaton* (3) is decisive of the question, as to the power of the Court to stay the proceedings.

BLACKBURN, J.—The affidavit is not so precise as one could wish, but I think that we may act upon it, and that we cannot suppose, in the teeth of such an affidavit, that the attorney had authority to bring the action in the names of the plaintiffs. The next question is one of law, namely, assuming that the attorney acted without authority, have the plaintiffs a right to call upon us to stay the proceedings? In the Anonymous Case in 1 Salk. p. 86, Holt, C.J., said, that where an attorney takes upon him to appear the Court looks no farther, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him. The Court seems to have thought that the judgment was regular, and that the remedy was by action against the attorney who acted without authority, and at page 88 the question would seem to be whether or not the attorney was solvent, but there is the case of *Robson v. Eaton* (3) which is distinctly contrary. There the action was brought in the Court of King's

(1) 1 C. M. & R. 402; s. c. 3 Law J. Rep. (n.s.) Exch. 356.

(2) 13 Mee. & W. 702; s. c. 14 Law J. Rep. (n.s.) Exch. 103.

(3) 1 Term Rep. 62.

Bench, and the defendant pleaded that after the making of the promises in the declaration mentioned, the plaintiff, by William Hodgson, his attorney, impleaded the defendant for the very same cause of action. That in the course of that suit it was ordered by the Court that the defendant should pay to the plaintiff the sum of 62*l.*, if the plaintiff would accept thereof in discharge of the suit, and if not, that the defendant should immediately pay the same into Court. That in pursuance of that order, he did pay the same into Court, and that the said William Hodgson, the attorney for the plaintiff in that suit, took the same out of Court. Then there was a replication that William Hodgson was never retained by the plaintiff to implead the plaintiff, or empowered by the plaintiff to receive the money out of Court for him. Rejoinder (not denying that Hodgson was not retained by the plaintiff, but) saying that the said William Hodgson was admitted and received on record by the said Court of Common Pleas as the attorney of the plaintiff, and permitted by the said Court to receive the said money out of Court. To this there was a demurrer. In fact one Davis having procured a forged power of attorney had commissioned Hodgson to bring the action, and the money paid into Court had been paid by Hodgson to him. Lord Mansfield, C.J., said—"There can be no doubt upon this case. The attorney who trusted to the warrant of attorney is liable, and Davis, who committed the forgery, is liable to him. The record of the Common Pleas amounts to no more than this, that the attorney prosecuted the suit in the plaintiff's name, but it does not state the authority given to him by the plaintiff for so doing." Therefore the Court came to the conclusion that judgment must be given for the plaintiff. This was quite inconsistent with the decision in *Salkeld*, and it decides that as long as the attorney acted without authority the proceeding was a nullity altogether. Then the question arises whether we can impose any terms when the proceeding is a nullity. In *Mudry v. Newman* (1), *Robson v. Eaton* (3) was not brought to the attention of the

Court, nor in *Barber v. Wilkins* (4), when Parke, B., was sitting alone. In *Bayley v. Buckland* (5) it was cited, and upon the authority of *Hubbart v. Phillips* (2), in which case Parke, B., had mentioned and referred to it, the Court decided that the judgment was irregular and must be set aside. The point was raised in *Stanhope v. Firmin* (6), but what became of it I do not know. We must take it in this case that the action was brought without authority from the plaintiffs, and that it must be stayed. Of course whenever a person hears that an attorney has brought an action in his name without any authority, he should repudiate it as soon as possible.

ARCHIBALD, J.—I am of the same opinion. In some of the cases the decision has turned upon the question whether or not the attorney was solvent, but in those cases *Robson v. Eaton* (3) was not brought to the attention of the Court. The law is settled by that case, and the only question which we have to decide is one of fact whether the attorney is shewn to have acted without authority or not. I think it does sufficiently appear that he did so act without authority, and that the plaintiffs are entitled to have the proceedings stayed.

Rule absolute without costs.

Attorneys—Dod & Longstaffe, for plaintiffs;
Field, Roscoe & Co., for defendants.

1873. { THE QUEEN v. THE CHESHIRE
May 31. { LINES COMMITTEE.
THE SAME v. THE SAME.

Special Constable—Appointment of—1 & 2 Will. 4. c. 41—Order for Payment of—1 & 2 Vict. c. 80—Right to be heard against such Orders being made.

Under 1 & 2 Will. 4. c. 41, justices of the peace may appoint special constables, if it

(4) 5 Dowl. P.C. 805.

(5) 1 Exch. Rep. 1; s. c. 16 Law J. Rep. (N.S.) Exch. 204.

(6) 3 Bing. N.O. 301; s. c. 6 Law J. Rep. (N.S.) C.P. 175.

is made to appear to them upon oath of any credible witness that a tumult or riot may be reasonably apprehended, and if they are of opinion that the ordinary officers appointed for preserving the peace are not sufficient.

Under 1 & 2 Vict. c. 80, justices are empowered, upon being satisfied upon the oaths of three credible witnesses, that the appointment of such special constables was occasioned by the behaviour, and reasonable apprehension of the behaviour, of persons employed upon railway works, to make an order for the payment of such special constables upon the treasurer or other officer having the control of the funds of any company carrying on such works:—

Held, that before such last-mentioned order is made, an opportunity must be afforded to the persons upon whom it is proposed to be made to be heard against it.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 100.]

1873. } CROUCH v. THE CREDIT FONCIER
July 5. } COMPANY.

Joint Stock Company—Debenture—Negotiable Instrument.

A company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), issued a debenture under the seal of the company and countersigned by two of the directors and the secretary. By it the company promised, subject to conditions endorsed, to pay to the bearer the sum of 100l. upon the 1st of May, 1872, or upon any earlier day upon which it should be entitled to be paid off or redeemed according to the conditions. By the conditions the company contracted not only to pay the money, but also to cause a portion of the debenture to be drawn in a stipulated manner. Of late years a custom of trade has prevailed to treat such bonds as negotiable instruments:—Held, that the debenture was not a negotiable instrument, and that therefore where it had been stolen from the owner, no action could be maintained upon it against the company by a person who claimed through the thief who stole it.

Declaration that the defendants made their certain debenture in the words and figures following—

“No. B. 499.

“The Credit Foncier of England, Limited.

“Incorporated under the Company's Act of 1862.

“£100

Debenture £100.

“The Credit Foncier of England, Limited, hereby promise (subject to the conditions endorsed on this debenture) to pay to the bearer the sum of 100l. on the 1st day of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off or redeemed, according to the said printed conditions endorsed hereon, such payment to be made at Messrs. Smith, Payne & Smiths, bankers, No. 1, Lombard Street, London.

“And, subject to the said endorsed conditions, the Credit Foncier of England, Limited, hereby further promise to pay to the bearer interest, at the rate of eight per cent. per annum, upon the said sum of 100l. hereby secured, by equal half-yearly payments on the 1st of November and the 1st of May in each year, according to the coupons hereto annexed, the first of such half-yearly payments to be made on the 1st day of November, 1869, and to be continued half-yearly up to the 1st day of May, 1872, unless this debenture shall be entitled to be paid off or redeemed upon any earlier day than the 1st day of May, 1872, in which case the payment of such interest shall be made up to such earlier day only. And, subject to the said endorsed conditions, the Credit Foncier of England, Limited, hereby further promise to pay to the bearer as and by way of additional interest or bonus upon the said principal sum of 100l. hereby secured, the further sum of 10l., such payment to be made at the same time and place as the said principal sum of 100l. shall become payable according to the tenor of this bond and the conditions hereon endorsed.

“In witness whereof, the common seal of the Credit Foncier of England, Limited, has been affixed this 19th day of May, 1869.

“Directors. { G. N. Alford.
 { A. F. Cunningham.

" Henry J. Bacher, Financial Secretary.

" Conditions upon which this debenture is issued—

" 1. This debenture is one of the series B. of debentures of 100*l.* each, Nos. 81 to 1,140 inclusive, issued by the Credit Foncier of England, Limited.

" 2. The debentures of the several series amount together to 200,000*l.*, and are issued in amounts of 500*l.*, 100*l.*, 50*l.*, 20*l.* and 10*l.* as follows—

Series A.	80 debentures, No. 1 to 80 of 500 <i>l.</i> each.	£40,000
" B.	1,060 debentures, No. 81 to 1,140 of 100 <i>l.</i> each.	106,000
" C.	790 debentures, No. 1,141 to 1,930 of 50 <i>l.</i> each.	39,500
" D.	380 debentures, No. 1,931 to 2,310 of 20 <i>l.</i> each.	7,600
" E.	690 debentures, No. 2,311 to 3,000 of 10 <i>l.</i> each.	6,900
	<hr/> 3,000	<hr/> £200,000

" 3. The debentures will be paid off or redeemed according to the following table shewing the times when such redemptions are to be made, and the aggregate principal sums, exclusive of bonus or additional interest, to be paid off on each occasion—

Dates of Redemption.	Amount.
1870, 1st of May . . .	£40,000
1st of November . . .	40,000
1871, 1st of May . . .	40,000
1st of November . . .	40,000
1872, 1st of May . . .	40,000
	<hr/> £200,000

" 4. A proportionate number of debentures of each series will be drawn for redemption at each periodical drawing.

" 5. The directors of the Credit Foncier of England, Limited, however reserve to themselves the right to pay off the whole of the debentures at any earlier period than those specified above, on giving thirty days' notice by advertisement in a London daily newspaper of their intention so to do; should such right be exercised both the amount of interest then accrued and a bonus equal to 10*l.* per cent. on the amount of the debenture by way of additional interest will be paid at the same time.

" 6. The particular debentures to be paid off on each occasion will be determined in the following manner.

" (a) The drawings will take place half-yearly at the office of the Credit Foncier of England, Limited, St. Clement's House, St. Clement's Lane, in the City of London, or other the head office of that company for the time being, in the presence of a notary public of the City of London, at least twenty-one days before the respective half-yearly days on which the debentures are to be paid off or redeemed.

" (b) Public notice of such drawing will be given by the company at least ten days previously by advertisement in a London newspaper.

" (c) Forthwith, after each drawing, notice will be given by advertisement in a London daily newspaper of the numbers and amounts of the debentures drawn to be paid off the next half-yearly day for redemption.

" 7. All the debentures not previously drawn will become payable on the 1st day of May, 1872.

" 8. Every debenture is entitled to interest on the principal sum at the rate of eight per cent. per annum, payable on the 1st day of November and the 1st day of May, the first of such payments to be made on the 1st day of November, 1869, and to be continued until the 1st of May, 1872, unless, in the meantime, the debenture shall become entitled to be paid off or redeemed, and in that case interest shall only be paid up to the day on which the debenture is entitled to be so paid off; at the time of payment of any coupon for interest such coupon is to be delivered up to the company.

" 9. Every debenture, as it becomes payable, will be paid to the bearer, together with a bonus by way of additional interest equal to ten per cent. on the amount of the debenture at Messrs. Smith, Payne & Smiths, No. 1, Lombard Street, London, but the person presenting it will be required to surrender it up at the time of payment, together with all coupons for future interest thereon as hereafter mentioned.

" 10. When any debenture is drawn or advertised to be paid off or redeemed, the

coupons annexed to it purporting to be for interest accruing due after the day on which the debenture is entitled to be paid off or redeemed become null, and must be delivered up to the company at the same time as the debenture itself."

And the plaintiffs became the lawful bearers of the said debenture, and all things happened, and all times elapsed, and all conditions were fulfilled, necessary to entitle the plaintiff to a performance of the said promises of the defendants, and to payment of the said sum of 100*l.* in the said debenture mentioned, and to the interest thereon for one half of a year, which became payable thereon on the 1st day of May, A.D. 1872, and to the bonus by way of additional interest therein expressed to be payable, and to maintain this action for the breach thereof hereinafter alleged, and nothing happened to prevent the plaintiff from maintaining this action for the same: Yet the defendants have not paid the said sum of 100*l.* in the said debenture mentioned, or the said interest on the said bonus or any part thereof.

Pleas—

1. That the debenture is not the deed of the defendants.

2. That the plaintiff did not become, nor was, at the commencement of this suit, the lawful bearer of the said debenture, as alleged.

3. On equitable grounds, that after the making and issuing of the said debenture, the same became and was the lawful property of one James Macken, as the bearer thereof, and before the plaintiff became possessed thereof as hereinafter is mentioned, the same debenture was feloniously stolen from the said James Macken, and that the said debenture was, at the time of the said felony, and still is, the property of the said James Macken, and that the plaintiff was not, nor is he a *bona fide* holder, for value received, of the said debenture; and that the plaintiff had, before and at the time of taking the said debenture, notice and knowledge of the premises; and the plaintiff also first took and received the same after it had become overdue and payable; and the plaintiff is not, nor is he entitled to the said debenture, or to sue upon or enforce payment of the same;

New Series, 43.—Q.B.

and the defendants say that they refused and still refuse payment of the said debenture and moneys in the declaration mentioned, at the request of the said James Macken, which is the breach complained of.

4. As to the 4*l.* parcel of the money in the declaration claimed as and for one half-year's instalment of interest, payable on the 1st of May, 1872, the defendants say that the debenture was, according to the said conditions endorsed thereon, as in the declaration alleged, duly drawn, to be paid off on the 1st of November, 1870, and that the defendants have paid interest on the said debenture according to the said conditions up to the said 1st of November, 1870; and that such notices were given of the said drawing as are required by the said conditions. And the defendants further say that all conditions have been fulfilled, and all things have happened, and times elapsed, necessary to entitle the defendants to the benefit of the said conditions, in respect of the matters herein pleaded to, and that they are not liable to pay the said interest upon the said debenture since the said 1st of November, 1870.

Replication—Issue thereon.

At the trial, which took place at the Summer Assizes for Kent, 1872, before Bramwell, B., it appeared that the defendants had, in May, 1869, sold ten debentures for 100*l.* each, including the one set out in the declaration, to one James Macken, who never parted with these debentures. In July, 1869, his house was broken into, and the ten debentures were stolen. He gave immediate notice to the defendants, and they, on his indemnity, agreed to stop the payment of the stolen debentures, and gave him other debentures with corresponding numbers, in the place of those stolen. In October, 1870, the debenture in question was drawn as one of those to be paid off on the 1st of November, 1870, according to the conditions printed on the back, and the amount was paid to the holder of the substituted debenture of that number. In the end of 1871 the plaintiff purchased the debenture from a person called Stanley, who has since absconded. The company refused to pay it,

2 B

and this action was brought, Macken, in pursuance of his indemnity, defending the action in the name of the company.

The jury found that the plaintiff gave value for the debenture, and without notice. The verdict was entered for the plaintiff for 110*l.*, except as to the 4th plea, leave being reserved to the defendant to move to enter the verdict for him.

Subsequently a rule *nisi* was obtained, calling upon the plaintiff to shew cause why the verdict obtained by him should not be set aside, and the verdict entered for the defendants instead thereof, on the grounds, first, that the instrument declared on was not negotiable, or one where the holder could acquire a better title than his transferor; secondly, that the instrument having been drawn for payment, was overdue, and imported notice to every subsequent holder.

Garth and F. Turner shewed cause against the rule (on May 6). [The case is so fully gone into in the judgment, that it is not necessary to set out the arguments.] They referred to the following authorities and statutes—

Gorgier v. Mieville (1); *Re The Imperial Land Company of Marseilles* (2); *Horton v. The Westminster Improvement Commissioners* (3); *Partridge v. The Bank of England* (4); *Re The Blakely Ordnance Company* (5); *Dixon v. Bovill* (6); *In re The Natal Investment Company* (7); *Coleman v. Cooke* (8); *Byles on Bills*; *Halford*

- (1) 3 B. & C. 45.
- (2) 40 Law J. Rep. (N.S.) Chanc. 93; s. c. Law Rep. 11 Eq. 478.
- (3) 7 Exch. Rep. 780; s. c. 21 Law J. Rep. (N.S.) Exch. 297.
- (4) 9 Q.B. Rep. 396; s. c. 15 Law J. Rep. (N.S.) Q.B. 395.
- (5) 37 Law J. Rep. (N.S.) Chanc. 418; s. c. Law Rep. 3 Ch. 160.
- (6) 3 Macq. H.L. Cas. 1.
- (7) 37 Law J. Rep. (N.S.) Chanc. 362; s. c. Law Rep. 3 Ch. 355.
- (8) Willes, 393.
- (9) 16 Q.B. Rep. 442; s. c. 30 Law J. Rep. (N.S.) Q.B. 160.

v. Cameron's Coalbrook Steam Coal Company (9); 30 & 31 Vict. c. 131. s. 37; *Re The General Estates Company* (10); *Burbridge v. Mannors* (11); *Carlton v. Keneale* (12).

Philbrick, in support of the rule, commented on the cases cited above, and, in addition, referred to *Miller v. Dibble*, cited in a note in *Byles on Bills*, 10th edit. 207; 25 & 26 Vict. c. 89. s. 47; *Glyn v. Baker* (13); *Lang v. Smyth* (14); *Miller v. Race* (15); *Higgs v. The Northern Assam Tea Company* (16); *Re The Bahia and San Francisco Railway Company* (17).

Our. adv. vult.

The judgment of the Court (18) was delivered (on July 5) by

BLACKBURN, J.—This was an action brought by the plaintiff in his own name, as holder of an instrument called a debenture, against the Credit Foncier, a company incorporated under the Companies Act, 1862. It was defended in the name of the defendants by one Macken, to whom the defendants had originally issued the debenture, and who had indemnified the defendants.

The instrument was under the seal of the company, countersigned by two directors and the secretary. The form of the instrument, as far as is material to the points we have to decide, is as follows—It is headed with the name of the company, "The Credit Foncier of England (Limited), incorporated under the Companies Act, 1862."

It is called a debenture, and is numbered B 499. It then proceeds—

"The Credit Foncier of England here—

- (10) Law Rep. 3 Ch. 758.
- (11) 3 Campb. 194.
- (12) 12 Moo. & W. 139; s. c. 13 Law J. Rep. (N.S.) Exch. 64.
- (13) 13 East, 509.
- (14) 7 Bing. 284, 294.
- (15) 1 Smith's Leading Cases, 390.
- (16) 38 Law J. Rep. (N.S.) Exch. 233; s. c. Law Rep. 4 Exch. 387.
- (17) 9 B. & S. 844; s. c. 37 Law J. Rep. (N.S.) Q.B. 176.
- (18) Blackburn, J., Quain, J., and Archibald, J.

by promise, subject to the conditions endorsed on this debenture, to pay to the bearer the sum of 100*l.* on the 1st day of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off or redeemed, according to the said printed conditions endorsed hereon, such payment to be made at Messrs. Smith, Payne & Smiths', bankers, No. 1, Lombard Street." [Then follow some stipulations as to interest and bonus, which we need not notice.]

"In witness whereof the common seal of the Credit Foncier of England (Limited) has been affixed, this 19th day of May, 1869."

"Directors. { "G. Balfour,
 { "A. F. Cunningham,
 { "Henry Barber,
 { "Financial Secretary."

The conditions printed on the back, as far as material to notice, are as follows: [His Lordship read some of them, and then stated the facts as they appeared at the trial, and as they are above set out.]

The question left to the jury was, whether the plaintiff gave value for this debenture without notice, and the jury found this in favour of the plaintiff, and no motion has been made to question that verdict.

The question of law reserved for this Court was whether the plaintiff could, under such circumstances, maintain this action, it being admitted that the debenture had been stolen, and that the plaintiff derived title from the thief.

No evidence was given at the trial as to whether similar documents are in practice treated as negotiable, nor was any express admission made as to this point, but from my brother Bramwell's report we think that we must take it to have been tacitly admitted at the trial that they are so treated, and we must in this case assume that this admission is correct. As instruments of this kind have only come into use within the last few years, a custom or usage to treat them as negotiable can only have begun recently, but we must, in deciding this case, proceed on the assumption that they have acquired whatever degree of negotiability can be created by any such recent custom of trade. As we proceed entirely on this

admission, it is not to be taken in any future case that any custom was in this case established.

The general rule is not disputed that a *chose in action* cannot be transferred at law at all, but that in equity it may be assigned, though the action at law must be brought by the assignee in the name of the original contractee, in this case, Macken. Equity will compel the contractee if he has assigned the contract to allow his name to be used for this purpose, on an indemnity against costs. Had Macken assigned this contract to the plaintiff, either directly or through the medium of intervening assignees, the question whether the plaintiff was able to sue in his own name, or was obliged to sue in the name of Macken, would have been purely technical. But the general rule, both at law and in equity, is that no person can acquire title either to a *chose in action* or any other property from one who has himself no title to it, and therefore the plaintiff could not, in equity, have compelled Macken to permit his name to be used, unless, to borrow the language of Tindal, C.J., in *Brandao v. Barnett* (19), "such an instrument as this falls within that description of property, to which a good title may be acquired by a party who takes it *bona fide* for value, notwithstanding any defect of title in the party from whom it is taken."

In the present case the plaintiff has taken upon himself the burthen of establishing both that the property in the debenture passed to him by delivery, and that the right to sue in his own name was transferred to him. The two propositions are very much connected, but not identical. The holder of an overdue bill or note may confer the right on the transferee to sue in his own name, but he conveys no better title than he had himself. So the assignee of a Scotch bond, which is assignable by the law of Scotland, may sue in his own name in the courts of this country—see *Innes v. Dunlop* (20), but he has not a better title than those from whom he took the bond, unless (perhaps) if the contract is by the law of

(19) 1 Man. & Gr. 908, 935.

(20) 8 Term Rep. 595.

Scotland not merely assignable, but also negotiable. As to this, in *Dixon v. Bovill* (6), Lord Cranworth, then Lord Chancellor, in delivering the judgment of the House of Lords, in a Scotch case, as to iron scrip notes, says: "I have no hesitation in saying that independently of the law merchant, and of positive statute, within neither of which classes do these scrip notes range themselves, the law does not, either in Scotland or in England, enable any man by a written engagement to give a floating right of action, at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title."

But the two questions go very much together, and indeed in the notes to *Miller v. Race* (15), where all the authorities are collected, the very learned author says: "It may, therefore, be laid down as a safe rule, that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, i.e., if it be either not accustomably transferable, or though it be accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a *negotiable instrument*, nor will delivery of it pass the property of it to a vendee, however *bona fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt."

Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who by a genuine indorsement or where it is payable to bearer, by a delivery becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from

whom he took it. The first question, therefore, is, whether this instrument is a promissory note.

It is under seal, and therefore is *prima facie* a covenant, not a promise, and it is quite clear that a covenant to pay money is not negotiable by the custom of merchants.

When a corporation is established for trading purposes, it is from its nature capable of drawing a bill of exchange and making the promise implied by law from making a bill, and is liable to be sued in *assumpsit* on the bill, though a body corporate—see *Murray v. The East India Company* (21).

This is not by virtue of any statute but upon the common law. But all such bills of exchange in practice always have been made under hand by an agent authorised to draw or accept, as the case may be.

The East India Company draw by their secretary. The Bank of England, as any one who looks at a Bank of England note may see, make their notes by an agent, and there is no case in the books where a bill of exchange made under seal has been sued upon.

The negotiability of promissory notes depends (in part at least) upon the statute 3 & 4 Anne c. 9, and it seems to have been the opinion of Lord Justice Wood in *Re The General Estates Company* (10), and of Malins, V.C., in *The Imperial Land Company of Marseilles* (2), that inasmuch as that Act enacts that "all notes in writing that shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant or trader who is usually intrusted by him, her or them, to sign such promissory notes for him, her or them, whereby such person or persons, body politic or corporate, his, her or their servant or agent as aforesaid, doth or shall promise to pay any sum of money," shall be indorsable as bills of exchange are by the custom of merchants, it follows that a corporation fixing its seal to a written promise to pay, must be considered as signing the promise, not as covenanting under seal to fulfil it, and so that the statute by impli-

cation enacts that what would at common law be their covenant to pay is their promise to pay. In *Slark v. The Highgate Archway Company* (22) a similar question was raised but not decided. There, however, the Act authorised the making of notes under the seal of the corporation. But, although intimating their opinion, neither of the learned persons referred to gave any decision on the point, as it was not necessary for the purpose of the case before them. Neither is it necessary for us to decide it, as, for reasons which will presently be given, the instrument in question, even if under hand, could not be a promissory note; but we wish to point out that in *Glyn v. Baker* (13) the form of the East India bond was that the East India Company acknowledged to have received of G. W. Sibley 100*l.*, which the company promised to repay to Sibley, his executors or assigns, by indorsement.

It was therefore, in form, a promissory note for value received payable to order, and had it been signed as such by an agent of the East India Company, would have been negotiable. But it was a bond under the seal of the East India Company, and Le Blanc says, "It is clear no action could have been maintained on this bond but by Sibley the obligee or in his name; or if he died, in the name of his executors." The alarm occasioned by this decision was so great that within a month afterwards an Act (51 Geo. 3. c. 64) was passed to make East India Bonds negotiable like promissory notes. It seems not to have occurred to anyone that it would be said that this was already done by virtue of the statute of Anne, the promise in writing being signed by the East India Company's seal. This seems a strong authority for saying that instruments under the seal of a body corporate are not exceptions from the general rule laid down in *Byles on Bills*, p. 67*n.*, that at "common law bills of exchange and promissory notes, being simple contracts, cannot be under seal at least so as to retain their negotiable qualities." And it certainly is very desirable that it should not be left doubtful on the face of an instrument whether it is a covenant or a promise.

(22) 5 Taunt. 792.

But it is not necessary to decide in the present case whether an instrument under the seal of a corporation can be a promissory note, for the contract of the Credit Foncier is not merely to pay the money, but also to cause a portion of the bonds to be drawn in the stipulated manner, and any one entitled to sue on the contract contained in this instrument would be entitled to sue for damages, if the company did not fairly give him his chance of having his bond drawn according to the stipulated conditions. And it is obvious that such a contract as that cannot be a promissory note. It is not pretended that there is any statute applicable to such a class of instruments as the present. We have, therefore, to see whether it falls within any other principle.

Foreign and Colonial Governments frequently create a public debt, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder.

There can hardly properly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign government. In *The Attorney-General v. Bouvens* (23), it was found in the special verdict as to Russia, Danish and Dutch Bonds, that those securities have always been dealt with as transferable within this kingdom by delivery only, that it is not necessary to do any act out of England to render such a transfer valid, and that the bearers of the bonds have always been treated and dealt with by the agents of the three sovereigns as entitled to the money payable under the bonds.

The Court in that case held the bonds transferable in England, so as to render the executors liable to probate duty in respect of them. And the Court of King's Bench in *Gorgier v. Mieville* (1) decided that a Prussian bond of similar description was negotiable. We have no intention to throw the least doubt on this decision, but we do not think it applicable to an English instrument made in England, and we express no opinion as to what might be the law as to obligations

(23) 4 Mee. & W. 171; s. c. 7 Law J. Rep. (x.s.) Exch. 297.

made by subjects abroad, which by the law of the country where they were made are negotiable in that country.

We confine our judgments to the case before us, which is that of an English instrument made by an English company in England.

We think that the form of the instrument shews that the defendants did contract with Macken, to whom they originally issued this instrument, to pay the money to the bearer of this instrument, and (wholly irrespective of any custom) they were competent to make any stipulations they pleased with Macken, that would affect their own rights and his only. If Macken had sued them, a plea that they had paid the money to the bearer without any notice that he was not entitled to it, would be good, if, on the true construction of the instrument, it is stipulated that the receipt of the bearer giving up the instrument should be a sufficient discharge for the company, for they were quite competent to stipulate to that effect. And if Macken were suing in his own name for the benefit of an assignee, as in *Higgs v. The Northern Assam Tea Company* (16), or if the assignee were proceeding in equity in his own name, as in *Re The Blakely Ordnance Company* (5), *Re The Natal Investment Company* (7), *Ex parte The City Bank* (24) and *Re The Imperial Land Company of Marseilles* (2), and the defendants set up some equitable defence, good against the original contractee, and therefore generally good against the assignee also, it would be a good answer to say that the defendants had, with a view to induce persons to become assignees of such instruments, represented that there were no such equities, and that the now holder was induced to take this instrument on the faith of that representation. That would amount to an estoppel at law—see *The Bahia and San Francisco Railway Company* (17); and in *The Blakely Ordnance Company* (5) it was held that it was a good answer in equity. In *Re The Natal Investment Company* (7), Lord Cairns, as we understand him, thought that the mere fact of making an investment payable to order did not amount to

such a representation, but he did not dispute that if made out it would produce the effect contended for, or say that such a provision was beyond the competency of the parties. We have not now to consider whether the form of this debenture is such as to amount to such a representation or not. If it does, the Credit Foncier had full power to alter or abandon their own rights, but the plaintiff is obliged to contend in this case that they had also power to alter and abandon the rights of those who might become holders of the instruments, and to declare that such persons should (contrary to the general rule of law) hold their property on a precarious title, liable to be diverted, if a thief or finder could find a *bona fide* purchaser for the debenture. No authority has been cited to shew that it is within the competency of private persons by their contract to attach such an incident to any property.

He is also obliged to contend that they could give a right of action in his own name to any holder, though the general law would give no such right of action to the holders.

There is no decision or authority that it is competent to a party to create by his own act a transferable right of action on a contract. It is enough to refer to *Dixon v. Bovill* (6) and *Thompson v. Dominy* (25) as authorities that he cannot (irrespective of custom) so create it.

We have only further to consider whether the custom or practice of trade to treat such instruments as negotiable makes any difference. We must take it as admitted (whether truly or not we know not) that such a custom has prevailed of late years, but as the instruments themselves are only of recent introduction it can be no part of the law merchant.

Incidents which the parties are competent by express stipulation to introduce into their contracts, may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit incorporation, no

usage can annex the incident. But where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. It may be so annexed by the ancient law merchant which forms part of the law, and of which the courts take notice. Nor if the ancient law merchant annexes the incident, can any modern usage take it away. Thus in *Edie v. The East India Company* (26) there was a verdict of the jury founded on strong evidence that, according to usage in London, an indorsement to an indorsee by name without any further words was restricting, but the Court of King's Bench decided that the evidence should not have been admitted, the law merchant being known to the Court to be that it was not restrictive, and in *Partridge v. The Bank of England* (4) there was the exact converse.

There the dividend warrants of the Bank of England were in the form of cheques payable to a particular person, Partridge, without any words to make them transferable, which therefore were by the general law merchant not transferable.

The Court of Exchequer Chamber gave judgment *non obstante veredicto* on a plea on which it had been found that by custom for sixty years such dividend warrants were negotiable.

We have already intimated our opinion that it is beyond the competency of the parties to a contract by express words to confer on the assignee of that contract a right to sue in his own name. And we also think it beyond the competency of the parties by express stipulation to deprive the assignee of either the contract or the property represented by it, of his right to take back his property from any one to whom a thief may have transferred it, even though that transferee took it *bona fide* and for value.

As these stipulations, if express, would have been ineffectual, the tacit stipulations implied from custom must be equally ineffectual.

We think, therefore, that the rule to

enter a verdict for the defendant, ought to be made absolute.

My brother Bramwell, in reserving the question, provided that there should be no appeal without leave of this Court. We give that leave on two conditions: first, that the plaintiff within a month give security to the satisfaction of the master for the costs in appeal, as well as the costs below; and, secondly, that he consents that the court of error shall have liberty to disregard the form of the pleas and decide on the real question.

Rule absolute.

Attorneys—T. H. Darville, for plaintiff; Evans & Co., for defendant.

[IN THE EXCHEQUER CHAMBER.]

(*Error from the Court of Queen's Bench.*)

1873. } STEWART AND OTHERS v. THE
June 17, } WEST INDIAN AND PACIFIC
23, 27. } STEAMSHIP COMPANY.

Marine Insurances—General Average—Damage to Cargo by Water to extinguish Fire—Practice of Average Staters—Bill of Lading—"Average, if any, to be adjusted according to British Custom."

A ship was lying at anchor in port with a general cargo on board, when a fire broke out in the forehold. Every effort was made, but without success, to extinguish the fire by throwing water down the hatchways and upon the cargo. Finally, a hole was cut in the side of the vessel, and her fore compartment filled with water. This extinguished the fire, and if it had not been done the cargo would have been destroyed, and the ship seriously damaged if not rendered a total wreck. Part of a quantity of bark, shipped on board by the plaintiffs, was damaged or destroyed by the water thus poured or let into the vessel to extinguish the fire. The bark was shipped under a bill of lading, which contained the words, "average, if any, to be ad-

justed according to British custom." It is the practice of British average adjusters in adjusting losses to treat a loss occasioned by water in the manner above described as not a general average loss:—Held, affirming the judgment of the Queen's Bench, but without determining whether the loss was according to the general law of England the subject of a general average contribution, that the words "British custom" in the bill of lading must be taken to mean the practice of British average adjusters, so that the claim for general average was expressly excluded.

Error from the judgment of the Queen's Bench, reported *ante*, page 84, where the special case is set out. For the purpose of this report the facts are sufficiently stated in the head note.

The case was argued (on June 17, 23) by—

Butt (*Wilkins* with him), for the plaintiffs.

Milne (*R. G. Williams* with him), for the defendants.

Cur. adv. vult.

The judgment of the Court (1) was delivered, on the 27th of June, by

BRETT, J.—If it were necessary in this case to determine whether the destruction of merchandise by water cast upon it in the course of throwing water to extinguish a fire which is burning other merchandise in the same ship, is the subject of general average, we should desire further time to consider a question which is no doubt of great importance, and upon which we know of no direct authority in the law of this country.

But the bill of lading which in express terms provides that average, if any, is to be adjusted according to "British custom" appears to us to admit of no other construction than that which has been put upon it by the Court of Queen's Bench. The custom or usage prevailing among average staters in England is uniform and invariable that goods thus damaged or destroyed are not brought into account

in an average adjustment. We agree with the Court below that the phrase "British custom" in this bill of lading was intended to refer, and upon a true construction does refer, to this custom or usage, even if it be different from the British law, a point which in this case we do not determine.

The judgment of the Queen's Bench must, therefore, be affirmed.

Judgment affirmed.

Attorneys—*Milne, Riddle & Mellor*, for plaintiffs;
Chester & Urquhart, agents for *Haigh & Co.*,
Liverpool, for defendants.

1873. { THE AERATED BREAD COMPANY
June 7. { (*appellants*) v. GRIGG (*respondent*).

Bread—Sale of, otherwise than by Weight—6 & 7 Will. 4. c. 37. s. 4.

The appellant was convicted under 6 & 7 Will. 4. c. 37. s. 4, for selling bread from a van without having a beam or scales. The material of which the bread was made was, in all respects, the same as ordinary bread, except that carbonic acid gas was forced into it. It was crusty all round, and was known in the trade as French or fancy bread, but in no way, except the manner of baking in separate loaves, resembled what was called French or fancy bread at the time of the passing of the Act:—Held, that the conviction was right, as the proviso in s. 4. could not be construed to apply to bread of such a description.

The Queen v. Wood (38 Law J. Rep. (N.S.) M.C. 144) observed upon.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 117.]

(1) *Kelly, C.B.; Martin, B.; Cleasby, B.; Brett, J.; Grove, J.; and Deaman, J.*

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

1873. } EMMA SARAH ROBSON v. THE
 June 14, } SHROPSHIRE UNION RAILWAYS
 16, 20. } AND CANAL COMPANY.

Joint Stock Company—Trustee and Cestuique Trust—Share Certificates—Holder of—Obligation to Register.

H. and P., who were directors of the defendants' railway company, were the registered holders of shares. They held the shares as trustees for the company. After the death of P., H. became the registered holder of stock into which the shares had been converted, and which he held as trustee. The coupons or certificates for the stock were obtained by H., and he deposited them in a bank as a security for an advance of money. The money was advanced by B. at the request of H., who asserted that he was the real proprietor. B. received the certificates from the bank. No deed of transfer was executed in the life time of B., but after his death his widow, the prosecutrix, required H. to execute a transfer, which he did. Neither the bank nor B. had given any notice to the defendants that they had any claim on the stock, and the defendants had regularly received the dividends. As soon as the defendants discovered the fraud committed by H., they gave notice to the prosecutrix that H. had no right to mortgage the stock, as it stood in his name merely as trustee, and they refused to enter her name upon the register as proprietor of the stock:—Held, that H., as a trustee, had no right to hold the certificates; that the defendants by allowing him to hold them had enabled him to hold himself out as the proprietor of the stock; and that the prosecutrix was entitled to a mandamus commanding the defendants to enter her name as proprietor of the stock.

This was an application for a mandamus by Emma Sarah Robson, as the executrix of Christopher Robson, deceased, against the defendants, calling upon them to register a transfer of certain consolidated stock in the defendants' company from one George Holyoake to the prosecutrix.

The Court of Queen's Bench made absolute the rule for the mandamus and
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ordered the writ to issue, and the facts of the case to be stated, after the return, in the form of a Special Case. Judgment was given for the defendants in the Court below. The prosecutrix sued out a writ of error.

CASE.

1. The prosecutrix is the widow and sole executrix of the late Christopher Robson, solicitor, of No. 27, Sackville Street, Middlesex. The defendants are a company, subject to the provisions of the Acts of Parliament of 9 & 10 Vict. c. 322, 323 and 324.

1a. In the year 1845, the company of proprietors of the Birmingham and Liverpool Junction Canal Navigation was incorporated with the United Company of Proprietors of the Ellesmere and Chester Canal by Act 8 Vict. c. 2, and the shares of the Birmingham and Liverpool Company were exchanged into shares of the Ellesmere and Chester Canal Company. In the year 1846, the Ellesmere and Chester Canal Company became the Shropshire Union Railways and Canal Company under the provisions of the Acts of Parliament referred to in the first paragraph, and the shares of the Ellesmere and Chester Canal Company were exchanged into shares of the Shropshire Union Railways and Canal Company.

2. Under the said Acts of Parliament mentioned in paragraph 1, and the other Acts of Parliament relating to the Shropshire Union Railways and Canal Company, and the Acts incorporated therewith, the said company raised certain capital by the creation and issue of shares, which shares were fully paid up.

3. After the formation of the said company, and in or about the year 1846, ninety-nine shares in the same, of the value of 37*l.* 10*s.* each, were registered in the share register of the said company (in lieu of shares which had been originally Birmingham and Liverpool Canal shares) in the names of the late Earl Powis and George Holyoake (who then were directors of the said Shropshire Union Railways and Canal Company), as trustees for the company, and they held the said ninety-nine shares as trustees for the said company and not in their own right.

4. The said Earl Powis died in the year

1847, and the said ninety-nine shares subsequently to his death remained registered in the names of the said Earl Powis and George Holyoake, and continued to be held by the said George Holyoake, in trust for the said Shropshire Union Railways and Canal Company until the year 1854, when the said shares were converted into 3,712*l.* 10*s.* consolidated stock of the said last-mentioned company under the name or title of the "Shropshire Union Railways and Canal Company Consolidated Stock, 1854," which said consolidated stock was registered in the proper books of the said company in the names of the said Earl Powis and George Holyoake, and the said George Holyoake continued to hold the same as trustee for the said last-mentioned company and in no other capacity whatsoever.

5. In the year 1847, an Act 10 & 11 Vict. c. 121, was passed, authorising a lease of the undertaking of the Shropshire Union Railways and Canal Company to the London and North-Western Railway Company, and providing for the management from and after the passing of that Act of the undertaking of the Shropshire Union Company by a joint committee consisting of eight Shropshire Union and eight London and North Western Directors, and from that time the undertaking has been managed by such Committee.

5a. The said George Holyoake was a director of the Birmingham and Liverpool Canal Company, and also treasurer of that company and a partner in the firm of Sir F. Goodrick, Holyoake & Co., who were the bankers of that company. On the incorporation of the Birmingham and Liverpool Company with the Ellesmere and Chester Canal Company, he became a director of that company, and his firm were its bankers, and in like manner on the formation of the Shropshire Union Company he became a director of that company and continued to be so until March, 1869, and on the passing of the above-mentioned Act of 10 & 11 Vict. was appointed one of the Shropshire Union members of the joint Committee, and continued to be so until the last mentioned date. He was a very active member of the board, and his banking firm were the bankers of the

Shropshire Union Company and of the joint committee until May, 1863.

5b. The final settlement of a lease of the Shropshire Union Company's undertaking to the London and North-Western Railway Company, was the subject of much discussion and negotiation, and, amongst other disputed points, the London and North-Western Railway Company laid claim to the said sum of 3,712*l.* 10*s.* stock, as being part of the property of the Shropshire Union Company which they would be entitled to on the execution of the lease. This claim was strenuously resisted by the directors of the Shropshire Union Company, and more especially by Mr. Holyoake as one of such directors, and in the end the claim of the London and North-Western Railway Company was waived. The lease, though dated the 25th of March, 1857, was not actually completed until 1860, and its provisions were extended and explained by an agreement also dated the 25th of March, 1857, and executed at the same time as the lease. The 7th and 8th sections of the last-mentioned agreement are as follows:

"7th. Subject to the right of the Shropshire Union Railways and Canal Company to have realised therefrom such sum and sums as may be necessary to enable them to satisfy their covenant hereinbefore contained, to reduce their debenture and land debts to 724,207*l.*, and to satisfy the other sums in such covenant mentioned as to be paid by the said Shropshire Union Railways and Canal Company, all balances, whether of principal or interest, standing to the credit of the Shropshire Union Railways and Canal Company at bankers, and all shares and calls on shares, and all interest, dividends and other moneys due or hereafter to be due or received or recovered in respect of unissued or forfeited or forfeitable shares, which forfeited shares are to be forthwith sold, the same being first offered to the London and North-Western Railway Company, at the price of 45*l.* for every 100*l.* of consolidated stock in the Shropshire Union Railways and Canal Company, and all unclaimed dividends and all other realised or unrealised earnings, property, effects and credits of the same or the like or of any other kind belonging to the

same company, or held or possessed by or in trust for them, or in which they are or may be interested, shall be deemed to be included in the said lease, and shall pass therewith to the said London and North-Western Railway Company, but be under the management and direction of the joint committee as part of the lease capital account, and any interest or other profit which may accrue or be made in respect of any balance which may at any time be standing to the credit of the lease capital account, shall every half-year be accounted for, and form part of the current profits of the working of the undertaking of the Shropshire Union Railways and Canal Company, provided that this clause shall not include or apply to 3,700*l.* of old Birmingham and Liverpool Canal Stock standing in the names of the Earl of Powis and George Holyoake, Esq., as trustees, and provided that as regards the past, no charge shall be made against the London and North-Western Railway Company in respect of the dividends as unissued or forfeited shares.

"8th. Provided always that all registers of shareholders of the Shropshire Union Company, and other books connected therewith, shall belong to and be in the custody of the Shropshire Union Company, but the London and North-Western Company shall have the right to inspect the same, and all deeds and other documents of the Shropshire Union Company shall, during the continuance of the said lease, be held by the joint committee for the use and benefit of both the companies, parties hereto, but shall remain the property of the Shropshire Union Company."

This agreement was confirmed by "the London and North-Western (Additional Powers) Act, 1861," 24 & 25 Vict. c. 208.

5c. In the month of March, 1852, the share registers and transfer books, and other books connected with the registration of shares in the said Shropshire Union Railways and Canal Company, were, with the authority of the directors of the said last mentioned company, removed from their offices to the offices of the London and North-Western Railway Company at Euston Square, and the

business relating to the transfer of shares and of the consolidation of the same into stock, and of the transfer of such stock, and the issuing of share certificates, was conducted entirely under the control and management of the officers at the Euston Station of the said London and North-Western Railway Company until after the execution of the said agreement, and in fact until the month of March, 1863, the Shropshire Union Railways and Canal Company having been compelled to take legal proceedings to enforce the performance, by the London and North-Western Railway Company, of the 8th section of the said agreement, which proceedings were actively supported by Mr. Holyoake.

5d. In May, 1859, the said George Holyoake applied at the offices of the London and North-Western Railway Company for Stock Coupons representing the said 3,712*l.* 10*s.* consolidated stock, and the said London and North-Western Railway Company sent the coupons representing the said stock to Mr. Alfred Wragge (the then acting Secretary of the Shropshire Union Railway and Canal Company) for Mr. Holyoake. Mr. Holyoake having received the coupons from Mr. Wragge, with the object of temporarily increasing the nominal amount of the qualification of Mr. Henry Tootal, who was at that time Deputy-Chairman of the Shropshire Union Railways and Canal Company, on the 3rd of December, 1859, transferred the said stock to the said Henry Tootal, to whom stock coupons in respect thereof were issued from the offices of the London and North-Western Railway Company, such stock forming, in the books of the Shropshire Union Railways and Canal Company, one account with other stock then held by the said Henry Tootal. This stock was re-transferred by the said Henry Tootal into the joint names of the said George Holyoake and Lyttleton Robert Holyoake on the 4th of January, 1861, to be held by them as trustees for the said Shropshire Union Railways and Canal Company, and stock coupons in their names were issued by the London and North-Western Railway Company.

5e. Under the 10th section of the said agreement of the 25th of March, 1857, the shareholders in the Shropshire Union

Company are entitled at any time to exchange their stock in that company for stock in the London and North-Western Railway Company, at the rate of 100*l.* of Shropshire Union Stock for 50*l.* of London and North Western Stock.

In March, 1861, the said George Holyoake (he then being owner and proprietor of other stock, amounting to 1,185*l.* 10*s.*, standing in his own name in the Shropshire Union Company) and the said Lyttleton Robert Holyoake, without the actual knowledge or consent of the said Shropshire Union Company, the transfer books being then kept at Euston Station, converted 3,000*l.* of the said trust stock into London and North Western Stock, and disposed of the same. At this time he was still a director and banker of the Shropshire Union Company, and his banking firm always held in hand large sums of money belonging to such company.

5*f.* In October, 1861, some of the then London and North Western members of the Shropshire Union Joint Committee called attention to the fact that 3,000*l.* of the said trust stock had been converted and sold. A communication was subsequently made to Mr. Holyoake by the Chairman of the Shropshire Union Company, the present Earl Powis (son of the deceased earl), calling his attention to the circumstance. On the 26th of February, 1862, Mr. Holyoake wrote to Lord Powis that this particular stock had been converted in consequence of its having become mixed up with his own, and that he would take steps to replace it. He also stated afterwards to the secretary of the Shropshire Union Company that he found difficulty in buying back Shropshire Union Stock in the market, a large proportion of such stock having been converted into London and North-Western Stock.

5*g.* The said George Holyoake had at this time standing in his own name Shropshire Union Stock amounting to 1,185*l.* 10*s.*, and in the joint names of himself and the said Lyttleton Robert Holyoake stock amounting to 962*l.* 10*s.*, of which 712*l.* 10*s.* was part of the said trust stock. In order to make up the amount of the trust stock, the said George

Holyoake and the said Lyttleton Robert Holyoake transferred from their joint names into the name of the said George Holyoake stock amounting to 931*l.*, parcel of the said 962*l.* 10*s.*, and the said George Holyoake purchased in his own name other stock, which, added to the said 1,185*l.* 10*s.* and 931*l.*, made up the whole of the said 3,712*l.* 10*s.* stock, which from that time he has held as trustee in trust for the said Shropshire Union Railways and Canal Company, and in no other capacity whatsoever, and from thenceforth, from time to time, all the dividends which have become payable on the said stock, were invested in the names of the chairman of the said company and other directors thereof, who have held the same as trustees of the said company.

5*h.* When the said George Holyoake was called upon to replace the trust stock, he was in possession of coupons for the said 1,185*l.* 10*s.* stock, and he continued to hold the same. On the transfer of the 931*l.* into his own name, as mentioned in the last paragraph, coupons were issued to him, and in respect of the 1,596*l.* stock purchased by him to make up the 3,712*l.* 10*s.* stock, coupons were from time to time issued to him, the whole of which stock he held in trust for the said Shropshire Union Railways and Canal Company.

6. In the year 1865 the said George Holyoake was informed by the secretary of the said company, in reply to a letter from the said George Holyoake to him, that there was not any Shropshire Union Stock standing in his, the said George Holyoake's own name solely, except the said 3,712*l.* 10*s.* consolidated stock mentioned in the preceding paragraph of this case.

7. Before the date of the deposit of stock coupons in the 10th paragraph mentioned, the said George Holyoake being in fact trustee for the said company of the said 3,712*l.* 10*s.* of the said consolidated stock, had been and then was registered as the holder thereof on the register of the stockholders of the said company, and certain stock coupons had been issued to the said George Holyoake. It is customary to issue stock coupons to the registered holders of all consolidated stock,

said it is never the practice to set out or notice on the face of such coupons that the registered proprietors are trustees.

8. The said George Holyoake, notwithstanding he was such trustee for the said company, and without the knowledge and in fraud of the said company, between February, 1863, and April, 1866, deposited the said coupons for the said stock so held by him in trust for the said company with the Union Bank of London as security for a loan of 1,500*l.* or thereabouts, made by the said bank to the said George Holyoake.

9. Upon the request of the said George Holyoake, the said Christopher Robson paid to the said bank the said sum of 1,500*l.*, and upon the payment of the said sum of 1,500*l.* the said Christopher Robson received from the said bank the coupons for the said trust stock. The said sum of 1,500*l.* so paid to the said bank forms part of the said sum of 2,000*l.* in the agreement and memorandum in the 10th paragraph mentioned, advanced by the said Christopher Robson to the said George Holyoake, and the said coupons were delivered to the said Christopher Robson, as security for the said sum of 2,000*l.*

10. On the 5th day of April, 1866, the said George Holyoake, then being such trustee for the said company, as aforesaid, without the knowledge, consent or privity, and in fraud of the said company, affected to deal with the said trust stock by executing a memorandum in the words following—

“Memorandum.—That I, the undersigned, George Holyoake, of Neachley Hall, Neachley, in the county of Shropshire, Esquire, am possessed of, as my own property, and unincumbered, the following stock in the Shropshire Union Railways and Canal Company, namely,

[Then followed the numbers of shares, which need not be set out here.]

“And whereas I have drawn and endorsed a promissory note for the sum of 2,000*l.* bearing even date herewith, payable to my order at three months after the date thereof, and I have deposited the above mentioned shares as collateral security for the due payment of the said note, I hereby undertake and promise

on request to execute a legal mortgage of the said shares, and such mortgage deed is to contain a power of sale, and all usual and customary covenants in such deed, and the same is to be prepared by the solicitors of the holder of the said note at my expense. As witness my hand this 5th day of April, 1866.

“(Signed) G. Holyoake.

“Witness, H. Edgar Tidy, solicitor, 27, Sackville Street, Piccadilly.”

11. The said Christopher Robson subsequently made a further advance of the sum of 1,000*l.* to the said George Holyoake upon the security of the said trust stock, and also upon some shares in the Wheal Phoenix Mining Company, and at the time of the said advance, and in consideration of advances previously made, and extension of the time for payment of the same, certain memoranda of deposit relating to the same were entered into by the said George Holyoake, notwithstanding he was such trustee, without the knowledge, privity or consent, and in fraud of the said company.

12. Afterwards the said Christopher Robson died. No deed of transfer was executed in his lifetime. The said sum of 2,000*l.* which had been advanced under the agreement of the 5th of April, 1866, and interest thereupon, remained due and unpaid; and the said further sum in the 10th paragraph mentioned also remained due and unpaid, and the said coupons were in his possession up to and at the time of his death. The prosecutrix, Emma Sarah Robson, as the executrix of the said Christopher Robson, was entitled to the said moneys and interest, and the same being unpaid, she required the said George Holyoake to execute a deed of transfer of the said stock pursuant to the terms of the agreement and memorandum of the 5th of April, 1866, in the 10th paragraph mentioned, which the said George Holyoake accordingly executed. It is duly stamped, and is in manner and terms following—

“I, George Holyoake, of Neachley, near Shifnal, in the county of Salop, gentleman, in consideration of the agreement to execute the transfer hereinafter set out, and of the sum of 2,000*l.* paid to me by Christopher Robson, late of Sackville

Street, Piccadilly, in the county of Middlesex, gentleman, deceased, during his lifetime, do hereby bargain, sell, assign and transfer to Emma Sarah Robson, of No. 24, Dorset Square, in the county of Middlesex, executrix under the will of the said Christopher Robson, the sum of 3,712*l.* 10*s.* consolidated stock, 1854, of and in the undertaking called the Shropshire Union Railways and Canal Company, and all accruing and accrued dividends, profits and advantages thereof. To hold unto the said Emma Sarah Robson, her executors, administrators and assigns, subject to the several conditions on which I held the same immediately before the execution hereof. And I, the said Emma Sarah Robson, do hereby agree to accept and take the said stock subject to the conditions aforesaid. As witness our hands and seals this 5th day of May, 1869.

"G. Holyoake (L.S.)

"E. S. Robson (L.S.)

"Signed, sealed and delivered by the above-named George Holyoake and Emma Sarah Robson, in the presence of—

"H. Edgar Tidy,

"27, Sackville Street, Piccadilly."

12*a.* No notice or intimation of any kind was given to the said Shropshire Union Railways and Canal Company by the Union Bank or the said Christopher Robson that they or either of them had any claim on the said stock. It is the frequent but not invariable practice if money is advanced upon deposit of railway shares or stock, and a transfer not registered, for the lender to give notice to the secretary of the company of his lien. No application was ever made on behalf of the said Union Bank or Mr. Robson for the dividends payable on the said stock, but the said dividends were regularly received by the said company, the said George Holyoake each half-year countersigning the dividend warrants and returning them to the secretary of the said company. The first notice that the company received that the said George Holyoake had been dealing with this replaced stock was on the 13th of February, 1869, by letter from his attorney, dated the 12th of February, 1869, to the secretary of the said company, and up to that time the company and its officers

were entirely ignorant that the stock coupons had been deposited or dealt with in any way by the said George Holyoake.

13. Before the said deed of transfer in the 12th paragraph mentioned was prepared or executed, viz., on the 13th of February, 1869, the said Shropshire Union Company immediately on the discovery of the fraud committed by the said George Holyoake in so assigning over, gave notice in writing to the said Emma Sarah Robson through her attorney, that the said George Holyoake had no right to mortgage the said stock, as the said stock was standing in his name merely as a trustee. Previously to the date of the above notice neither the said Emma Sarah Robson nor Christopher Robson had notice or knowledge that the stock was held by the said George Holyoake upon any trust.

14. On the 20th of May, 1869, the said deed of transfer and the said coupons were delivered by the said Emma Sarah Robson to the secretary of the said company, in order that a memorial thereof should be entered in the register of transfers of the said company; and the said Emma Sarah Robson requested the secretary to enter the said memorial in the said register of transfers, and that such entry might be endorsed on the said deed of transfer, and that the said Emma Sarah Robson might be registered as the proprietor of the said stock, and the said Emma Sarah Robson offered to pay the proper charges relating to the same, but the said secretary thereupon refused and still refuses to comply with the said request as aforesaid.

The questions for the opinion of the Court are, whether the prosecutrix is entitled—

1st. To have the said memorial of such deed of transfer entered in the books of transfers of the company.

2nd. To have such entry endorsed on the deed of transfer.

3rd. To be registered as the proprietor of the said stock.

4th. To have new coupons of the said stock issued to the said prosecutrix.

If the Court shall be of opinion in the affirmative, a peremptory *mandamus* is to issue accordingly. If the Court shall be

of opinion in the negative, then judgment is to be entered for the defendants.

The following was the form of one of the coupons referred to in the case. The others were similar *mutatis mutandis*—

APPENDIX A.

£3 Os. 0d. Shropshire Union Railways and Canal Company Consolidated Stock, 1854. 1619.

Register No. { George Holyoake, of
1414 { Neachley, Shiffnal, } £2 Os. 0d.
185 { Shropshire, Esquire. }
20th November, 1862.

Proprietor of Coupon No. 1. }
Entered Braima.

Alfred Wragge, Secretary,
Shropshire Union Railways and
Canal Company Consols, 1854.

NOTE.—This stock coupon must be surrendered before any deed of transfer, whether for the whole or any portion thereof, can be registered or a new coupon issued in exchange.

The case was argued June 14, 16, by—
Horace Lloyd (Brooksbank and Eyre Lloyd with him), for the Crown; and by Sir J. B. Karlake (McIntyre and Jolliffe with him), for the defendants.

The following statute and authorities were referred to in the course of the argument—

8 & 9 Vict. c. 16, ss. 8, 11, 62. *Olyer v. Finch* (1), *Rice v. Rice* (2), *Hunter v. Walters* (3), *Dixon v. Muckleston* (4), *Waldron v. Sloper* (5), *Layard v. Maud* (6), *Hewitt v. Loosemore* (7), *Re The Bahia & San Francisco Railway Company and Trittin* (8), *Hart v. The Frontino Gold Mining Company* (9), *Rooper v. Harrison* (10), *Sharples v. Adams* (11),

(1) 5 H.L. Cas. 905, 920; s. c. 26 Law J. Rep. (n.s.) Chanc. 65.

(2) 2 Drew. 73; s. c. 23 Law J. Rep. (n.s.) Chanc. 289.

(3) Law Rep. 11 Eq. 292.

(4) Law Rep. 8 Ch. Ap. 155.

(5) 1 Drew. 193.

(6) 36 Law J. Rep. (n.s.) Chanc. 669; s. c. Law Rep. 4 Eq. 397.

(7) 9 Hare 449; s. c. 21 Law J. Rep. (n.s.) Chanc. 69.

(8) 9 B. & S. 844; s. c. 37 Law J. Rep. (n.s.) Q.B. 176.

(9) 39 Law J. Rep. (n.s.) Exch. 98; s. c. Law Rep. 5 Ex. 111.

(10) 2 Kay & J. 86.

(11) 32 Beav. 213.

Baillie v. McKewan (12), *Dodds v. Hills* (13).

Cur. adv. vult.

The judgment of the Court (14) was delivered on June 20 by—

CLEASBY, B.—The facts being stated in the form of a case it is unnecessary to restate them. All that is required is to give correctly the history of the shares which are the subject of enquiry.

Previous to the passing of the Shropshire Union Railway and Canal Act in 1846, the Birmingham and Liverpool Junction Canal Company had been incorporated with the Ellesmere and Chester Canal Company, and the shares of the former were exchanged into shares of the latter company. By the Act referred to the shares of the Ellesmere and Chester Canal Company were exchanged into shares of the defendants' company.

It appears by paragraph 3 of the case that after the formation of the defendants' company, ninety-nine shares in that company of 37l. 10s. each, were registered in the names of Earl Powis and G. Holyoake (who were the directors of the company), and that they held them only as trustees of the company. We have no distinct statement as to how this came to be done. All that is stated is that these shares were so registered in lieu of shares which had been originally Birmingham and Liverpool Canal shares.

Surmises may be made as to the manner in which this state of things arose. But it is enough to say that there is nothing in the case to warrant the inference that there was anything illegal, as was suggested, or improper in the relation of trustees and *cestui quo trusts* between Earl Powis and G. Holyoake and the company so as to prejudice the present position of the defendants.

Afterwards Earl Powis died, and the shares were changed into stock, and it may be taken that G. Holyoake became the registered holder of 3,712l. 10s. stock, as trustee for the company, he then being one of the directors of the company.

(12) 35 Beav. 177.

(13) 2 Hem. & M. 424.

(14) Kelly, C.B.; Martin, B.; Brett, J.; Cleasby, B.; Grove, J.; and Denman, J.

This was in 1847. In that year the Act was passed authorising the leasing of the line to the London and North Western Railway Company, and the Shropshire Union Railway was to be managed by a joint committee of eight members of the Shropshire Union and eight members of the London and North Western Railway Company.

Mr. Holyoake became and continued one of the committee of management. This is only noticed for the purpose of observing that the trustee, not being a stranger without any interest or authority, was a person who would have certain influence and authority in the affairs of the company so as to have greater facilities in acquiring the means of committing a fraud, as in fact he afterwards did by being able to obtain certificates for the purpose which will be mentioned hereafter. Up to this time, matters proceeded with regularity. No certificates were issued to Earl Powis and Holyoake, or to Holyoake.

We think that a person in the position of Mr. Holyoake had no right or title to the certificates.

A person who is the holder of shares in such a company may demand certificates of shares from the company (by section 11 of the Companies Clauses Consolidation Act) and becomes entitled to them as a matter of right, and they are conclusive evidence of his title against the company—*Re The Bahia and San Francisco Railway* (8), and *Hart v. The Frontino, &c., Company* (9).

A holder of shares may, no doubt, compel the delivery of the certificates, and may, therefore, deal with and use them so far as he can, not of course as passing the property (which must be by deed) but in a manner and for purposes similar to those available by persons who lawfully hold title deeds to real property.

But though ordinary title deeds and certificates of shares are made available for advances, there is a great difference between the two cases. The deposit of ordinary title deeds involves always a consideration of the title of the person depositing, and that title has to be regularly investigated before the transaction is completed.

But that is not the case with the

deposit of certificates, with an engagement to transfer, because the certificates themselves shew conclusively that the person depositing is the owner of the shares, since the shares could not be transferred without the certificates being given up. The fact of depositing, together with the agreement, puts out of question the idea of a trusteeship, and further enquiry would defeat the object of such a transaction, even if there were proper persons to make the enquiry of, which, as far as we can see, is not the case.

But it is obvious to us that a trustee for the committee had no right to demand from the company such certificates, and we can see no proper object for which they could be required. The giving such documents is, we think, an improper act, because it makes the trustee appear to be one thing when he really is another, that is, appear to be the real owner when in reality he is not so, and gives him indicia of property which he does not possess, and which are therefore in effect false. And it is plain from the statements in this case that for twelve years, that is from 1847 to 1859, no certificates were given out, and then only for a particular purpose.

It is impossible to recapitulate all the transactions connected with this stock found in paragraph 5 D to 9, but the transactions may be correctly summed up, in our opinion, by saying the certificates were in 1859 irregularly and improperly given to Holyoake for an illicit purpose, or at all events for indirect purposes of their own, and that this possession of the certificates, giving Holyoake the apparent character of real proprietor, enabled him to continue a system of irregularities and improper dealing with the shares, some of which irregularities were known to the defendants (as for instance that 3,000*l.* Shropshire Union Stock had been without any authority converted into London and North Western Stock), and that eventually he regained his original position of registered holder of the 3,712*l.* 10*s.* stock, with the possession of the certificates or *indicia* of property to which he was not entitled.

The certificates being once delivered out would be delivered up and again issued

out upon each transfer, but all is traceable to the first improper act, viz., the giving out the certificates in 1859, so as to enable a transfer to be made, and so give Mr. Footall an apparent title to a sufficient number of shares.

This being so, the conduct of the defendants, improper as we think in any case, but especially imprudent in relation to a man who had acted like Mr. Holyoake, enabled him to occupy the position of a holder of shares, and so to deal with them in the ordinary way, and it appears to us to follow (without entering into all the nice questions of equity to which the learned counsel referred) that the defendants cannot be suffered now, as against a person who *bona fide* acted upon the apparent title which the defendants gave him, to question the complete legal title of the prosecutrix, by reason of any equity arising from the ultimate transfer of the shares being a breach of trust known to her.

We think that the defendants are under the circumstances of this case (as between them and the prosecutrix) the persons who must suffer for the consequences of a breach of trust of Mr. Holyoake, which consequences are attributable to their giving him or rather, perhaps, negligently allowing him to obtain, he being a director, *indicia* of property which he did not possess—*Waldron v. Sloper* (5), *Rice v. Rice* (2). It is unnecessary to report at length here the very able judgment of Vice-Chancellor Kindersley in these cases. But the passages in page 200 to the end of the first report, and from page 80 to the end of the second report, fully justify the conclusion at which we have arrived. They deal with the effect to be given to the contract of the parties in dealing with a case of this description. They also deal with the effect to be given to the possession of the *indicia* of title, as to which the case *Layard v. Maud* (6) may also be referred to.

If the defendants had properly given the certificates (as in the case of a trustee for a third person), then a question of equity would arise between the transferee from the trustee, and the *cestui que trust*, and until the transaction was complete by transfer, it was contended upon the authority of *Baillie v. McKean* (12) that the

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equity of the *cestui que trust* would prevail being both *prior in tempore* and *potior in jure*, the equities being equal. But in that case the deeds deposited by the trustee were documents or *indicia* of property which were properly left in his possession by the *cestui que trust*. It is clear that a trustee who may be bound to defend the possession of land is properly in the possession of deeds which shew his title.

But there is only an apparent similarity between such a case and the present, and the consequence of this apparent similarity is that we had a considerable argument and reference to many authorities, but the great feature of the present case is the improper handing over by the *cestui que trust* himself of the *indicia* of property, which imported that as against the company (the *cestui que trust* in this case) the holder had an indefeasible title, and Mr. Robson having acted upon them as such, the defendants cannot, under the circumstances of this case, separate their character of company from that of *cestui que trust*, and say that though the certificates are conclusive against them as a company, they can defeat them in their character of *cestui que trust*.

We have not omitted to consider fully an argument which was much pressed, and properly so, namely, that this is not a question between two encumbrancers, which has generally been the case in the authorities referred to, but a question where there has been a breach of a direct trust by the person depositing the deeds and making the transfer. The answer to that argument is that the conduct of the *cestui que trust* in this case deprives him of the benefit of that distinction. In *Dodds v. Hills* (13) the deposit was of such certificates as we are now dealing with, and both deposit and transfer were breaches of direct trusts, but the Court held that the transferee was entitled to be registered, and to have his title completed. We may notice that in that case the certificates had been originally given out in the names of two persons, that is, in the name of the person depositing and of another, no doubt dead, and it was held that this fact, which no doubt makes a trusteeship probable, was not

2 D

enough to fix upon enquiry. It is true that in that case the transferee was not aware of the transfer being a breach of trust till after the transfer, which is not the case here. But the case shews that a title acquired by breaches of trust may, after the breach of trust, be completed so as to be effectual in a Court of Equity. And then we have in this case the conduct of the defendants which places the prosecutrix in as favourable a position.

The contest between the parties may be briefly stated thus: The plaintiff produces her regular deed of transfer and claims to be registered. The defendants say—"No, we have an equitable interest as *cestui que trusts*, which takes away your right to be registered." The prosecutrix answers, "I have also an equitable right by advance of money and deposit of *indicia* of property with engagement to transfer, and your conduct in relation to your equitable interest disentitles you to set up your equitable interest against mine; and the prosecutrix might, perhaps, say in addition, my position is better than yours, because I have also got the legal estate. We have not considered particularly the effect to be given to the possession of the legal interest, because in this judgment it has been thought better not to rely upon that fact, by reason of that interest being acquired after the real position of Mr. Holyoake as trustee was known. But if that fact had been relied on, it would have been necessary to consider how far that knowledge was decisive in a case where the legal estate was acquired under a contract from a person who had had the full benefit of that contract, and upon whom it was obligatory. Certainly the earlier authorities place very little restriction, in such cases, upon the mode in which the legal estate is acquired. We think the prosecutrix's answer is made good by the facts of this case.

There is no authority for saying that the mere fact of advancing money to a banker upon the deposit of scrip certificates with engagements to transfer, though made without further enquiry, amounts to negligence so as to destroy or abridge the equitable title which is acquired, or that the omission to insist upon a transfer for a considerable time of itself has that effect.

See Vice-Chancellor Kindersley's judgment in *Rice v. Rice* (2).

There is only one other question raised in argument, namely, upon the finding, in paragraph 12a, in the Case, that no notice was given of the first deposit, and it is said that the consequence of the omission to give notice was that a further advance was made, and also that the defendants were prevented from making enquiry and rectifying their position, and that the prosecutrix having been guilty of this omission loses the advantage of any position which she would have otherwise been entitled to.

We think there was no obligation to give such a notice. The case finds, and no doubt correctly, that it is frequent to give such a notice. But this is accounted for by its being necessary for a particular object, viz., to prevent the shares going to assignees in the case of bankruptcy as being in the order and disposition of the bankrupt. We cannot be ignorant of the fact that those loans upon deposit are resorted to (instead of transfers and mortgages) to prevent the credit of a person being injured by its being known that he is raising money. Secrecy is a necessary part of such an arrangement; when a banker borrows money upon a deposit of documents (except so far as regards the operation of the bankruptcy law), the allowing the advance and deposit to be concluded cannot affect the rights of the parties. For the reasons given we think that in the present case the legal title of the prosecutrix is complete to have her name entered on the register, and there is no equitable interest of the defendants themselves which can be set up against it.

Therefore the judgment of the Court of Queen's Bench must be reversed and a peremptory mandamus awarded.

Judgment reversed.

Attorneys—Anthony Fulbrook, for prosecution;
John Philpot, agent for Potts & Roberts, Chester,
for defendants.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Queen's Bench.)

1873. } EVERINGHAM v. IVATT AND
June 14. } OTHERS.

Copyhold—Admittance of Remainderman—Termor for Years—Right to compel Admittance of.

The uncle of O. E. I., being tenant in fee of lands in the manor of R., according to the custom of the manor devised his estate for a term of 500 years upon certain trusts, and, subject to the term, to O. E. I. in fee. Upon the death of the uncle, the lord admitted O. E. I., who was an infant, and received a full fine in respect of the admittance. The lord further insisted that the trustees, the termors for 500 years, should also be admitted, and should pay a fine in respect of that term. They refused to do so, whereupon, after proclamation, he seized quousque and brought ejectment to try his right to the additional fine:—Held, affirming the judgment of the Court of Queen's Bench, that he was not entitled to the fine, and could not maintain the action.

Error upon a judgment of the Court of Queen's Bench in favour of the defendants.

This was an action of ejectment commenced by writ issued on the 22nd day of January, 1871, the plaintiff being the claimant therein, and the property sought to be recovered being therein described as follows: All those several pieces or parcels of land formerly in the tenure or occupation of Thomas Ivatt, but now of John Hamilton Coales and Frederick Richmond Coales and William Rose.

The following CASE was stated for the opinion of the Court of Queen's Bench.

1. The plaintiff is Lord of the Manor of Rampton Lyles, in the county of Cambridge, and is seised in fee of the said manor, and he has been so since the 8th day of June, 1853.

2. The property sought to be recovered is a tuate within and parcel of the said manor and customary tenants thereof held of the said manor by copy of Court Roll.

3. Thomas Ivatt, a customary tenant of the said manor, became and was seised

of the said property in his demesne as of fee at the will of the lord, according to the custom of the said manor, and on the 16th day of August, 1869, died so seised thereof, and his death was duly presented by the homage at a general Court Baron and Customary Court duly holden in and for the said manor.

4. Thomas Ivatt was at his death also seised of other real estate both freehold and copyhold.

5. The said Thomas Ivatt, by his will and testament duly made, executed, published and attested, dated the 21st of December, 1867, appointed his wife, Eliza Ivatt (one of the defendants), the Rev. Alfred William Ivatt (since deceased) and William Pate (another of the defendants), executors and trustees thereof; and he thereby, amongst other things—after a bequest of certain legacies, and of annuities to the testator's wife, and to the Rev. Adam Fitch and Harriet his wife, if she should survive him, with a power of distress, in case of non-payment thereof, on his real estate, and a charge on his real estate of 2,000*l.* after the death of the said annuitants—gave and devised all his messuages, lands, tenements and hereditaments and real estate (except estates vested in him as trustee or mortgagee) unto his said wife and the said Alfred William Ivatt, since deceased, and William Pate, their executors, administrators and assigns, for the term of 500 years to be computed from the time of his decease, without impeachment of waste, upon trust that the said trustees, or the survivors or survivor of them, should, after the death of the survivor of the said Adam Fitch and Harriet, his wife, by sale or mortgage of the said hereditaments, or a competent part thereof, for all or any part of the said term of 500 years, buy and raise the said 2,000*l.*, and the interest thereof, and the costs and expenses attending the same, and pay the same when so raised to the persons and at the times therein specified; with a power of investment in case the persons to whom the same were payable were under age at the death of the survivor of the said annuitants. The will then proceeds as follows—"And as to all my messuages, lands, tenements, heredita-

ments and real estate (except estates invested in me as trustee or mortgagee), subject to the said annuities and the said sum of 2,000*l.* hereinbefore respectively charged thereon, and to the said term of 500 years, hereinbefore bequeathed, and the trusts thereof, and also subject, in aid of my personal estate, to the payment of my debts and funeral and testamentary expenses, and all the pecuniary legacies hereinbefore bequeathed, or which I may bequeath by any codicil to this my will, and also, as to the residue of my personal estate, I give, devise and bequeath the same unto my nephew, Charles Edward Ivatt, another son of the said Alfred William Ivatt, his heirs, executors, administrators and assigns, absolutely, and in case the said Charles Edward Ivatt shall be under the age of twenty-one years at my decease I direct that my said trustees or trustee shall dispose of, convert and get in my said residuary personal estate, and invest the clear proceeds arising therefrom, after payment of all incidental expenses, in manner hereinbefore mentioned, with such power of varying investments as aforesaid, and shall hold the stocks, funds, shares or securities in which such clear proceeds shall be so invested in trust for him, the said Charles Edward Ivatt, his executors, administrators and assigns; and in case the said Charles Edward Ivatt shall be under the age of twenty-one years at my decease, I also empower my said trustees or trustee, if they, she or he shall think proper and deem it expedient so to do, to continue and carry on the business of my farm as now carried on by me until the said Charles Edward Ivatt shall attain the age of twenty-one years, or for any shorter period, and for that purpose to employ and hire such bailiffs, servants, workmen and others, and to allow such sums of money for their salaries, wages or hire, and to buy and sell stock, and to do all other acts and things in or connected with the business of a farmer as they, she or he shall think proper without being responsible for any loss to arise thereby, and also to let on lease the said messuages, lands, tenements, hereditaments and real estate or any of them or any part thereof from

year to year or for any term of years not exceeding six years, to take effect in possession, at the best rent that can be reasonably obtained, and without taking anything in the nature of a fine or premium, and in the event of my said farming business being carried on by my said trustees or trustee as aforesaid, or of any such letting or lease as aforesaid, I direct that the clear profits (if any) arising from such business, and the rents payable under such letting or lease as aforesaid, shall be applicable in the same manner as the annual income arising from the investments of my said residuary personal estate." The will further contains a declaration, "That if the said Charles Edward Ivatt should be under the age of twenty-one years at the decease of the testator, or any issue of the said Adam Fitch and Harriet, his wife, presumptively entitled to the said 2,000*l.*, should be under that age on the death of the survivor of the said Adam Fitch and Harriet, his wife, the trustees or trustee should apply the whole or part of the annual income of the testator's residuary personal estate, or the investments thereof, or of the said 2,000*l.* towards the maintenance and education of the said Charles Edward Ivatt or such issue as aforesaid, and shall accumulate the remainder for the benefit of the *cestui que trusts* under the will."

6. The will has been duly enrolled on the rolls of the manor, and a copy thereof is to be referred to as part of this case.

7. The said will was duly proved by the said Eliza Ivatt and William Pate, his sole surviving executors and trustees, on the 11th day of October, 1869.

8. The property sought to be recovered forms part of the property given and devised by the will to the said trustees.

9. The said Eliza Ivatt and William Pate have let the whole of the property sought to be recovered, and received the rents thereof, and the other defendants are respectively their tenants.

10. Three proclamations have been duly made at three consecutive Courts, duly holden in and for the said manor for the heir or heirs, devisee or devisees,

or other person or persons having any estate, right, title or interest in or to the property in question, of which the said Thomas Ivatt died so seised as aforesaid, to come into Court and be admitted tenant or tenants thereto.

11. The said Charles Edward Ivatt was, on the 24th day of November, 1869, being then an infant, admitted tenant to the said property devised to him by the said will, to hold to him, his heirs and assigns for ever, according to the purport and effect of the said will of the lord of the said manor by the rod at the will of the lord, according to the custom of the said manor, at certain annual rents, relief, fealty, suit of Court and other customs, dues, suits and services theretofore due and of right accustomed, and, saving the rights of the lord and of all other persons, the said Charles Edward Ivatt was, by his attorney, admitted tenant thereof, and he paid to the lord his fine and relief as valued by Mr. John Robert Mann, who let the said property on behalf of the said trustees, amounting to the sum of 882*l.* 10*s.* 6*d.*, with fees amounting to 73*l.* 2*s.* 11*d.*; but his fealty was respited because, &c., and because the said Charles Edward Ivatt was an infant under the age of twenty-one years, therefore the custody as well of his person as of the premises aforesaid, with the appurtenances, was, on the nomination and at the request of the said Eliza Ivatt and William Pate, committed to them until, &c. The said Charles Edward Ivatt is still an infant, being now of the age of nineteen years or thereabouts. He was so admitted after a correspondence between his attorneys, Messrs. Francis, Webster & Riches, and Mr. Remnant, the chief steward of the said Manor of Rampton Lyles, and one of the plaintiff's attorneys, consisting of a series of letters. In the commencement of the said correspondence the said Mr. Remnant insisted that the three termors should be admitted, he having taken counsel's opinion to that effect, and afterwards, in consequence of its being insisted that the said Charles Edward Ivatt should be admitted, the said Mr. Remnant wrote a letter to the said Messrs. Francis, Webster & Riches, dated the 28th of October,

1869, in which he said—"The lord will admit Mr. Charles Edward Ivatt by his guardian. By book-post I send you the draft admission for approval;" and in another of which, from the said Mr. Remnant to the said Messrs. Francis, Webster & Riches, dated the 15th day of November, 1869, Mr. Remnant stated as follows—"I shall be glad to receive back this draft admission approved by you. You must clearly understand that in admitting the reversioner as required by you, the lord does not mean to waive his right to require the termors to take admission, so that he may have a tenant on the roll who can perform suit and service and pay the quit rents, &c."

12. The annuitants under the said will, the Rev. Adam Fitch and Harriet, his wife, are both still living.

13. The defendants, Eliza Ivatt and William Pate, have not nor has either of them answered to the said proclamations or either of them, and have not nor has either of them claimed or applied to be or been admitted tenants or tenant to the said property or any part of it, and have refused to be so admitted, and no other person or persons has or have answered to the said proclamations or any or either of them, or claimed or applied to be or been admitted a tenant or tenants to the said property or any part thereof for the whole or any part of the said term of 500 years.

14. For such default the plaintiff, subsequently to the admission of the said Charles Edward Ivatt, and before the issuing of the writ of ejectment, according to the custom of the said manor, in due form of law seised into his hands and for his use the said property, until the said Eliza Ivatt and William Pate or some person or persons shall appear and make good his or her claim to be admitted tenants or tenant of the same in respect of the said term of 500 years.

15. It is to be taken, for all the purposes of this case, that all things have been duly done, and have happened and exist, to entitle the plaintiff to make such seizure, and to bring and maintain this action, if he is entitled to have tenants or a tenant admitted to the said

property in respect of the said term of 500 years, notwithstanding the admission of the said Charles Edward Ivatt as aforesaid.

16. The said Eliza Ivatt and William Pate are under no disabilities, and cannot now disclaim their estate or trusts under the said will.

The question for the opinion of the Court is, whether the plaintiff was or was not entitled to make the said seizure *quousque* after the admission of the said Charles Edward Ivatt, under the circumstances hereinbefore mentioned, on the ground of no person or persons having been admitted tenants or tenant of the said property in respect of the said term of 500 years.

The case when in the Court below is reported in 41 Law J. Rep. (N.S.) Q.B. 263. Judgment was given for the defendants, and error was assigned by the plaintiff.

Joshua Williams (J. O. Griffiths with him), for the plaintiff, contended that he, as the lord of the manor, was entitled to require the termors or persons entitled to the premises for such term to take admission. That the admission of the infant as the remainderman is not the admission of the particular tenant for the term of 500 years. That the plaintiff as such lord of the manor is legally entitled to have a tenant or tenants admitted in respect of the term of 500 years, as well as the tenant already admitted in respect of the remainder dependant upon such term. That the admission of Charles Edward Ivatt was null and void to all intents and purposes, or if not so, was only an admission *in futuro* after the expiration or determination of the term, and the plaintiff, as such lord of the manor, was entitled to a tenant *in presenti*. That the admission of Charles Edward Ivatt does not operate as an estoppel to prevent the plaintiff from asserting that the possession was vacant. In the course of the argument he referred to the following authorities and cases—*Doe dem. Whitbread v. Jenney* (1); *Littleton's Tenures*; *Tenant by Copie*; and *Lord Coke's Complete Copyholder, Black-*

burne v. Graves (2), *The Earl of Bath v. Abney* (3); 11 Geo. 4. & 1 Will. 4. c. 65. ss. 3. 6. The forms of surrender and admission in *Scriven on Copyholds*, and in *Watkins on Copyholds—Tipping v. Bunning* (4), referred to by Lord Ellenborough, C.J., in *Doe dem. Whitbread v. Jenney* (1), *Brown's Case* (5), *The Queen v. The Lady of the Manor of Dullingham* (6).

Field (W. R. Cole with him), for the defendant, was not heard.

KELLY, C.B.—In this case the lord of a copyhold manor has brought ejectment to recover the possession of copyhold property parcel of the manor under the clause of a right to seize *quousque*. The circumstances of the case on which the claim is founded appear to be these: that Thomas Ivatt, seised in fee simple, devised the property in the first instance to certain persons as trustees for a term of 500 years in trust to pay certain legacies, and also to pay one or more annuities for the life or lives of certain persons named, and also to satisfy a charge of 2,000*l.*; but, subject to these various charges, the property in question was devised to the tenant in fee. It appears that on the death of the testator, Charles Edward Ivatt, who was an infant under age, came by his guardians, who turn out to be the same individuals as are now the surviving trustees under the will to which I have referred, before the lord, and claimed to be admitted as tenant in fee simple of this property. Upon that claim, the plaintiff, the lord of the manor, by his steward, and according to the custom of the manor, admitted the infant as tenant to the property in question. Though it may be necessary to deal with other considerations in the case, really the question in the case is whether the admittance of the infant as stated upon the case was an admittance of him to this property in fee simple in possession. It is contended on the part of the plaintiff that it is not an admittance

(2) 1 Mod. 120; s. c. 2 Lev. 107; *nom. Batmore v. Graves*, 1 Vent. 261.

(3) 1 Burr. 206.

(4) Moor 466.

(5) 4 Co. Rep. 22 b.

(6) 8 Ad. & E. 858.

(1) 5 East 528.

to a fee simple in possession, but merely an admittance to an estate expectant on the termination of the term of 500 years. In the first place, we must determine the question what is the legal effect of the admittance, because if it be an admittance of the infant not to a reversion in the premises in question expectant on the termination of the term, but an admittance of him as tenant in fee simple in possession of this property, it would be clear law that the lord having a tenant on whom the obligation is imposed of paying rents and performing the services, whatever they may be, according to the custom of the manor, that he could not seize the property in derogation of his own grant and admittance in order to entitle him to some fine which he would claim from other persons on the ground that they ought to be admitted to some estate in possession, and that consequently he is entitled to call on them by proclamation to come in and be admitted, and to seize *quousque* on their failing to come in, and to recover and to hold possession of the property until they shall come in. Now the terms of the admission are these. After stating that the homage presented that Thomas Ivatt died seised of the lands, &c., it goes on to state "because no person came to be admitted tenants thereto," proclamation is duly made, and that the infant came by his attorney before the steward. It then states the will of the said Thomas Ivatt. The admission then proceeds, "and thereupon the said Charles Edward prayed of the lord of the manor to be admitted tenant to the hereditaments and premises devised to him by the will." The parcels are all described in the admission. Now it is insisted on the part of the plaintiff that this is an admission of the infant to the estate and to the estate only, which on the face of the will he takes under the will, and of no more, and that therefore would be an admission to him of the reversion expectant on the determination of the 500 years. It may be, and I shall not enter on the question whether it is so or not in point of law, if the admission stopped there, or there were merely formal words, and which would not have varied the effect of the passage

which I have just read, that it might be so taken. I do not say such would be the construction of it, and I think it more than doubtful whether it would not have been an admission to the fee simple in possession, subject to the right of anybody else to come and contest the possession. When we look at the rest of this document it seems to me that no question can arise on its true construction, for it proceeds to say—"Saving the rights of the lord and of all other persons, the said Charles Edward Ivatt was by his attorney admitted tenant thereof in manner aforesaid, and he paid to the lord his fine and relief as valued by Mr. John Robert Mann, who let the said property on behalf of the trustees, amounting to the sum of 882l. 10s. 6d., but his fealty was respited because" and so forth. "And because the said Charles Edward Ivatt was an infant under the age of twenty-one years, therefore the custody, as well of his person as of the premises aforesaid with the appurtenances, was, on the nomination and request of the said Eliza Ivatt and William Pate, committed to them." What is the plain and obvious meaning of those words? That the custody of the said premises with the appurtenances that is the custody of the lands, tenements and hereditaments in question, with the appurtenances, is thereby vested in and transferred—committed is the word—to the guardians of the infant. If that does not place this land in actual possession of these guardians, I know not the meaning which any such word can bear in the English language. I think that if the devisee in fee simple had not been an infant, the words would have been, or at least might have been, if any such clause had been introduced at all, that the custody and possession of the land and tenements in question are hereby committed and delivered over to the tenant thus admitted, but it is useless and at least unnecessary to enter into what would be the effect of anything different from what we find here. We find express terms that the infant having claimed to be admitted in fee simple, that he was admitted to these premises according to the terms of the will whereby the property in fee simple is devised to him; and with regard to the intermediate

estate, the particular estate, the words are, "The custody as well of his person as of his property aforesaid was, on the nomination and request of the said Eliza Ivatt and William Pate, committed to them as guardians of the infant." I think the necessary effect of that is this: it is an admittance in fee simple in possession; and the actual possession of the property in question is by this instrument in effect and in contemplation of law delivered over, as I imagine it has been, whether it is so or not is not material, to these two persons as guardians of the infant. That being so, then this question arises, not whether the lord was bound under the circumstances of this case, and with the will in question before him, to admit the infant as tenant in fee simple in possession, but whether, having admitted the infant under an instrument, and in terms which operate as an admission to the fee simple of the estate in actual present possession—whether he can now, in derogation of that admission, at all events of an admission which he has given, and in derogation of the clear and express terms of that admission, proceed by ejectment to turn this infant out of possession, and to hold the land until some other person within the term of 500 years shall come in. If it be so, it implies in the first place an obligation on the part of the devisees of the term to come in and be admitted and pay their fine, and also implies a right and power of the lord of a manor, who has admitted an individual who is entitled to an estate subject to a prior charge on it, and who has admitted him to the estate in fee simple in possession, in derogation and violation of the grant, to turn him out of possession, in order that he may seek to obtain a fine from somebody else, and to seize the property until somebody else shall come in and be admitted, and is ready to pay that fine. Now, an argument has been raised as to the obligation on the part of the lord who has admitted the infant. I am by no means prepared to hold that he would have been bound to admit, but on the other hand, I am not prepared to say that he would not have been bound on the tender by himself of a person who claimed under the will to admit him to that estate

to which he claims title under this will, or to which he claims title at all. See *Garland v. Mead* (7), cited in the Court below. If the case rested entirely on the terms of the admission, on the grounds I have stated, I think there is a tenant in possession admitted by the lord, and that he cannot therefore seize the property, turning that tenant out of possession, and hold it until some other persons, who may have some other title under the will, shall come in and claim to be admitted; but when we look at the facts that appear in this case, and which have actually occurred, I do not think we are at liberty, considering altogether the facts that are now before us, to disregard altogether the fact that the lord accepted on this admission, I will not say "exacted," a full fine. On the view I take of this case he has a perfect right, if the devisee in fee simple thinks fit to come forward, and claim to be admitted as a tenant in fee simple in possession of the property in question, to admit him, and then in that case, admitting him to an estate in fee simple, to take and receive from him the full fine upon the property. Be that as it may be, here he has, if not exacted, at all events taken and received it, and it has been duly paid to him without protest and without any conditions or qualification by the tenant. To hold that with a tenant in possession whom he has admitted, from whom he has received a full fine, he is entitled to treat his own act as a nullity, and deprive the tenant whom he has admitted of the possession to which he has admitted him, and for which he has received the fine, is so repugnant to one's notion of justice that it would require some authority in point of law to do so. All the authorities go to shew that though the lord may, under certain circumstances, refuse to admit a tenant or may admit a tenant to a particular estate, or possibly a tenant to a remainder, and may be held nevertheless to have a right to proceed for a fine against other persons, yet I find none which shew that where once the lord has admitted a person as a tenant in fee simple in possession to the

copyhold estate, and received the full entire fine upon it, that he has any right then to seize *quousque* for the purpose of obtaining another fine from any other person. I find in a case referred to in the argument, *Blackburne v. Graves* (2), a very old case which had been reported in no less than three of the old reports of the time, that Lord Hale, as reported in 1 Mod., expressly lays down the law in these terms—"I do not see any inconvenience why the admittance of tenant for life or years should not be the admittance of all in remainder, for fines are to be paid, notwithstanding, by the particular remainder, and so the books say it shall be no prejudice to the lord." Here the fine having been assessed for the whole estate, I think, in the language of Lord Hale, there is an end of it. If, after a time, the devisees had come forward and claimed to be admitted, I am not prepared to say he would not be bound to admit them. If the heir at law, the devisee under the will, or anybody claiming by another title, were to come forward at once, and each claim to be admitted, it is the duty of the lord to admit them all, and it is his interest to do so, because he could recover a fine from everyone whom he has thus admitted. Where no one comes forward to claim, but one who has even a *prima facie* right, that is to the estate in fee simple as heirs at law, or devisee of the estate in fee simple, and the lord thinks fit to accept and admit him who claims to be admitted, all the authorities go to shew that having received a full fine on that admittance, he can claim no other fine in respect of that estate, or any parcel or portion of that estate, but if he be entitled to claim a fine he must do it by action, and cannot do it by seizure *quousque*. It only remains for me to refer to the cases cited by Mr. Williams. The case of Doe on the demise of *Whitbread v. Jenney* (1), is consistent with the right of this infant to retain possession of this property. At first I supposed it was an authority in support of the plaintiff's claim, but when we look at the facts of the case we find that there was an express custom of the manor that notwithstanding the admission of the tenant for life the re-

NEW SERIES, 42.—Q.B.

mainderman in fee might be called on to come forward and be admitted. Lord Ellenborough, in giving his judgment, lays down the general rule—"That the admission of a tenant for life is the admission of him in remainder to vest the estate in him, but not to bar the lord of his fine." In confirmation of this he refers to Lord Coke's *Compleat Copyholder* and to Lord Chief Baron Gilbert's book on Tenures. He alludes to the particular custom existing in that manor, and then says—"The case of *Auncelme v. Auncelme* (8) only proves that the admittance of tenant for life is the admittance of the tenant in remainder, so far as to vest in him the estate in remainder, and enable him to convey a title to it, but that it is not such an admission as to make him full and complete tenant to the lord. And further, that though it should be holden that where there is no custom, the remainderman need not be admitted, yet the present defendant was bound to be admitted, there being such custom within this manor, which is the life of copyholds, and that the custom is a reasonable one, as by means of it will appear distinctly upon the rolls of the manor to whom the different copyholds belong, and the lord will be better able to call for his fines and enforce his suits and services."

Therefore, looking at all the authorities, I am of opinion that the plaintiff, having admitted the infant as tenant in fee simple in possession, cannot in derogation of that admittance, which was by his own act, especially having taken and received the full fine in respect of the tenancy in fee simple in possession, now seize the property and dispossess the tenant whom he has admitted and hold the property until some other person shall come in.

MARTIN, B.—I am quite of the same opinion. It is sufficient to say that I have read very carefully the judgment of the Court of Queen's Bench in this case, and it seems to me that none of the arguments addressed to this Court by Mr. Williams in the slightest degree affect it, and I have no doubt the rule is

(8) Cro. Jac. 31.

2 E

as it is laid down by Lord Cranworth in *Glass v. Richardson* (9), that a "testator disposing of the copyholds by his will does no more than name the person whom the lord will admit. All that the lord can insist on is, that he shall never be without either a tenant or the possession of the land; this is effectually secured to him by his right of seizing the land *quousque* upon the death of the tenant, unless the heir or some one claiming under the testator's will comes in and is admitted." Assuming that to be the rule, everything has been done here which the law requires. It is quite clear, on the face of it, that this is a most unconscionable claim. The real interest in this estate was that of a person who was entitled to a sum of 2,000*l.* charged on the property. The person who was admitted was a person who was entitled to this estate subject to the particular mode in which it was done, which was by granting a term of 500 years to trustees, and the property to go at the expiration of that term to the person who paid the 882*l.* 10*s.* 6*d.* on his admission. I have not the slightest doubt that the person really interested in the land was this person who was the real owner of it, and the fine is exacted by reason of it. The argument put forward to-day is that it is not so, for that the interest is to commence 500 years after the death of the testator. To suppose that that could be so, would be to say that this estate could not enure except to the seventh or eighth descendant of the testator. That is a proposition which seems to me utterly untenable and entirely a false position, and I think that the fine having been really assessed, an attempt is here made to treat it as if the interest of the termors was to continue for 500 years, for them to have possession for 500 years, and that the person who has paid the fine was to have no interest.

BRETT, J.—I am of the same opinion.

CLEASBY, B.—I merely say one word to shew why I think we may properly read

(9) 2 De Gex, M. & G. 658; s. c. 22 Law J. Rep. (N.S.) Chanc. 105.

this as an admission of a man who has been admitted as a tenant in possession. The case is not at all like the case of a devise to a tenant for life. Although in some senses technically this is a remainder, it is substantially a devise of the whole estate. The person who enters into possession of property is the person who has it subject to the charges. I can see clearly from the statement in this case that that was the view taken on it; it was insisted on as a matter of right—I will not say properly—but it was insisted that this person was entitled to be admitted and pay the fine as tenant in possession. The plaintiff writes word that he insists that the termors shall be admitted, he having taken counsel's opinion to that effect. Then afterwards, in consequence of its being insisted that C. E. Ivatt should be admitted the steward writes to say, "The lord will admit Mr. Charles Edward Ivatt by his guardian." Having done that act when it was insisted on, he cannot afterwards, by writing a letter stating that the lord does not mean to waive his right to require the termors to take admission, limit the effect of the act by which he has agreed to admit Ivatt as tenant, he paying as tenant in possession the whole fine due to the lord. It is contended that this is only a constructive sort of admission, and that if they will not pay the fine to the lord, he is entitled to seize *quousque*, for which in the case of a remainder man there may be some authorities. But if this admission was intended and paid for as an actual admission to the whole interest, the argument fails.

GROVE, J.—I am of the same opinion. Mr. Williams was driven by the stress of the case to admit that the admission of the remainder-man was the admission of the particular tenant. Then the particular tenant being admitted, the Lord could only seize *quousque* as for a forfeiture. It might be enough to answer in this case there was no demand and refusal, which it seems by all the cases is absolutely necessary, and very rigidly required. But not to put it on that technical ground, at the time of the admission of the remainder-man, a fine is taken not merely

apportioned to the remainder-man's interest, but is taken for the whole fee simple of the estate. How then can it be said that the estate of the particular tenant has been forfeited, and that the Lord is entitled to seize for the non-payment of the fine, which fine he has absolutely taken, and which he admits to have been taken?

DENMAN, J. — I am of the same opinion.

Judgment affirmed.

Attorneys—Remnant & Penley, for plaintiff; Cole & Jackson, agents for Francis Webster & Co., Cambridge, for defendant.

1873. }
May 26. }

THE QUEEN v. HARRELD.

Municipal Corporation — Election of Borough Councillor — Burgess on Roll for two Wards — Selection of Ward — 5 & 6 Will. 4. c. 76. s. 44.

By the Municipal Corporation Act, 5 & 6 Will. 4. c. 76. s. 44, "if a burgess be rated in respect of distinct premises in two or more wards, he shall be entitled to be enrolled and to vote in such one of the wards as he shall select, but not in more than one." At an election of councillors for a borough which was divided into wards, a burgess who was on the roll for two wards voted for the defendant in one ward, and immediately afterwards voted in the other ward:—Held, on the authority of The Queen v. Tugwell, that the vote was good, and that the voter having voted in one ward, had irrevocably made his selection, which was not affected by what took place afterwards.

Information in the nature of a *quo warranto* for exercising the office of councillor of the borough of Sunderland.

First plea, that the defendant was duly elected councillor. Joinder of issue.

At the trial before Willes, J., at the Durham Summer Assizes, 1872, it appeared that the borough of Sunderland is divided into several wards, two of which were (see

41 Law J. Rep. (N.S.) Q.B. 173) called the Sunderland ward and the Bishopswearmouth ward. In November, 1871, there were two vacancies for the office of councillor for the ward of Sunderland, and the defendant was declared duly elected by a majority of one vote. It appeared from the evidence of one W. Cockburn, who had voted for the defendant, that he was on the roll and entitled to vote both in Sunderland ward and Bishopswearmouth ward, and that on the day of the election he voted in both wards, but that he voted in Sunderland ward, for the defendant, first. The learned Judge held that the vote was good, and directed a verdict for the defendant.

A rule having been obtained to set aside the verdict and enter it for the relator, or for a new trial, on the ground that the Judge misdirected the jury in telling them that the vote was good—

Crompton (Carr with him) shewed cause. —The vote given by Cockburn in the Sunderland ward was good, and cannot be affected by the fact that he afterwards voted in another ward. *The Queen v. Tugwell* (1) is in point.

(He was then stopped.)

Herschell and *Shield*, in support of the rule.—There is nothing to shew that the voter having voted in both wards, has elected to vote in the Sunderland ward.

[BLACKBURN, J.—The voter must make his election if challenged to do so, when he comes to be enrolled (2). If he does not make his election then, he must make it when he votes.]

The voter, perhaps, intended to vote in both wards. The selection is a mental operation.

[BLACKBURN, J.—A person's rights are to be regulated upon the supposition that he knows the law, and no issue can be taken as to a mental operation. In *Comyn's Dig.*, Election, c. 2, it is laid down that if a man once determines his election, it shall be determined for ever,

(1) 37 Law J. Rep. (N.S.) Q.B. 275.

(2) By the Municipal Corporation Act, 5 & 6 Will. 4. c. 76. s. 44, if any burgess shall be rated in respect of distinct premises in two or more wards, then he shall be entitled to be enrolled and to vote in such one of the said wards as he shall select, but not in more than one.

as if an obligation delivered to the use of A. be refused when he is first informed of it, he cannot afterwards accept it.]

There is no conclusive evidence that the voter ever made his election.

BLACKBURN, J.—This rule must be discharged. The voter had a right to select the ward in which he wished to vote, and having voted in one ward, this was an unequivocal determination of his election.

QUAIN, J.—I am of the same opinion. The authorities as to making an election are collected in *Broom's Maxims* in the note to the rule "*quod semel placuit in electionibus amplius displicere non potest.*" I see no reason why giving a second vote should make the first bad.

Rule discharged.

Attorneys—Harle & Co., for relator; J. W. Hickin, agent for R. Brown & Son, Sunderland, for defendant.

1873. } BOOTH (*appellant*) v.
May 31. } SHADGETT (*respondent*).

Weights and Measures—Spring Balance Incorrect—Selling on Highway—22 & 23 Vict. c. 56. s. 3.

The appellant, when in the act of selling provisions upon a highway, used, for the purpose of weighing the said provisions, a spring balance which was incorrect, as being against the seller and in favour of the purchaser. No fraud on the public was intended:—Held, that the spring balance could not be seized under section 3 of 22 & 23 Vict. c. 56, nor was the appellant liable to the penalty imposed by that section upon persons having in their possession false or unjust beams, scales or balances.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 98.]

1873. } BEST v. PEMBROKE—CURTIS
May 24. } (*garnishee*).

Attachment of Debt—Interpleader—1 & 2 Will. 4. c. 58. s. 7—Order in Pursuance thereof—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125. ss. 60, 61)—Garnishee Clauses.

An order for the payment of costs, made in pursuance of 1 & 2 Will. 4. c. 58, which, by s. 7, may be entered of record, and shall then have the force and effect of a judgment, does not become a judgment so as to enable the person in whose favour it is made to obtain the benefit of the garnishee clauses of the Common Law Procedure Act, 1854.

Rule, calling upon the defendant to shew cause why he should not pay to the claimant a debt due from him to the plaintiff, or so much thereof as should be sufficient to satisfy the sum of 101l. 15s. 6d.

The action having been brought by the plaintiff against the defendant, an interpleader order had been made, ordering that an issue should be tried, in which the claimant should be plaintiff, and the plaintiff in the original action defendant, and that the question to be tried should be whether the sum of 180l. 0s. 9d., paid into Court therein, belonged to the claimant, or whether he had a lien or charge thereupon as against the judgment creditor. Upon the trial of the issue a verdict was found for the claimant, and an order was afterwards made by a Master of this Court that the sum of 180l. 0s. 9d. should be paid to the claimant, and that the original plaintiff should pay the costs of the interpleader order and the trial of the issue, which were taxed at 101l. 15s. 6d. That order was entered at the judgment office of this Court, in pursuance of 1 & 2 Will. 4. c. 58. s. 7.

An order was then obtained from this Court that all debts owing and accruing from the defendant in the original action to the plaintiff should be attached to answer the above-mentioned Master's order, upon which order the sum of 101l. 15s. 6d. remained unpaid, and a rule *nisi* was granted, as above-mentioned.

Bullen shewed cause against the rule.—The question to be decided arises upon 1 & 2 Will. 4. c. 58. s. 7. (1). *The Sunderland Local Marine Board v. Frankland* (2) is decisive of the point now before the Court. It is true that case was decided upon 1 & 2 Vict. c. 110. s. 18, but the words of that section are practically the same as those upon which the present question arises, and the judgment applies to the present case. All the authorities bearing upon the question were referred to in that case.

Charles, in support of the rule.—This case falls within *Hartley v. Shemwell* (3), which was discussed in *Frankland's case* (2), but was not overruled. The language of 1 & 2 Will. 4. c. 58. s. 7, is different from that of 1 & 2 Vict. c. 110. s. 18, the words being, "every such rule or order so entered shall have the force and effect of a judgment," while in the 1 & 2 Vict. c. 110. s. 18, the words are, "shall have the effect of judgments," &c. The word "force" must have some meaning addi-

tional to the word "effect." It was intended that when an order was made in pursuance of the Act, and was entered upon record, it should be the same as a judgment, except in the way pointed out by the Act, and that the person who obtained it should be a creditor who has obtained a judgment. Then, by s. 60 of the Common Law Procedure Act, 1854, he has a right to have the judgment debtor examined as to what debts are owing to him, and, by s. 61, to obtain an order attaching any debt due from the garnishee to the judgment debtor. Again, the 1 & 2 Vict. c. 110. s. 18, applies to decrees and orders of Courts of Equity as well as to rules of Courts of Common Law, but the 1 & 2 Will. 4. c. 58. s. 7, applies to Courts of Common Law only.

BLACKBURN, J.—We in this Court must take *Frankland's case* (2) to have been rightly decided, and I think that there is no real distinction between the words of 1 & 2 Vict. c. 110. s. 18, which were construed in that case, and those of 1 & 2 Will. 4. c. 58. s. 7, under which the present question arises. Under that last Act the words now in question are, "every such rule or order so entered shall have the force and effect of a judgment," and execution may issue by *fi. fa.* or *ca. sa.*, so that a person in whose favour such rules or orders are made is entitled to enforce them so far, as if they are judgments. This provision only applies to the Common Law Courts, while the 1 & 2 Vict. c. 110. s. 18, applies to all decrees and orders of Courts of Equity, and all rules of Courts of Common Law whereby any sum of money, or any costs, charges or expenses shall be payable to any person. These are to have the effect of judgments in the Superior Courts of Common Law.

Then the Common Law Procedure Act, 1854, gives to creditors who have obtained judgments entirely new remedies. The legislature thought fit to make the provision in section 61, the effect of which is to enable a person who has obtained a judgment, which is still unsatisfied, to attach a debt due from a third person as if he had obtained a judgment against him. But in *Frankland's case* (2), following the decision in *Re Price*, it was held that

(1) 1 & 2 Will. 4. c. 58. s. 7.—"That all rules, orders, matters and decisions to be made and done in pursuance of this Act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *feri facias* or *capias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution, if by *feri facias*; and such writ and writs may bear *teste* on the day of issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the Court."

(2) 42 Law J. Rep. (N.S.) Q.B. 13.

(3) 1 B. & S. 1; s. c. 30 Law J. Rep. (N.S.) Q.B. 223.

that enactment does not apply to rules or orders referred to in 1 & 2 Vict. c. 110. s. 3, or to similar orders or decrees of the Court of Chancery, and that the plaintiffs were not "creditors" within the meaning of the Common Law Procedure Act so as to be entitled to attach the debts owing from the garnishee. I was a party to the decision in *Frankland's case* (2). I think that it is correct, and we sitting here are bound by it. I see nothing in the language of 1 & 2 Will. 4. c. 58. s. 7, to take this case out of that decision. In both the reports of *Hartley v. Shemwell* (3), it appears that the point which was really fought was whether there could be a garnishee order when Shemwell had been arrested under a *ca. sa.* We cannot support the decision in *Hartley v. Shemwell* (3) as settling the present point, unless we overrule *Frankland's case* (2), which I do not think we ought to do.

QUAIN, J.—I am of the same opinion. This case is decided by *Frankland's case* (2), for it does not seem to me that we can draw any real distinction between the words in the 1 & 2 Vict. c. 110. s. 18, and those in 1 & 2 Will. 4. c. 58. s. 7. In fact I think that the words of section 18 are the stronger of the two, because, after enacting that all decrees, &c., shall have the effect of judgments, &c., it provides that the persons to whom any such moneys or costs, charges or expenses shall be payable, "shall be deemed judgment creditors," &c.

ARCHIBALD, J.—I think that we are concluded by *Frankland's case* (2), and that there is no substantial distinction between the language of the two statutes. *Frankland's case* (2) decides that all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, &c., whereby any sum of money or any costs, charges or expenses shall be payable to any person, shall have the effect of judgments. Their effect is enlarged, but they are not made judgments so as to be the same as judgments recovered in actions which are described in the Common Law Procedure Act, 1854. When we look at section 60 of that Act, we find that "it shall be lawful for any creditor who has obtained a judgment in any of the Superior Courts

to apply," &c. Unless, therefore, a person who has obtained an order can be said to have obtained a judgment, he is not entitled to apply under the 60th section. We must construe these Acts as they stand. I can only say that the construction adopted in *Frankland's case* (2) is the correct one, and that there is no sound distinction between the words of the two statutes.

Rule discharged.

Attorneys—C. P. Greenhill, for plaintiff; Pattison, Wigg & Co., for defendants.

1873. }
May 2. }

LEMAN v. FLETCHER.

Medical Act, 1858, 21 & 22 Vict. c. 90. ss. 31 & 32—*Apothecaries Act*, 55 Geo. 3. c. 194. s. 21—*Right of Surgeon to sue for Medicines unconnected with Surgical Treatment.*

Under the Apothecaries Act (55 Geo. 3. c. 194), s. 21, which is not repealed by the *Medical Act*, 1858, 21 & 22 Vict. c. 90. ss. 31, 32, a member of the College of Surgeons registered as a surgeon only under the later Act, and having no further qualification, cannot recover for medicines administered by him in a case not requiring surgical treatment.

Action in the Alfreton County Court to recover the sum of 2l. 19s. 6d. for medicine supplied to and medical attendances made upon the defendant's wife and children by Arthur Matthews.

Arthur Matthews is a surgeon practising at Selston, Nottingham, and is registered under the *Medical Act*, 1858 (21 & 22 Vict. c. 90), as a member of the Royal College of Surgeons of England. He has no other qualifications within the meaning of the Act.

At the trial before George Russell, Esq., on the 22nd of October last, it appeared from the evidence that some of the items in the bill against the defendant were for medicines administered in the case of an

internal disease not requiring surgical treatment, and for advice and attendances connected therewith, and that other items were for medicines administered for the purpose of removing a complaint which it is within the province of a surgeon to attend to and cure.

It has been agreed that the sum of 2*l.* 14*s.* shall be taken to represent the value of the first named items, and the sum of 5*s.* 6*d.* the value of the last named items.

For the defendant it was objected that in order to entitle the plaintiff to recover the charges for any of the above mentioned items, Matthews ought to appear in the *Medical Register* as a licentiate of the Society of Apothecaries, inasmuch as the Apothecaries Act, 55 Geo. 3. c. 194, (1) was not repealed by the Medical Act, 1858, and under section 31 of the latter

(1) By the Apothecaries Act, 55 Geo. 3. c. 194. s. 21, no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial he was in practice prior to or on the 1st of August, 1815, or that he has obtained a certificate from the Court of Examiners.

By the Medical Act (21 & 22 Vict. c. 90) s. 31, every person registered under the Act shall be entitled according to his qualification or qualifications to practise medicine or surgery, or medicine and surgery as the case may be, in any part of Her Majesty's dominions, and to demand and recover in any Court of law, with full costs of suit, reasonable charges for professional aid, advice and visits, and the cost of any medicines, or other medical or surgical appliances, rendered or supplied by him to his patients, provided always, that it shall be lawful for any College of Physicians to pass a bye-law, to the effect that no one of their fellows or members shall be entitled to sue in manner aforesaid in any Court of law, and thereupon such bye-law may be pleaded in bar to any action for the purposes aforesaid, commenced by any fellow or member of such college.

By section 32, after the 1st of January, 1859, no person shall be entitled to recover any charge in any Court of law, for any medical or surgical advice, attendance, or the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial, that he is registered under this Act.

Act, a person could not recover charges for medicines and professional advice and attendance except according to his qualification.

For the plaintiff it was contended, that the Apothecaries Act was impliedly repealed by the Medical Act, that the words, "according to his qualification," in the 31st section of the latter Act, applied only to the right to practise and were inserted merely to preserve the grades of the medical profession, and did not apply to the latter part of the section giving the right to sue. That section 31 was not to be regarded in the question before the Court, but that section 32 was the only section to be looked at, that it was a disqualifying section and should be construed strictly, and under it, to entitle a person to recover for any kind of professional aid, it was only necessary that he should be simply registered under the Medical Act, 1858, and that section 34 supported this contention.

The learned Judge reserved his judgment, and on the 26th of November last, delivered judgment for the defendant, holding that sections 31 and 32 must be read together, that by virtue of those sections the plaintiff could recover for medicines and advice and attendance according to the qualifications of Matthews only, and as he possessed no other qualifications than that of a surgeon, the plaintiff was not entitled to recover the items so objected to by the defendant.

The plaintiff having entered in the County Court about one hundred other cases of a similar nature, the learned Judge gave leave to appeal.

The questions for the opinion of the Court are—

First. Whether a person entered in the *Medical Register* under the Medical Act, 1858, and possessing no other qualification than that of a member of the Royal College of Surgeons of England, can recover charges for medical advice and attendance or medicines administered in the cure of diseases or complaints not requiring surgical treatment.

Second. Whether such a person can recover for medicines administered for the purpose of removing complaints which it

is within the province of a surgeon to attend to and cure?

Cave, for the plaintiff.—The plaintiff having proved that he was registered under 21 & 22 Vict. c. 90, was not disabled by the 32nd section of that Act from recovering for any medicine which he had both prescribed and supplied, whether such medicine was prescribed in a case requiring surgical treatment or not. The 31st section of the Act is an enabling and not a disabling enactment and cannot be read with the 32nd section for the purpose of extending the disability created by the latter section. The object of the Act was to encourage registration and, as between the medical practitioner and the patient, to abolish the distinction between medical and surgical cases. These sections must be taken to have impliedly repealed the Apothecaries Act, 35 Geo. 3. c. 194. s. 21, which prevents anyone who is not entitled to a certificate from the Court of Examiners, from recovering the price of medicines supplied by him.

[BLACKBURN, J.—Assuming that the plaintiff could not maintain an action before the late Act, how can he now, except according to his qualification?]

The Legislature in passing the last Act intended that any practitioner duly registered should be enabled to recover for medicines supplied by him. He cited *Gibbon v. Budd* (2), *Haffield v. Mackenzie* (3), *Turner v. Reynall* (4).

R. V. Williams, for the defendant, was heard only as to the plaintiff's right to recover for medicines supplied as a surgeon.

BLACKBURN, J.—I think that there can be no doubt in this case. By the Apothecaries Act, 55 Geo. 3. c. 194. s. 21, no apothecary could recover for medicines supplied by him, unless he had a certificate from the Society of Apothecaries. Then came the Medical Act, 21 & 22 Vict. c. 90, which by section 31 enables a person registered under the Act according to his qualification to practise medi-

cine or surgery and recover charges for professional aid and the cost of medicines supplied by him. This section does not repeal the Apothecaries Act, but so far as its provisions apply, takes a case out of that Act. Therefore, where the qualification of a medical practitioner is to practise medicine, he is at liberty to recover for medicines not connected with surgery; but if he is not so qualified, he is not within the new Act, and the former disability remains. Section 32 does not advance the plaintiff's case, as it is a disabling section, and confers no additional rights. It seems to me quite proper, that a gentleman should not be qualified to practise in one department of medicine, merely because he has passed an examination in another.

QUAIN, J., concurred.

ARCHIBALD, J.—I am of the same opinion. The Medical Act was passed in order that all medical practitioners might be registered according to their qualifications. By the Apothecaries Act, no one can recover for medicines sold by him, unless he has a certificate, and the only effect of section 31 of the later Act is to enable a physician to recover according to his qualification. The plaintiff, however, was only qualified as a surgeon and not as an apothecary, and as there is nothing to shew that the Apothecaries Act is repealed, his disability remains.

Judgment for the defendant upon the first point and for the plaintiff on the second.

Attorneys—G. L. P. Eyre & Co., agents for Abbott Thurman, Alfreton, for plaintiff; Stevens & Co., agents for John Cutts, Chesterfield, for defendant.

(2) 2 Hurl. & C. 92; s.c. 32 Law J. Rep. (N.S.) Exch. 182.

(3) 10 Irish Com. L. Rep. 289.

(4) 14 Com. B. Rep. N.S. 328; s.c. 32 Law J. Rep. (N.S.) C.P. 164.

1873. }
May 23. } *Ex parte* ELISE COUNHAYE.

*Extradition—Fraudulent Bankruptcy—
Offence by Wife of Bankrupt—33 & 34
Vict. c. 52.*

Under the Extradition Act, 1870, 33 & 34 Vict. c. 52, which provides that foreign depositions (if duly authenticated) may be received in evidence in proceedings under the Act, such depositions are admissible, although taken in the absence of the person accused, and without his having had an opportunity of cross-examining the witnesses.

In the list of "extradition crimes" in the schedule to the Act are included "crimes by bankrupts against the bankruptcy law":—Held, that a married woman charged with complicity in the fraudulent bankruptcy of her husband is not a person charged with a crime within the meaning of the above description, as it is limited to crimes committed by bankrupts only.

By treaty between this country and Belgium, it was provided that a requisition for the surrender to Belgium of a fugitive criminal should be made to the Foreign Secretary, accompanied by a warrant of arrest or other equivalent judicial document issued by a Judge or magistrate, duly authorised, &c., together with duly authenticated depositions taken on oath before such Judge or magistrate, which documents were to be transmitted to the Home Secretary, who, if there be due cause, should require a magistrate to apprehend the fugitive:—Held, that the Secretary might waive the fulfilment of these conditions, and that such documents might be received in evidence before the police magistrate before whom the fugitive was brought, although the warrant was not issued and the depositions were not taken before the same Judge.

Quære, whether the Extradition Act, 1870, applies to criminals who have taken refuge in this country before the date of the Act.

Habeas corpus to the Governor of the House of Detention directing him to bring up the body of Elise Victoria Hortense Counhaye or Dethier, whose extradition was claimed by the Belgian Government for complicity in a crime of fraudulent bankruptcy.

NEW SERIES, 42.—Q.B.

It appeared from the affidavits in support of the writ and from the return that in April, 1873, the prisoner was brought before a metropolitan police magistrate, when a warrant was produced dated the 7th of November, 1872, and issued by the Court of First Instance at Brussels directing the arrest of the prisoner, described as the wife of Aubin Adolphe Counhaye, "charged with complicity in a fraudulent bankruptcy at Brussels in 1870, that is to say, in having on the 1st of July, 1870, deposited in her own name with La Société Générale de Paris a sum of one hundred and seventy-five thousand francs in exchange for seven bonds of the Society payable to bearer, which bonds were abstracted from the creditors under the bankruptcy of her husband, decreed on the 23rd of July, 1870, by the Tribunal of Commerce at Brussels, since the money employed in their purchase was clearly part of the bankrupt's estate." A decree of the Tribunal of Commerce at Brussels, dated the 24th of July, 1870, by which Adolphe Counhaye Dethier and Victor Counhaye, his brother, who had carried on business in partnership, were adjudicated bankrupts, was proved.

A witness was also called, who proved that he was employed in the office of La Société Générale de Paris, and that on the 1st of July, 1870, the prisoner, accompanied by her husband, deposited 175,000 francs with the Society, and received in exchange seven bonds payable to bearer of 25,000 francs each. Copies of depositions taken before magistrates in Belgium were produced, from which it appeared that a few days before the adjudication the bankrupts absconded, carrying with them a large portion of the assets, and that the prisoner followed her husband to England, taking with her the bulk of their household furniture, goods and chattels.

None of the depositions had been taken in the presence of Elise Counhaye, nor were they taken before the Judge who issued the warrant of arrest.

The prisoner was committed to await the order of the Secretary of State.

Sir J. Karlake, Day and R. V. Williams now moved that the prisoner be dis-

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charged.—First, Madame Counhaye is not accused of an extradition crime within the meaning of the Extradition Act, 1870 (1). She is accused of complicity

(1) The Extradition Act, 1870 (33 & 34 Vict. c. 52), was passed on the 9th of August, 1870. By section 2, "Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, her Majesty may by order in council direct that this Act shall apply in the case of such foreign state."

By section 6, "Where this Act applies in the case of any foreign state, every fugitive criminal in that state who is in or suspected of being in any part of her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any Court of her Majesty's dominions over that crime."

By section 10, "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner, if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged."

By section 14, "Depositions or statements on oath taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act."

By section 26, "The term 'extradition crime' means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act," and by the first schedule, "The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act."

In this list of crimes are—

"Murder and attempt and conspiracy to murder."

"Manslaughter."

"Crimes by bankrupts against bankruptcy law."

"Sinking or destroying a vessel at sea, or attempting or conspiring to do so."

"Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master."

On the 31st of July, 1872, a treaty between her Majesty and the King of the Belgians, for the mutual surrender of fugitive criminals, was

in the fraudulent bankruptcy of her husband, but the Act only mentions "Crimes by bankrupts against bankruptcy law," so that never having been a bankrupt, she cannot have been guilty of any such crime. Even if the evidence goes to shew that she was an accessory before the fact in the crime of her husband, this is not enough, for although the treaty applies to accessories before the fact as well as principals in any such crimes, it cannot enlarge the operation of the Act, which is limited to crimes by bankrupts. Secondly, the definition of "extradition

signed. By article 1 it is agreed "that her Majesty and his Majesty the King of the Belgians, shall, on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any person except, as regards Great Britain, native born and naturalised subjects of her Britannic Majesty, and except, as regards Belgium, those who are by birth or who may have become citizens of Belgium, who being accused or convicted as principals or accessories before the fact, of any of the crimes hereinafter specified, committed within the territories of the requiring party, shall be found within the territories of the other party." Then follows the list of crimes in the words of the first schedule of the Extradition Act, 1870.

By article 2. In the dominions of her Britannic Majesty, other than the colonies or foreign possessions of her Majesty, the manner of proceeding shall be as follows—"In the case of a person accused (of a crime in Belgium), the requisition for the surrender shall be made to her Britannic Majesty's Principal Secretary of State for Foreign Affairs by the minister or other diplomatic agent of his Majesty the King of the Belgians, accompanied by a warrant of arrest or other equivalent judicial document, issued by a judge or magistrate duly authorised to take cognisance of the acts charged against the accused in Belgium, together with duly authenticated depositions or statements taken on oath before such judge or magistrate, clearly setting forth the said Acts, and containing a description of the person claimed, and any particulars which may seem to identify him. The Secretary of State shall transmit such documents to her Britannic Majesty's Principal Secretary of State for the Home Department, who shall then by order under his hand and seal, signify to some police magistrate in London that such requisition has been made, and require him, if there be due cause, to issue his warrant for the apprehension of the fugitive."

This treaty was ratified on the 29th of August, 1872, and an order of council was afterwards made by which the Extradition Act, 1870, from and after the 28th of October, 1872, is to apply in the case of the treaty with the King of the Belgians.

crime" in section 26 of the Act is what would be one of the crimes specified in the schedule, if committed in this country. Now, by the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, which contains the law relating to the punishment of fraudulent debtors, the offence of fraudulent removal of property in contemplation of bankruptcy only relates to acts by the bankrupt and not to a fraudulent complicity in such acts, which is the offence with which the prisoner is charged. Again, by section 6 of the Extradition Act, 1870, a fugitive is liable to be apprehended whether the crime, in respect of which the surrender is sought, was committed before or after the date of the order in council applying the act, but in the present case the crime was committed before the Act itself was passed, and it is contrary to all principle, in the absence of express provision, to give a retrospective operation to a criminal statute. The law was not intended to apply to fugitives who were at the date of the Act resident in this country. Then with regard to the depositions taken in Belgium, the magistrate ought not to have received them in evidence. Sections 14 and 15 of the Act allow foreign depositions to be received in evidence if properly authenticated, but by section 10 the magistrate is only to commit the person charged upon such evidence as, *according to the law of England*, would justify the committal. Here it appears that the depositions were not taken in the presence of the prisoner, and she had no opportunity of cross-examining the witnesses. Lastly, with regard to the Belgian warrant of arrest, it is submitted, first, that it does not disclose any crime committed by the prisoner within the territory of Belgium, but a crime (if any) committed in France; secondly, the second article of the treaty between Belgium and this country requires that a requisition for surrender on the part of Belgium is to be accompanied by a warrant issued by a Judge or magistrate, and depositions taken before such Judge or magistrate. Here the depositions were not taken before the same Judge who issued the warrant.

The Attorney-General (Sir J. Coleridge), and O. Bowen shewed cause, and were

requested to confine their argument to the questions, first, whether there was sufficient proof of an "extradition crime" within the meaning of the Act; secondly, whether extradition could be granted of a fugitive who had taken refuge in this country before the date of the Act.—The Legislature intended that the list of crimes should be construed according to law, and accessories before the fact are by law liable, and may be proceeded against as principals. The first crime specified in the list, "murder and attempt and conspiracy to murder," would surely include accessories before the fact. With regard to the question whether the Act applies to persons who came here before it was passed, there can be no doubt that it was intended to clear this country of foreign criminals without regard to the date of their crime or of their arrival here. The words in section 6, "whether the crime in respect of which the surrender is sought, was committed before or after the date of the order," were only inserted from extra caution.

BLACKBURN, J.—I am of opinion that the prisoner is entitled to be discharged from custody on the ground that she is not shewn to be accused of an "extradition crime" within the meaning of the statute. With regard to the different points which have been taken and argued, in the first place, we are all satisfied that the provisions in Article 2 of the treaty as to the documents and particulars which are to accompany a requisition for the surrender of a fugitive criminal, are only material to this extent, that if they are not complied with, the Home Secretary may refuse to order the magistrate to intervene. If, however, the Home Secretary, without insisting upon these conditions, chooses to require the magistrate to issue his warrant, all that remains for us to do is to consider whether the magistrate had jurisdiction to commit the prisoner under the Extradition Act, 1870. We think, therefore, that there is nothing in the objection that the depositions were not taken before the same Judge who issued the warrant of arrest. Secondly, we are of opinion that under sections 14 & 15 of the Extradition Act, foreign depositions may be put

in evidence before the English magistrate, although they were not taken in the presence of the accused person and he had no opportunity of cross-examining the witnesses. These are matters which, having regard to the practice in other countries, we do not think affect the admissibility of the depositions, though I do not say that the magistrate ought not to give weight to the circumstances under which they were taken, and receive the statements with due qualification. But with regard to the third question, I am sorry to be obliged to say that I think neither the Act nor the treaty enables us to order the prisoner to be surrendered. The Act enumerates in a schedule the different descriptions of crimes called "extradition crimes," of which a person must be accused or convicted before he can be surrendered to a foreign state, and the only description which it is suggested can apply here, is that of "crimes by bankrupts against bankruptcy law." Now I am disposed to agree with the argument of the Attorney-General that in the case of murder, the first crime specified in the schedule, the description would include accessories before the fact, who were always liable to be punished as criminals, and who now by 11 & 12 Vict. c. 46 may be indicted and punished as if they were principal felons. But here, in the schedule to the Act, there is a particular designation and description of the sort of person by whom the crime must be committed. It is a crime by a "bankrupt," and this description cannot include crimes against the bankruptcy law committed by persons who are not bankrupts. I think, therefore, that the charge against the prisoner—that of complicity in the fraudulent bankruptcy of her husband—does not come within the words of the schedule, and is therefore not an extradition crime. Whether this was a mistake of the Legislature or not, I cannot say; it is conceivable that it may have been intended to make a difference between the law applicable to bankrupts themselves, and that concerning accomplices in their fraud; but whatever was the intention, it is impossible for us to extend the application of the Act to the accused in the present case, in the face of these words. We are there-

fore on this ground bound to order the prisoner to be discharged. Lastly, with regard to the question whether the Extradition Act applies to crimes committed before the date of the Act, I will only say that I think the point so doubtful that I consider it very desirable the Legislature should interfere and cause the enactment to be amended (2).

QUAIN, J.—I am of the same opinion. I think that the words in the schedule, "crimes by bankrupts," are too strong to be got over. In the case of the other crimes described in the schedule, there is no description of the person by whom the crime is committed, but merely a description of the crime. Here the operation of the schedule is limited to a specific class of persons to which the prisoner does not belong.

ARCHIBALD, J.—I am of the same opinion. I quite agree with what has been said by my brother Blackburn as to the different points which have arisen. As to the third point, I will only say that if we were to put a different construction upon the schedule, we should have to ignore the words, "by bankrupts," which we have no power to do.

Prisoner discharged.

Attorneys—Ingle, Cooper & Holmes, for applicant; Solicitor of the Treasury, for the Crown.

1873. }
May 28. }

THE QUEEN v. POWELL.

Highway—Proceedings for Stopping up—Vestry Meeting—Sufficiency of Notice—5 & 6 Will. 4. c. 50, s. 84; 58 Geo. 3. c. 69. s. 1.

By the Highways Act, 5 & 6 Will. 4. c. 50. s. 84, "when the inhabitants, in vestry assembled, shall deem it expedient that any highway should be stopped up, diverted or turned . . . the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to the justices to view the same, &c." (specifying other proceedings

(2) See "The Extradition Act, 1873," 36 & 37 Vict. c. 60. s. 2.

for stopping up or diverting the highway). By 58 Geo. 3. c. 69. s. 1, no vestry shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel, &c.

Notice of a vestry meeting was given in the words following—"Hamlet of Trevecca.—I, the undersigned, hereby give notice that a meeting of the ratepayers of the above hamlet will be held at the Vestry Room, &c. . . . for the purpose of taking into consideration the proceedings now taken by Mr. John Parry, of —, against Mr. Rhys Davies, surveyor of the Talgarth District Highway Board, respecting Blaenabach Road, and for other purposes connected with the highways of the above hamlet."

The meeting so convened passed a resolution that the road should be stopped up, under the 5 & 6 Will. 4. c. 50. s. 84:—

Held, that, having regard to the fact that proceedings had been taken for compelling the parish to repair the highway, the notice sufficiently informed the public that any steps which might be necessary for defeating these proceedings, such as stopping up the highway, would be considered by the vestry, and that the meeting was therefore duly convened.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 129.]

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Queen's Bench.)

1873. } JONES AND WIFE v.
June 17. } CUTHBERTSON.

Husband and Wife—Chose in Action—Money borrowed and received for Improvement of Wife's Separate Estate—Set-off of Debt due from Husband—Parties to Action.

A married woman entitled to property for her separate use was desirous of raising money for the improvement of her estate, while her husband also wished to raise money to discharge a debt. They accordingly arranged through the defendant, their

solicitor, to borrow money upon mortgage of the separate estate, and upon policies upon the lives of each of them respectively. The money was to be advanced by instalments, and when the first instalment was due the husband and wife signed a joint authority for the defendant to receive it for them. The defendant received the money, and claimed to retain part of it in respect of a separate debt due to him as solicitor of the husband:—Held, by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that in an action by husband and wife the defendant could not retain the money, or set off against it a debt due to the husband, as it was received upon the express understanding that it was to be held for the husband and wife jointly, so that there never was any reduction into possession on the part of the husband.

Appeal from the decision of the Court of Queen's Bench, reported 41 Law J. Rep. (N.S.) Q.B. 145.

Declaration for money payable by the defendant to the plaintiffs, for money received by the defendant for the use of Jones and Rhoda Celia, his wife, in right of the said Rhoda Celia alone, she being then entitled to the same for and to her sole and separate use, free from and independent of husband, and for the recovery of which she had a right to sue the defendant.

Pleas: Never indebted, and payment.

Joinder of issue.

The material facts were as follows—

The plaintiffs were married on the 9th May, 1869; no settlement was at any time made on the marriage; the defendant is an attorney. William Hopkins (the father of the female plaintiff) by his will dated 13th May, 1838, devised and bequeathed all his real and personal estate unto his daughter (then Rhoda Celia Hopkins) for her separate use, free from the control, debts and engagements of any husband, and appointed her executrix of his will.

The testator died on the 24th of February, 1870, without revoking his will, which was afterwards duly proved by the female plaintiff.

In the course of the summer succeeding the testator's death, the male plaintiff was

indebted to Messrs. Franklyn and other persons; he was desirous to pay Messrs. Franklyn's debt, whilst the female plaintiff was desirous to raise money to build or repair some cottages on the property at Neath, devised to her separate use as before mentioned. With a view to raise money to effect these objects, they consulted the defendant, who was their attorney, and by his advice entered into a negotiation with "The Union Finance Company, Limited," for a loan of the sum of 550*l.* on the security of the landed property, and also of two policies of insurance of the male plaintiff, one being a policy on his own life, and the other on that of his wife. The transaction was afterwards carried out, the company consenting to advance the sum on mortgage.

A deed between the plaintiffs and the company was accordingly prepared and executed on the 2nd July, 1870, to effect the above objects.

On the 1st July, 1870, the following authority was given to the defendant to receive the said sum of 150*l.*—

"We, the undersigned, do hereby authorize you to receive of and from the Union Finance Company, Limited, Bristol, or their solicitors, Messrs. Sweet & Burroughs, the sum of 150*l.* (less solicitor's charges), being the first instalment on account of a loan of 550*l.*, which the said company have agreed to lend us on the security of property situate in Neath and Swansea, Glamorganshire, and for your so doing this shall be your sufficient authority. Dated 1st July, 1870.

"(Signed) THOMAS JONES, Junr.

"(Signed) RHODA CELIA JONES.

"To Mr. Howell Cuthbertson,

"Solicitor, Neath."

Part of the sum of 150*l.* was to have been applied in discharge of the debt of the male plaintiff to Franklyn; the remainder was to have been applied to the erection of the cottages. The said first instalment of 150*l.*, less mortgagee's solicitor's charges, was thereupon paid over to the defendant by the company; and out of the same he retained the sum of 70*l.* 8*s.* 7*d.* for money due to him for a bill of costs for professional services theretofore rendered by him to the male plaintiff, and for money paid by the de-

fendant for the use of the male plaintiff at his request. The present action was afterwards brought by the plaintiffs jointly for its recovery.

The Court of Queen's Bench held on these facts that the defendant was not entitled to set off the money against the husband's debt, as there never had been any reduction into possession on the part of the husband.

This was an appeal against that decision.

Manisty (Hughes with him), for defendant, repeated the arguments urged in the Court below.

Giffard (B. F. Williams with him), for the plaintiffs, was not heard.

KELLY, C.B.—I am of opinion that this judgment should be affirmed, upon the ground that where the consideration moves wholly or in part from the wife, or she is the meritorious cause of action, the husband may join his wife in the action, thereby giving his assent to her taking an interest in the property. That is the case here, both on the declaration and evidence. Upon looking at the prominent case on the subject, *Bidgood v. Way* (1), we find it is an authority that an action is not maintainable at law for money had and received to the use of both husband and wife *simpliciter* without any allegation of the wife's right to the money. But when it appears in the declaration and from the evidence that the action is wholly or in part upon a contract relating to the wife's separate property, it is competent to the husband to give his wife an interest in the contract and join her in an action with him. There is nothing in this qualification to interfere with the law as decided by *Bidgood v. Way* (1), nor by *King v. Basingham* (2). It appears in the argument of the former that there are many exceptions to the general rule, and amongst them were mentioned *Abbott v. Blofield* (3), *Breshford v. Buckingham* (4), &c. The question, therefore, here, is whether in this case the wife is not at least in part the meri-

(1) 2 W. Bl. 1236.

(2) 8 Mod. 199.

(3) 2 Rolle 205.

(4) Cro. Jac. 205.

torious cause of the action, and whether, therefore, the husband might not join her in suing. The declaration in this case, if it had simply been for money had and received to the use of the husband and wife, would have been bad, upon the authority of *Bidgood v. Way* (1), but for the words "in right of the said Rhoda Celia alone, she being then entitled to the same for and to her sole and separate use, free from and independent of the said Thomas Jones, and for the recovery of which she had a right to sue the defendant." This statement in the declaration is not strictly accurate, but it appears from the evidence that the wife had a separate estate in some freeholds and leasehold property, and as the money was advanced upon the security of her separate estate for certain purposes, and the defendant knew that it was obtained for these purposes only, and the wife would have been entitled to an injunction if either the husband or the solicitor had attempted to apply the money to different purposes, there can be no doubt this was enough to make the wife in part the meritorious cause of action. Certainly she comes within the exception to the general rule, and therefore may sue with her husband. In the last case in error, *Fleet v. Perrins* (5), the rule from all the authorities was clearly stated by my brother Cleasby. When that case was before us, I doubted whether there was sufficient upon the record or in the evidence to take it out of the authority of *Bidgood v. Way* (1), and I dissented from the view of the rest of the Court; but when it appears, as in this case, that the wife was in part the meritorious cause of the action, and we have power to amend the declaration, I think it was competent for the husband to give his wife an interest in the money sought to be recovered. The judgment of the Queen's Bench must be affirmed.

MARTIN, B.—I am of the same opinion, and on simple grounds. I do not consider whether this is money had and received *ad damnum ipsius* or *ipsorum*; such technicalities are mere nonsense. Any amendment may be made to this

declaration consistent with the same parties remaining on the record, and there can be no doubt that this money was treated as the money of the wife, so as to make her the meritorious cause of action, and to bring this case within the rule of law enabling the husband either to sue himself or join his wife.

BRETT, J.—As I understand, the question is whether there was evidence at the trial to support a joint action by husband and wife on a declaration disclosing the true facts of the case. The facts proved perhaps did not support the declaration as drawn, but they did support a cause of action which we may supply by amendment. It seems clear that the husband might sue alone; but the question is whether he can also join his wife in the action so as to give her an interest. The facts were that this money from the loan society would not have been advanced except for the security of the wife's separate property. The contract for the loan was made after marriage, and there was an implied contract of the defendant with both the husband and wife. This made the wife in part the meritorious cause of an action upon the defendant's implied contract within the rule laid down in *Roper on Husband and Wife*, p. 213, and for which he quotes *Rose v. Bowler* (6); that case does not directly decide this point, but Roper's statement is a fair inference from it. I think that a declaration stating that the money had been raised partly on the security of the wife's separate estate would have been good.

CLEASBY, B.—I am of the same opinion. The declaration has been framed evidently to escape the difficulties raised by *Bidgood v. Way* (1), and it is not accurate in fact; but the question is whether a good declaration can be stated in the joint names of the plaintiffs. The husband could not reduce the property, which was mortgaged, into his possession; that was the separate estate of his wife. We must then see whether the money raised upon this mortgage was in any way reduced into the husband's possession; that is a question of intention. It seems to me that the joint authority to the defendant

negatives any intention on the husband's part to reduce the money into his possession, and if there was such an intention, it was never effected.

GROVE, J.—I am of the same opinion. Here the defendant is more in the nature of an agent of the husband than the defendant in *Fleet v. Perrins* (5), but he must be agent to appropriate the money to the purpose directed by his authority, in other words he has no election as to whether the money shall be reduced or not into the husband's possession, contrary to the original intention of the deposit.

DENMAN, J.—The only question is whether the plaintiffs can sue jointly for this sum of money in the defendant's hands. I agree with the Lord Chief Baron on the general law, and I think this case is decided by the answer to the question, "Must the husband set up his *jus mariti*?" It would be very inequitable if he must, and I adopt the words of the Court below: "When the husband and the wife signed the joint authority to the defendant to receive the first instalment, he was well aware that with the exception of the debt to Messrs. Franklyn, the residue of the money was to be applied solely for the benefit of the wife, and he became the agent of both the plaintiffs to carry that purpose into effect. The money, therefore, when received by him, was received simply as agent for the husband and wife to carry into effect their several objects, and he could not, against the will of the parties, treat the transaction as a reduction into possession by the husband on his own account and for his own purposes, and he had no right, therefore, to set up as an answer to the present action that the money when it got into his hands was the money of the husband only." Therefore, independently of the general law, the attorney was estopped from setting up the husband's right. The judgment of the Queen's Bench will be affirmed.

Judgment for the plaintiffs.

Attorneys—Bell, Brodrick & Gray, agents for Smith, Lewis & Jones, Swansea, for plaintiffs; E. Peacopp, agent for Cuthbertson & Turberville, Neath, for defendant.

1873. { FISHER AND OTHERS v. THE LIVER-
July 5. { POOL MARINE INSURANCE COM-
PANY.

Marine Insurance—Policy unstamped and unexecuted—Slip—Action—30 Vict. c. 23, ss. 7, 9.

The defendants, an Insurance Company at Liverpool, employed E. & Co. as their agents in London to accept risks and receive premiums in London for policies of marine insurance. The plaintiffs instructed P. & Co., insurance brokers in London, to effect an insurance upon a cargo of rails. P. & Co. on the 16th of November, 1871, prepared a slip which was initialed by E. & Co., and a copy was made out by P. & Co. who sent it to E. & Co. On the same night E. & Co. sent the copy to the defendants at Liverpool. A policy ought to have been executed and sent soon after, but this was not done. An account, including 2s. 6d. policy duty, was sent by E. & Co. to P. & Co., who paid it on the 13th of March, 1872. No stamped policy was ever prepared or executed, and the ship on which the cargo of rails was having been lost, the defendants refused to execute the policy or to pay the insurance money. The jury found that the defendants authorised E. & Co. to issue slips, accept risks and receive premiums; that they had given plaintiffs reasonable ground to believe, and that the plaintiffs did believe, that if the plaintiffs paid the premium and stamp, on a slip initialed by E. & Co., they, the defendants, would issue a policy in accordance with the slip. They also found that the plaintiffs were prevented by the conduct of the defendants from insuring elsewhere:—Held, by QUAIN, J., and ARCHIBALD, J. (BLACKBURN, J., dissentiente), that there was no duty on the defendants separable from the contract to insure in the usual and customary manner, and, therefore, that no action on such contract being maintainable by the plaintiffs against the defendants without contravening the provisions of ss. 7 and 9 of 30 Vict. c. 23, the plaintiffs could not recover in any form of action brought against the defendants.

The first count of the declaration stated that the defendants by warranting to the plaintiffs, that one Eames was duly authorised as their agent, and on their behalf,

to accept certain risks, and receive on their behalf certain premiums for insurance upon risks, represented by the said Eames to have been accepted by the defendants, and in respect of a policy of insurance drawn up and executed by the defendants to cover such risks, induced and caused the plaintiffs to pay certain premiums for the said insurance, and certain other moneys for the costs and expenses of the said policy of insurance by the said Eames, for and in respect of a risk accepted by him for and in the name of the defendants, upon a ship of the plaintiffs called the *Lizzie*, and for the said policy of insurance represented by the said Eames to have been prepared and granted by the defendants to the plaintiffs, and retained as usual in the hands of the defendants, and also thereby induced and caused the plaintiffs not to cover the said ship by other insurances, and to rely upon the said policy said to have been granted by the defendants. And the plaintiffs say that all conditions precedent were fulfilled, and all times elapsed, and all matters and things were done and happened, necessary to entitle the plaintiffs to have the said warranty fulfilled and performed, and to sue the defendants for the breach of the said warranty hereinafter complained of. Yet the plaintiffs say that the defendants were guilty of a breach of the said warranty in this respect, that the said Eames had not authority as their agent to accept the said risks and receive the said premiums for insurances as warranted as aforesaid, whereby the plaintiffs sustained great loss and damage as in the second count hereinafter set forth.

Second count—And the plaintiffs also sue the defendants, for that the defendants by falsely and fraudulently misrepresenting to the plaintiffs that one Eames was then duly authorised to act as their agent in accepting premiums for insurance; and also that the defendants had granted and accepted a policy of insurance in favour of the plaintiffs, covering a certain ship of the plaintiffs called the *Lizzie*, induced the plaintiffs to pay to the said Eames a large sum of money for and as a premium for such insurance, and for the price of a stamp for the said policy, and also to abstain from effecting insurances with other un-

derwriters, whereas in truth and in fact no such policy was granted or executed by the defendants, nor was the said Eames authorised to receive premiums for the defendants, all of which premises the defendants well knew at the time of the making the said false representations; whereby the plaintiffs sustained loss and damage by paying the said sum of money to the said Eames, without having the benefit of an insurance, and by abstaining from covering the said ship by other insurances; and by the said ship being lost by perils of the sea, against which the plaintiffs then supposed they were insured, the plaintiffs were otherwise greatly damnified.

And the plaintiffs also sue the defendants for money payable by the defendants to the plaintiffs for money had and received by the defendants to the plaintiffs' use.

Pleas—First. As to the first count of the declaration, that the defendants did not warrant as therein alleged.

Second. And for a further plea to the said first count, the defendants say that they are not guilty of such breach of warranty as therein alleged.

Third. And for a further plea to the said first count, the defendants say that they did not induce or cause the plaintiffs to act as therein alleged.

Fourth. As to the second count of the declaration, the defendants say that they are not guilty.

Fifth. And as to the residue of the declaration, except as to 25*l.* 15*s.* 6*d.* parcel of the money thereby claimed, the defendants say that they never were indebted as alleged.

Sixth. And as to the said sum of 25*l.* 15*s.* 6*d.* parcel, &c., the defendants bring into Court the said sum of 25*l.* 15*s.* 6*d.*, and say that the said sum is enough to satisfy the claim of the plaintiffs in respect of the matter herein pleaded to.

Replication, taking issue on the pleas.

The cause was tried before Brett, J., at Liverpool, when it appeared that the defendants, a Liverpool Insurance Company (Limited), employed the firm of Eames & Co. as their agents in London to accept risks and receive premiums in London for policies of marine insurance.

The course of business was that one of the firm of Eames & Co. accepted risks for the defendants by himself initialing slips. When a slip was thus initialed a copy was sent to him, which he always forwarded to the defendants at Liverpool on the same night that it was received by him. The defendants issued circulars informing the public that Eames & Co. were their London agents. The plaintiffs wishing to insure some steel rails instructed Patton & Co., insurance brokers in London, to insure the rails for them. On the 16th of November, 1871, Patton & Co. prepared a slip (1). This slip was initialed by one of the firm of Eames & Co. Patton & Co. also made out a copy of the slip and sent it to Eames & Co., who on the same night sent it to the defendants at Liverpool. In regular course this ought to have been done directly after the slip was initialed, and the stamped policy ought to have been soon after executed by the defendants and sent by them to Eames & Co. If this had been done, the premium would have been payable on the 8th of December by the broker to the defendants. Patton & Co. asked for the policy several times at the office of Eames & Co. without obtaining it, and on the 29th of January, 1872, the defendants, being then in the course of liquidation, an enquiry was made of Eames & Co. by the Liquidator, whether the slip was to go forward. Eames & Co. immediately communicated with Patton & Co., and in consequence of their directions the slip was put forward. Eames & Co. forwarded to Patton & Co. an account (1). Patton & Co. did not pay until the 13th of March, on which day they paid the amount to Eames & Co. by a cheque payable to the order of the defendants. Eames & Co., by virtue of an authority which they had from the defendants, indorsed the cheque and received the money. The defendants never did prepare or execute any stamped policy; the ship, with the rails, was totally lost, and the defendants refused to execute the policy or pay the insurance.

The learned Judge asked the jury—First,—Did the defendants authorise

Eames & Co. to issue slips, accept risks and receive premiums?

Second—Did the defendants, by issuing the circular, and the authority which they gave to Eames & Co. to issue slips, accept risks and receive premiums, give the plaintiffs reasonable ground to believe, and did the plaintiffs believe that if the plaintiffs paid the premium and stamp on a slip initialed by Eames & Co., they, the defendants, would issue a policy in accordance with the slip?

Third—Were the plaintiffs prevented by the conduct of the defendants from insuring elsewhere?

The jury found for the plaintiffs and the learned Judge gave leave to the defendants to move to enter the verdict for them, if there was no evidence upon an amended declaration, or if he ought not to have amended the declaration.

A rule *nisi* was subsequently obtained on the ground, so far as is material to the present report, first, that there was no evidence to go to the jury; second, that no action would lie on the slip alone without a policy; third, that the learned Judge should not have allowed the declaration to be amended.

Benjamin and Macafee shewed cause against the rule.—They referred to 30 & 31 Vict. c. 23. ss. 7 and 9 (2), *Ionides v. The Pacific Fire and Marine Insurance Company* (3), and *Dutton v. Powles* (4).

R. G. Williams, in support of the rule,

(2) Statute 30 Vict. c. 23. s. 7. "No contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of The Merchant Shipping Act Amendment Act, 1862) shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes."

Section 9. "No policy shall be pleaded or given in evidence in any Court, or admitted in any Court to be good or available in law or in equity, unless duly stamped; and it shall not be lawful for the said commissioners or any officer of inland revenue to stamp any policy at any time after it is signed or underwritten by any person, on any pretence whatever, except in the two cases following," &c.

(3) 41 Law J. Rep. (N.S.) Q.B. 33, in error, 190 a. c. Law Rep. 6 Q.B. 674, in error, 517.

(4) 2 B. & S. 174; a. c. 30 Law J. Rep. (N.S.) Q.B. 169.

(1) See the judgment of Blackburn, J., where the material part of the slip and also of the account is set out, pages 227-8.

referred to *Ionides v. The Pacific Fire and Marine Insurance Company* (3), *Cory v. Patton* (5), 35 Geo. 3. c. 63. ss. 4 and 11, *Xenos v. Wickham* (6), and to *Arnold on Marine Insurance*, by *Maclachlan*.

Cur. adv. vult.

BLACKBURN, J.—In this case on the trial before my brother Brett at Liverpool the plaintiffs had a verdict for 1,000*l.*, subject to leave to move to enter a verdict for the defendants, reserved by the learned Judge in the following terms—"If there was no evidence upon an amended declaration, or if I ought not to have amended." The Common Law Procedure Act, 1852, section 222, gives the Judge at Nisi Prius power to make all amendments on such terms as he thinks fit, and requires that all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be made. No suggestion was made either at the trial or on the argument that there were any terms which it was proper to impose. That being so, we must construe this reservation as meaning that if there is any form of declaration under which the evidence at the trial would prove the plaintiffs' right to recover, the verdict is to stand.

Mr. Aspinall obtained a rule on four grounds, thus stated in the rule: First, that there was no evidence to go to the jury; second, that no action will lie on the slip alone without a policy; third, that no interest was shewn in the plaintiffs; fourth, that the learned Judge should not have allowed the declaration to be amended. Against this, cause was shewn in the first instance before my brother Quain and myself, when we were agreed that there was no foundation for the objection that no interest was shewn in the plaintiffs, and that was disposed of on the argument, and we need not further notice it.

On the other points we felt so much difficulty that we directed a second argument when my brother Archibald could

be present, and after that argument the Court took time to consider.

To make the case intelligible, it is necessary to state the material parts of the evidence.

From the Judge's note it appears that the defendants, a Liverpool Insurance Company, limited, employed the firm of Eames & Co., as their agents in London, to accept risks and receive premiums in London. One of that firm was called as a witness, and gave evidence that the course of business was that he accepted risks for the defendants by himself initialing the slips. That when he had initialed the slip a copy of the slip (as he called it) was sent to him. This appears to have been the practice described in the 7th paragraph of the case stated in *Xenos v. Wickham* (6).

In that case I expressed an opinion (7) to which I still adhere, that what is here called the copy of the slip is not like the first slip, in legal effect, a memorandum of the terms on which the parties agreed to insure, but a request, or mandate to the company to make out and execute a policy according to the practice. The witness proceeded to explain that the course of business was that the witness always forwarded the copies of the slips or request notes to the defendants at Liverpool on the same night that they were received by him in London. A circular approved by the defendants, informing the public that Eames & Co. were their London agents, was put in.

The plaintiffs had instructed John Patten, junior, & Co., insurance brokers in London, to insure for them steel rails, and on the 16th of November, 1871, Patten & Co. prepared a slip which was put in evidence at the trial, and which has been produced before us.

It was headed in print, "Cash account, John Patten, junior, & Co.," and was dated 16th of November, 1861. Then in writing followed—

Lizzy
"Barrow" "New York."
"Steel rails f. p. a.
f. g. a. £800 } 60s. %"
f. c. & s. £6000 }

Below followed several sums initialed by different parties. These sums, in all,

(7) 33 Law J. Rep. (N.S.) C.P. 16.

(5) 41 Law J. Rep. (N.S.) Q.B. 195 in note to *Ionides v. The Pacific Fire and Marine Insurance Company*.

(6) 36 Law J. Rep. (N.S.) C.P. 313; s. c. Law Rep. 2 Eng. & Ir. App. C. 296.

amounted to 4,200*l.* Amongst them was "1,000*l.* T. R. E."

It was proved by the evidence of Mr. Eames that these were his initials. No evidence was given as to the effect of this; but there is no doubt that in mercantile understanding this amounted to an agreement between the brokers, Patten & Co., and Eames (acting for the defendants), to insure on the ship *Lizzie* on a voyage from Barrow to New York, 1,000*l.* part of 6,880*l.* on steel rails free of particular average and of general average, and of capture and seizure, at 60*s.* per cent., and that the premiums were to go into the cash account. I will consider the effect of the revenue laws on this afterwards.

The copy-slip or request-note was made out by Patten & Co., and sent to Eames & Co., who, on the same night, sent it on to the defendants at Liverpool. It was not stated by any witness when this was done. In regular course it ought to have been done directly after the slip was initialed, and the stamped policy ought then to have been sent up by the defendants to Eames & Co., duly executed by them soon after.

Had this been done in November, the amount of the premium, in this case 30*l.*, less 10 per cent. on that amount for discount, or in this case 27*l.*, less a still further deduction of 5*s.* per cent. on that 27*l.*, making the net sum 25*l.* 13*s.*, would have been payable on the 8th of December by the broker to the defendants. And as the defendants would have advanced for the broker the amount of the stamp, that would have been due at once, although, for convenience sake, the actual payment would in practice no doubt be made at the same time when the larger sum for the premiums was paid.

The defendants, for some reason not explained, but probably connected with their being in liquidation, neglected to send up the stamped policy. Patten & Co.'s clerk proved that he several times called for it at the office of Eames & Co., and was told that it had not come up, and that Eames & Co. would write to the defendants sharply about it. At last, on the 29th of January, 1872, the defendants' liquidators wrote a letter to Eames & Co. inquiring whether this slip was to

go forward. Eames immediately communicated with Patten & Co., and in consequence of their directions the slip was put forward, and Eames & Co. forwarded to Patten & Co. an account of which the following is a copy—

"The Liverpool Marine Insurance Company, Limited.

"London Agency, Eames & Co.,

"St. Michael's House,

"Cornhill, E.C.

"To premiums for the month of January, 1872, less brokerage, and 10 per cent. discount for cash

£25	13	0
"Policy duty	0	2 6
<hr/>		
£25	15	6

"Note—The discount will be forfeited in default of prompt payment on the 8th of February."

This account, it will be observed, is made out exactly as if there had been a fresh slip initialed in January, and the stamp had been duly procured by the defendants.

For some reason not explained, actual payment was not made by Patten & Co. till the 13th of March, on which day they paid the amount to Eames & Co. by a cheque payable to defendants' order. Eames & Co., by virtue of an authority which they had from the defendants, indorsed that cheque, and received the money.

These facts are very strong evidence that, as between Eames & Co. and Patten & Co., it was understood that the company had undertaken the duty of preparing the policy; the defendants never did prepare or execute any stamped policy. The *Lizzy* was totally lost, and then the defendants refused to execute any policy or to pay the insurance.

The main contention of the defendants was that the plaintiffs could not recover unless the Court, in direct contravention of the 30 Vict. c. 23. ss. 7 & 9, permitted the plaintiffs to make available a contract for marine insurance not expressed in a stamped policy, and on the pleadings, as they stood at the trial, this was the case.

But the learned Judge was of opinion, and we think quite correctly, that if by any amendment the pleadings could be

made such as to enable the plaintiffs to recover for the breach of the defendants' duty, without contravening the statute, that amendment should be made.

He asked the jury three questions—first, Did the defendants authorise Eames to issue slips and accept risks and receive premiums? second, Did the defendants, by approving the circular and the authority which they gave to Eames to issue slips and accept risks and premiums, give the plaintiffs reasonable ground to believe, and did the plaintiffs believe that, if the plaintiffs paid the premium and stamp on a slip initialed by Eames, they, the defendants, would issue a policy in accordance with the slip? third, Were the plaintiffs prevented by the conduct of the defendants from insuring elsewhere?

The jury found for the plaintiffs, and the verdict was entered for 1,000*l.*, subject to the leave already mentioned.

I have come to the conclusion that the plaintiffs may, in this case, recover without infringing the existing revenue laws.

In *Marsden v. Reid* (7) the Court of King's Bench decided that the then Stamp Acts forbade them to look at the slip for any purpose. In that case the defence was that a material representation was made to the first underwriter to induce him to subscribe, which representation the defendants contended was to be taken to have been made to all the rest of the underwriters, who acted on the credit of that first underwriter, without the necessity of repeating it to each. It is obvious that the underwriter who was the first in this sense was the first underwriter who agreed to subscribe, and first initialed the slip, not the one who first signed the policy, but the Court thought themselves bound to hold the contrary.

A subsequent statute, 54 Geo. 3. c. 144, provided for the stamping of slips, but I believe that slips never were in practice stamped, though that Act remained on the statute book till the 30 Vict. c. 23.

The whole of the Stamp Acts were, as far as related to marine insurance, repealed by the 30 Vict. c. 23, and therefore we need not inquire whether the monstrous injustice done in *Marsden v. Reid* (7) was really forced upon the King's

Court by the then Stamp Acts. It has been determined on the construction of the now existing Act that, though the slip being a contract for insurance not expressed in a stamped policy is void as a contract, and as such not admissible in evidence, it is admissible for other purposes.—See *Ionides v. The Pacific Fire and Marine Insurance Company* in the Exchequer Chamber (3), *Cory v. Patton* (5), *Lisman v. The Northern Marine Insurance Company* (8).

In the case now before us, Patten & Co., as brokers to the plaintiffs, had undertaken a duty to use due care and diligence about procuring, making and completing the insurance for them.

When a slip is initialed the contract is binding in honour but not in law, and the broker's duty requires him to take the further steps to procure it to be made binding in law. For this purpose it is necessary that the policy should be drawn up on stamped paper, and the brokers have to advance the stamp, and see that the policy is properly drawn up, and then to take care that within a reasonable time the matter is concluded.

The broker does not undertake that the underwriter who has initialed the slip shall sign the policy, though that is the way in which, in the great majority of cases, the matter is concluded; and as soon as the underwriter has signed, the premiums are, as between the assured and the underwriter, paid, the underwriter taking in satisfaction of them the broker's personal promise to pay at the end of the customary period, subject to the customary deductions. But if the underwriter refuses to sign, there is no mode either at law or in equity to force him to do so. The matter in that case is concluded by this breach of honour on the part of the underwriter, and if the broker has used due diligence to bring it to a conclusion either one way or the other, within a reasonable time, he has done his duty.

If the broker has been negligent, and in consequence the final conclusion of the matter has been unreasonably delayed, the broker is responsible to his principal for the damage sustained through that delay.

(8) 42 Law J. Rep. (n.s.) C.P. 108; s. c. 8 Law Rep. C.P. 42.

That damage must depend on circumstances. If, notwithstanding the delay, the risk will be still taken by other underwriters at the same premiums, the damage would generally be nothing; if the risk was still insurable, but at an enhanced premium, the measure of damages would generally be the increase of the premium; but if, in consequence of the delay, news of the loss had come, or for any other reason, the risk was no longer insurable, the damage would generally be the amount which would have been recoverable if a stamped policy had been duly executed within a reasonable time.

In order to prove the case against the broker, it would be necessary to give in evidence the slip; not for the purpose of enforcing it as a contract of insurance, but for the collateral purpose of shewing that the broker had not used due diligence in bringing the matter to a conclusion within a reasonable time, so that the principal might be insured elsewhere if this underwriter did not insure him, and I think, on the authority of the cases above cited, the slip is admissible for such a purpose.

Then, it seems to me that on the usage stated in *Xenos v. Wickham* (6), and followed in this case, the effect of giving to a company a request slip, or copy slip, and of the company accepting it, is that the company, by what I consider a fresh arrangement, no part of the contract made by initialing the slip, take on themselves that which would otherwise be the duty of the broker, namely, to use due skill and diligence about preparing the policy properly, and bringing the transaction, as regards the company's subscription, to a conclusion in a reasonable time. And for this undertaking the mere fact that they were trusted with that duty would be a sufficient consideration.

I do not think the company by this acceptance of the request slip promises to execute the policy; that they had already done by initialing the slip, and the acceptance of the request slip carries that contract no further. But I think that it does by what, when the practice first begun, must have been in each case an express subsequent agreement, and what I think still is a subsequent agreement, though now a usual one, take upon itself a

responsibility precisely co-extensive with that which the broker would otherwise have undertaken.

If the company at once returns the request slip, and without any delay informs the assured that it will not execute a policy though bound in honour so to do, I do not think that any action would lie against it. The assured would then be at liberty to insure elsewhere. But if the company is guilty of unreasonable delay, the damages to which it would be liable would, I think, be just the same as the broker would have been liable to if he had been guilty of the same delay. And I see nothing inconsistent with the objects of the revenue laws in enforcing a contract to pay the Government for the stamp. Nor do I see any reason why we should strive to turn the second independent contract into part of the first in order to bring the case within the letter of the statute if it is not within its spirit.

In the present case I think the evidence and the answer of the jury to the first question put by my brother Brett would prove a count framed on the undertaking of the defendants to use due skill and diligence in framing a stamped policy in conformity with the request slip and bringing the transaction to a conclusion within a reasonable time, either by executing or repudiating that policy.

And I think that the evidence and the answers of the jury to the second and third questions shew a breach of that duty and damage sustained by the plaintiffs, justifying the verdict for 1,000*l*.

And I think that by giving effect to that verdict we should not transgress the 30 Vict. c. 23, as we should neither treat the contract for assurance contained on the slip as valid, nor make it available at law as a policy, but merely receive it in evidence for the collateral purpose of shewing the duty which the defendants took upon themselves and neglected.

I think, therefore, that the rule should be discharged, but as the majority of the Court are of a different opinion, it must be made absolute.

The judgment of Quain, J., and Archibald, J., was delivered by—

ARCHIBALD, J.—The question in this case is, whether upon the facts, and as—

suming the necessary amendment made, the plaintiff is, under any form of declaration, entitled to recover, notwithstanding the provisions of the 30 Vict. c. 23.

The facts, as proved, are fully set forth in the judgment of our brother Blackburn, and it is unnecessary, therefore, to repeat them in detail.

Those which are the most material relate to the difference in regard to the preparation of the stamped policy between the usage in the case of private underwriters and that which prevails in the case of insurance companies.

In the former case, after the slip has been initialed, the usage is for the broker of the assured to advance the stamp, draw up the policy on stamped paper, and present it to the different underwriters for execution.

But in the case of an insurance company, after the slip has been initialed by an agent of the company, it is retained by the broker of the assured, and a copy of it is then sent to the company by the broker, in order to enable the company to prepare the policy. The policy is then drawn up on stamped paper by the company, who themselves advance the stamp and execute the policy ready to be delivered to the assured or his broker.

The duty of the broker of the assured in ordinary cases and the measure of damages for any breach of it are well established and understood, and if the evidence in this case satisfied us that a precisely analogous duty unconnected with and separate from a promise to execute the policy, was undertaken by the defendant's company, we should have no doubt that the consequences of a breach of duty by the company would be similar to those of a breach by the broker. It appears to us also that inasmuch as the slip, though invalid as a contract, would be admissible in evidence for the collateral purpose [see *Ionides v. The Pacific Fire and Marine Insurance Company* (3), *Cory v. Patton* (5)], of establishing the existence and the breach of such a duty, the plaintiff would, if the declaration could be made to assume such a shape, be entitled to recover. Indeed this seems to us to be the only conceivable form of declaration upon which, if at all, the defendants can be rendered liable; for the 30 Vict. c. 23 expressly

renders invalid "any contract or agreement for sea insurance unless it be expressed in a policy" (in which also certain prescribed particulars must be specified), and prohibits a policy being "pleaded or given in evidence, or admitted in any Court to be good or available in law or in equity unless duly stamped," i.e. stamped before being signed or underwritten, so that no action can be directly maintained upon the slip itself, which in the opinion of all of us amounts to an agreement for sea insurance within the meaning of the Act. —See per Willes, J., in the case of *Xenos v. Wickham* (6).

It is abundantly clear that in consequence of the provisions of the Act the engagement entered into by initialing the slip cannot be directly enforced either at law or in equity, and being therefore only binding in honour, it is open to unconscientious men to break it, unless it can be indirectly enforced in the manner and on the grounds suggested by our brother Blackburn in his judgment.

Whether it can or not in the present case depends upon the true nature and effect of the usage with respect to the preparation of the policy.

In the case of private underwriters, the engagement entered into by initialing the slip must, having regard to the course of business, be understood to be an engagement to execute a stamped policy when it has been prepared and presented by the broker.

In the case of insurance companies it is equally understood to be an engagement to execute a stamped policy at some time, and under some circumstances, and the question is whether it does not also import that the company are, on receipt of the copy of the slip, to procure the stamp and fill up the policy.

When or how the difference of usage between the case of private underwriters and that of companies first sprung up does not appear. The monopoly of the two old companies, the Royal Exchange and the London Assurance, was done away with in 1824, by the 5 Geo. 4. c. 114, and it may be that when other companies were first established for carrying on the business of marine insurance the practice, as it exists between policy brokers and private underwriters, was in

the first instance adopted, and that the present practice of sending a copy of the initialed slip to the company, in order that they, and not the broker, might procure the stamp, and prepare as well as execute the policy, afterwards came into use; or it may be that from the first the latter course was found to be the most convenient. However this may be, it makes, in our judgment, little difference to the question under consideration; for it appears to us that when this practice became the fixed and settled usage the only reasonable implication from the initialing of the slip, on behalf of a company, is that it is an engagement not merely generally to execute a binding policy, but to execute it in accordance with the usual and accustomed course of business, including therefore an undertaking, on receipt of the copy of the slip, to procure a stamp and fill up the policy.

If then this be (as we think it is) the true effect of the transaction, the agreement being one and entire, and including as part of it an undertaking to execute the policy, i.e., an agreement for sea insurance, the statute applies, and presents an insuperable obstacle to any action founded on a supposed breach of duty in not procuring a stamp and preparing a policy, or in failing to give notice within a reasonable time that the company decline to prepare and execute it.

It is contended that, in the case of companies, there are in fact two separate transactions. First, the initialing of the slip constituting an agreement to execute a policy; and second, an agreement, on a new and separate consideration, upon receipt and acceptance of the copy slip, to do all that it is the duty of a broker to do in the case of private underwriters.

We are wholly unable to concur in this view. It appears to us that there is no evidence of any such second agreement separate and distinct from the agreement, which arises from initialing the slip, to execute the policy.

In our opinion there is only one agreement, namely, that which is to be implied in accordance with the usual course of business from the initialing of the slip. Nor do we think that there is any duty cast upon the company separate and distinct from the rest of their agreement, or

which bears any true analogy to the well-known duty of a policy broker.

The copy slip sent by the broker of the assured to the company, is sent merely for the purpose of enabling the company to prepare and fill up the stamped policy, and we do not think that it imposes on them any fresh duty different from that they had already undertaken, or transforms the company into brokers for the assured.

The broker, in his endeavour to procure the completion of the policy, has to deal with third persons over whose intentions or decision in the matter he has of course no control. If, when he has done all that his duty in the matter prescribes, the underwriter should decline to execute the policy, the broker would be discharged if, within a reasonable time, he gave notice of it to his employer, in order that the latter might effect or direct an insurance to be effected elsewhere.

But the company, if any analogous duty were supposed to be incumbent on them, would certainly not fulfil it by merely preparing a stamped policy ready for execution in their office, if they stopped short of executing it, and if it were added to their supposed duty that they were within a reasonable time after they decided not to execute, to give notice of such intention, this would imply a duty to make up their minds within a reasonable time whether to keep or break their agreement, a duty altogether unlike anything undertaken by a broker.

We are unable, upon the facts, to find that there is any such duty undertaken upon a new consideration, or any duty whatever separable from the contract to insure in the usual and customary manner, and upon the whole, therefore, that there is no possible form of action under the circumstances of this case which could be maintained without contravening the 30 Vict. c. 23.

For these reasons we are of opinion that the rule to enter the verdict for the defendants must be made absolute.

Rule absolute.

Attorneys — J. McDiarmid, for the plaintiffs;
F. Venn & Son, agents for Anderson, Collins
and Robinson, Liverpool, for the defendants.

1873. } ROBERTS (appellant) v. HUM-
May 28. } PHREYS (respondent).

Alehouse—Sale of Intoxicating Liquors on Sunday—Bona fide Traveller—Onus of Proof—Licensing Act, 1872 (35 & 36 Vict. c. 94), ss. 24, 51.

By "*The Licensing Act, 1872*," 35 & 36 Vict. c. 94, s. 24, "any person who sells or exposes for sale, or opens or keeps open premises for the sale of, intoxicating liquors during the time that such premises are directed to be closed in pursuance of this section," shall be liable to (a prescribed penalty); and by the same section, "none of the provisions contained in the section shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor to bona fide travellers, or to persons lodging in his house." By section 51, sub-section 4, "any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negated in the information, and if so specified or negated, no proof in relation to the matters so specified or negated shall be required on the part of the informant or complainant."

At the hearing of an information against the appellant (who had the usual license to sell liquor to be consumed on the premises), for keeping his premises open in prohibited hours on Sunday, it was proved that nineteen workmen were found drinking, and some of them smoking, there at the time in question, and that all except one came from central parts of the town of Birmingham, at distances varying from a mile and three-quarters to two miles from the premises, which were only 400 yards distant by road from Birmingham. There was no evidence that they had travelled or were about to travel. On the part of the appellant it was proved that an attendant was placed near the premises for the purpose of preventing the entrance of any except bona fide travellers; that no one was admitted who did not state that he had come more than three miles. The appellant also proved that notices were posted on his premises stating that none but travellers could be admitted, and that during the hours in question no persons were admitted

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who did not represent themselves to be bona fide travellers.

The justices found that the men found on the premises were not all bona fide travellers, and, also, that inasmuch as upon misrepresentations made by the persons who were not bona fide travellers, intoxicating liquors had been obtained by them, sufficient diligence had not been used. That it was for the appellant to bring himself within the exception as to bona fide travellers and that he had failed to do so. They accordingly convicted him in a penalty of 5l.:

Held, that the justices were right in holding that under the Act the burden lay upon the appellant of shewing that the sale of liquor was within the exception in section 24; but upon the point taken that the honest belief of the appellant that the men were bona fide travellers brought him within the exception, the case must be remitted to the justices to find as a fact whether the appellant bona fide thought that the persons admitted by him were travellers within the meaning of the Act,—QUAIN, J., inclining to the opinion that such a bona fide belief would bring the appellant within the exception; BLACKBURN, J., and ARCHIBALD, J., to the opinion that the appellant must prove that the persons admitted were actually bona fide travellers.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 147.]

1873. } THE QUEEN v. THE JUSTICES OF
June 17. } BRECKNOCKSHIRE.

Certiorari—Application for—Time for Application—Order of Quarter Sessions.

The general rule that application for a writ of mandamus to the quarter sessions to enter continuances and hear an appeal must be made not later than the term following the sessions at which the refusal was made, does not apply to an application to remove into this Court an order of sessions for the purpose of getting it quashed.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 135.]

1873. }
June 6. } MILLS v. SCOTT.

County Court—Powers of Amendment—19 & 20 Vict. c. 108, s. 57—County Court Rules, 1867—Amendment of Plaintiff—Description of Plaintiff—Action by local Authority of County to recover Expenses under Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 57.

By the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 57, the local authority constituted by the Act may exercise compulsory powers with regard to horses and other animals, "and the local authority may recover the expenses of the execution by them of this section from the owner of the horse or animal."—Held, that in proceedings in the County Court to recover such expenses, where the plaintiff was described as "J. M., the inspector appointed by the local authority for the county of H. under the Contagious Diseases (Animals) Act, 1869," first that the County Court Judge might, without the defendant's consent, amend the plaint by substituting the proper description of the party suing; secondly, that the plaint was rightly amended by describing the action as brought by "The Local Authority for the county of H," as s. 57 enabled the local authority to sue for the expenses under that description, although they were not a corporation.

CASE stated on appeal from the County Court of Hertfordshire, holden at Hitchin.

The summons was taken out in the name of James Mills, the inspector appointed by the local authority for the county of Hertford, under the Contagious Diseases (Animals) Act, 1869, as plaintiff, against Nathan Scott, defendant.

The particulars were as follows—

Mr. Nathan Scott, Ashwell, Herts.

To the Local Authority for the county of Hertford, under the Contagious Diseases (Animals) Act.

		£ s. d.		
1872.				
Nov. 5	} Hire of meadow 26 days for to 7 calves at 1s. 9d. per day .	2	5	6
Dec. 11.		1	18	0
	19 trusses of hay .			
	Attendance, man for water, &c.	0	6	6
		4	10	0

At the hearing it appeared that the

action was brought by the plaintiff to recover from the defendant the expenses of the keep of certain animals seized by Mills in execution of the Contagious Diseases (Animals) Act, 1869, s. 57 (1).

For the defendant the attention of the Judge was directed to the discrepancy between the summons and the particulars,

(1) By the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 9, and schedule 2, the local authority in counties are the justices in general or quarter sessions assembled.

By section 57—"If any person exposes in a market, or fair, or other public place where horses or animals are commonly exposed for sale . . . any horse or animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shews to the satisfaction of the justices before whom he is charged that he did not know of the same being so affected, and that he could not with reasonable diligence have obtained such knowledge."

"When any horse or animal so affected is exposed or otherwise dealt with in contravention of this section, an inspector of the local authority authorised to act in execution of this Act may seize the same, and cause it, if affected with glanders, cattle plague, or sheep pox, to be slaughtered; and if affected with any other contagious or infectious disease, to be removed into some convenient and isolated place, and to be there kept for such time as the local authority think expedient; and the local authority may recover the expenses of the execution by them of this section from the owner of the horse or animal," &c.

By 19 & 20 Vict. c. 108, s. 57—"The Judge of a County Court may at all times amend all defects and errors in any proceeding in such Court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made, if duly applied for."

namely, that by the summons the plaintiff, James Mills, sued in his own name, but that by the particulars annexed to the summons the amount sued for was claimed to be due "To the Local Authority for the county of Hertford, under the Contagious Diseases (Animals) Act."

Evidence was given to shew that the plaintiff had inadvertently applied for the summons to be issued in his own name, contrary to the instructions he had received from the clerk of the peace.

The Judge, with the consent of the plaintiff's counsel, but without the consent and against the contention of the defendant's advocate, amended the summons and proceedings by striking out the name of James Mills, as plaintiff, and substituting as plaintiffs "The Local Authority for the county of Hertford, under the Contagious Diseases (Animals) Act, 1869," assuming that he could do so by virtue of the powers given him by 19 & 20 Vict. c. 108, s. 57, and No. 121 of the rules, orders and forms for regulating the practice of the County Courts, 1867.

It was further contended by defendant's advocate that, assuming the Judge had power to amend the summons and proceedings as aforesaid, the proper names of the persons constituting the local authority must be given, they not being a corporation.

It was admitted on the part of the defendant that some of the cattle mentioned in the particulars were affected with foot and mouth disease at the time the same were seized by Mills.

It was admitted on the part of the plaintiff that the defendant had been summoned to appear before the justices sitting in petty sessions for the division of Hitchin, in the county of Hertford, for exposing the animals mentioned in the particulars in alleged contravention of the Contagious Diseases (Animals) Act, 1867, s. 57, and that the defendant had shewn to the satisfaction of the justices before whom he was charged, that he did not know of the same being so affected, and that he could not, with reasonable diligence, have obtained such knowledge, and that thereupon such summons and complaint were dismissed.

It was admitted by Mills that he had

been paid by the local authority before action brought the amount for which the defendant was sued.

It was contended by the advocate for the defendant that, the justices having dismissed the summons and complaint against the defendant, there was no such contravention by him of the Contagious Diseases (Animals) Act, 1869, as would render him liable for the care and keep of the animals during the time of their detention.

Judgment was given for the substituted plaintiffs, leave being granted to state this case.

Grantham, for the appellant.—First, the County Court Judge had no power to amend the plaintiff by substituting a different plaintiff. The Act 19 & 20 Vict. c. 108. s. 57 does not confer any such power, neither do the County Court Rules of 1867. In *Clay v. Oxford* (2) the Court refused to amend a writ by striking out the name of a plaintiff and substituting that of his executors, Kelly, C.B., saying, "The Common Law Procedure Act contains no power to substitute one person for another, or persons in a representative capacity for others."

[BLACKBURN, J., referred to *La Banca Nazionale v. Hamburger* (3), and the then unreported case of *Bolingbroke v. Townsend* (4), clerk to the Swindon Local Board.]

Secondly, conceding that an amendment might have been permitted, the Act under which the action was brought does not authorise proceedings in which the plaintiffs are only described as "the local authority for the county of Hertford."

[BLACKBURN, J.—Where a power is given by statute to a public body to recover penalties, are they not a *quasi* corporation, like churchwardens, for the purpose of taking the necessary proceedings?]

Lastly, the defendant cannot, under s. 57, be liable for the expenses in question, as no guilty knowledge on his part was proved.

Graham, for the plaintiffs, was not heard.

(2) 4 Hurl. & C. 690; s. c. 36 Law J. Rep. (N.S.) Exch. 15.

(3) 2 Hurl. & C. 330.

(4) 42 Law J. Rep. (N.S.) C.P. 255.

BLACKBURN, J.—We need not trouble the counsel for the plaintiffs. With regard to the first point I think that the case of *La Banca Nazionale v. Hamburger* (3) is a good authority to shew that what was done here was not to substitute one plaintiff for another, but merely to amend the description of the plaintiff. It was never intended to bring the action in anybody's name except that of the right plaintiff, but a mistake was made in the description. Then, with regard to the argument that the penal Act does not enable the local authority to sue by that name, it is true that the Act might have given a better description of the plaintiffs in whose name proceedings might be taken, but I think that it authorises an action by the local authority suing under that name. I do not think that there is anything in the point as to the absence of guilty knowledge on the part of the defendant.

QUAIN, J.—I am of the same opinion. Where a statute gives power to a local authority to recover expenses, it must mean that the plaintiffs are to be described as the local authority, as in actions by churchwardens and overseers under 39 Geo. 3. c. 12. s. 17, where the declaration must describe the plaintiffs as churchwardens and overseers. I think, therefore, that the amendment was the right one. With regard to the question whether the amendment ought to have been allowed, I think that *La Banca Nazionale v. Hamburger* (3) is undistinguishable. The case of *Clay v. Oxford* (2) is not in point; there the parties wished to place a different plaintiff on the record. With regard to the point as to the absence of guilty knowledge, I quite agree with my brother Blackburn.

ARCHIBALD, J., concurred.

Judgment for the plaintiffs.

Attorneys—Nicholson & Herbert, for the plaintiffs;
William Maynard, for defendant.

1873. } THE QUEEN v. THE HACKNEY
June 16. } BOARD OF WORKS.

Metropolis Local Management Act, 1855
(18 & 19 Vict. c. 120), s. 105—*New Street*
—*Repairs.*

Under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 105, the vestry or district board of a parish or district after having once compelled the owners of the houses forming a new street, to pay the cost of providing and laying the pavement, are bound for the future to keep it in repair, and this obligation may be enforced by mandamus.

The H. Board of Works, acting under the powers of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 105, paved and flagged a new street, charging the expense on the adjoining owners. The Board afterwards neglected to repair the road on the ground that a barrier had been erected upon it by the owner of the soil:—Held, that the Board, having exercised their power to pave a new street at the expense of the adjoining owners, were bound to keep it in repair, and that the obstruction by the owner of the soil did not exonerate them from the performance of such duty.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 151.]

1873. } THE MERSEY DOCKS AND HARBOUR
June 4. } BOARD (appellants) v. THE
OVERSEERS OF THE POOR OF
THE TOWNSHIP OF BIRKENHEAD,
CHESTER (respondents).

Poor-rate—Docks, Warehouses, and Machinery occupied as one Estate—Warehouses capable of Beneficial Occupation apart from Docks—Increased Value by Connection with Docks—Separate Rating.

The appellants were the occupiers of docks, warehouses and works situate in different townships. By the provisions of various Local Acts the docks, &c., were to constitute one estate under an uniform system of management. The appellants were rated to the poor-rate in respect of warehouses, &c., which were capable of

beneficial occupation apart from their proximity to and connection with the docks situate in the rating township, and were enhanced in value by their connection with these docks, though the income of the docks, taken as a whole, and as one concern, exceeded the income derived from them:—Held, that the rate was good, and that the premises were properly rated at their enhanced value, as above mentioned.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 141.]

1873.
April 30.
May 23.

{ THE TRUSTEES OF THE MARKET
HARBOROUGH AND BRAMPTON
TURNPIKE TRUST (appellants)
v. THE MARKET HARBOROUGH
HIGHWAY BOARD (respondents).

Turnpike Trust—Power to take Tolls on particular Road on Condition of keeping it in Repair—Contribution under 4 & 5 Vict. c. 59. s. 1.

By a Local Turnpike Act, 5 Vict. c. lxxv. s. 2, in case the trustees should keep in good repair part of a road within the parish of G. B. they were empowered to take certain specified tolls upon it. The tolls received by the trustees in respect of this portion of the road were considerably more than was sufficient to keep it in repair:—Held, that so long as the trustees continued to take these tolls, and found them sufficient to keep such part of the road in repair, they could not in addition to the tolls claim to have an order made on the parish of G. B., for the payment of a further sum under 4 & 5 Vict. c. 59. s. 1, on the ground that there was a general deficiency of the funds of the whole turnpike trust.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 139.]

1873. }
June 3. }

THOMAS v. SYLVESTER.

Rent-charge — Conveyance of Land charged—Recovery of Arrears of Rent-charge by Action of Debt—Abolition of real Actions—3 & 4 Will. 4. c. 27. s. 37.

The plaintiff seized in fee of land granted it unto and to the use of C., subject to the payment for ever to the plaintiff, his heirs and assigns of a yearly rent-charge payable out of the land. C. covenanted for himself, &c., that he, his executors, administrators and assigns would pay unto the plaintiff, his heirs or assigns the said rent-charge. The land became vested in the defendant, after which the rent-charge fell in arrear:—Held, that the plaintiff might maintain an action of debt against the defendant for the arrears, the remedy by real action having been taken away by 3 & 4 Will. 4. c. 27. s. 36.

First count of the declaration.—For that the plaintiff being seized in fee of certain messuages and hereditaments situate and being in the parish of Bedminster, in the county of Bristol, and known as Nos. 11 to 14 inclusive, Greenback Road, by indenture bearing date the 15th day of January, 1870, made and entered into by and between the plaintiff of the one part, and one David Cotter of the other part, granted and conveyed the said messuages and hereditaments subject to and charged and chargeable with the payment for ever to the said plaintiff, his heirs and assigns, of a certain yearly rent-charge of two pounds, eight shillings and sixpence, payable out of each of the said messuages and hereditaments, on the 24th day of June and the 21st day of December in each year, unto and to the use of the said David Cotter, his heirs and assigns, and the said David Cotter in the said indenture covenanted for himself, his heirs, executors and administrators, that he, his heirs, executors, administrators and assigns would pay unto the said plaintiff, his heirs or assigns, the said yearly rent-charge on the days aforesaid. And the plaintiff avers that afterwards all the estate of the said David Cotter in the premises aforesaid became vested in the defendant, and while the said estate was

so vested in the defendant as aforesaid, to wit, on the 24th day of June, 1871, the said rent-charge accrued due and became and was payable from the defendant to the plaintiff. Yet the defendant did not pay the same, and the same remains wholly due and unpaid.

Demurrer and joinder.

W. H. Cole, in support of the demurrer.—The question is whether this is a covenant which runs with the land. It is submitted that it is not. There is merely a burdensome personal covenant entered into by Cotter not binding upon the defendant who is assignee. It is doubtful whether in the case of covenants entered into by the owners of land, such covenants ever run with the land so as to bind the assignees of the covenantor; see the notes to *Spencer's Case* (1), where the learned author refers to *Roach v. Wadham* (2) and *Brewster v. Kitchell* (3). It is difficult to see how there is any privity of contract between the parties.

[BLACKBURN, J.—The Statute of Uses will apply, and then the houses are vested in the defendant as assignee; why should not an action of debt lie?]

The only way in which an action can lie is by construing Cotter's covenant as one which runs with the land. All the cases are collected in the notes to *Spencer's Case* (1). See *Randall v. Rigby* (4), *Milnes v. Branch* (5), *Platt on Covenants*, 67, and *Sheppard's Touchstone*, 177.

Charles S. O. Bowen, contra.—The defendant is liable in this action upon the broad principle that the person who takes the enjoyment of the land takes also upon him the burthens imposed upon the land. *Qui sentit commodum sentire debet et onus*. By 3 & 4 Will. 4. c. 27. s. 36, real actions were abolished, and the personal remedy is now available. The declaration is good. An action of debt will lie. In *Webb v. Jiggs* (6) it was said in argument, that if an

annuity be granted *for years* debt lies for the arrears, so if for life or *per autre vie*, after the estate determined, debt lies. But by the common law debt does not lie for the arrears of a rent or annuity in fee, fee tail or for life, so long as the estate of freehold has continuance. And for this was cited *Ognel's Case* (7) to the same effect. And the reason given is because the law will not suffer a real injury to be remedied by an action merely personal. This distinction is sound—3 Bl. Com. 232. In 2 *Dart's Vendors and Purchasers*, p. 699, 4th ed., it is stated, "Covenants entered into by purchasers are of three descriptions; first, such as relate to interests possessed or acquired by the covenantee in the purchased land, independently of the covenant—e.g. a covenant to pay a rent-charge issuing out of the land," &c., and then after referring to the other descriptions, it is said, "As respects covenants of the first class, it is not perfectly clear whether they run with the land, so as to be enforceable by the vendor or his representatives against each successive owner. The hardship and inconvenience which would in many cases result from holding that an alienee is to be bound by a covenant, of the very existence of which he may have been ignorant, is frequently alleged as a reason why the burthen of such a covenant, should not be held to run with the land. Upon the whole, however, it seems to be the sounder opinion that such a covenant, if it be reasonable, may be enforced against the successive owners of the land even though the assigns are not expressly named; but in order that it may have this effect, it is essential that the alienee, against whom the covenant is sought to be enforced, should have the estate of the original purchaser." That applies to the present case. See also the Report of the Real Property Commissioners set out at p. 117 of *Davidson's Precedents in Conveyancing*, 2nd ed., and *Sugden's V. & P.*, ch. 15, s. 1, par. 2 to 46, citing the cases upon the subject. In *Ognel's Case* (7), it was resolved that in the case of an annuity in fee, in some cases an action of debt may be maintain-

(1) 1 Smith's L. Cas. 4th ed. 36.

(2) 6 East 289.

(3) Lord Raym. 317; Comb. 424, 466; 1 Salk. 198; 12 Mod. 166; Holt 176, 669.

(4) 4 Moo. & W. 130; s. c. 7 Law J. Rep. (N.S.) Exch. 240.

(5) 5 M. & S. 411.

(6) 4 M. & S. 113.

(7) 4 Rep. 48b, Com. Dig. Debt (A. 6, 7), ibid (B); also 1 Rol. Abr. 594 (G.), pl. 1.

able for the arrears, otherwise in case of a rent, be it rent service or rent-charge or seck, and a reason is given, "for when the rent continues of any estate of freehold, no action of debt lies for the arrearsages."

[BLACKBURN, J.—At p. 51a, Hil. 17, Eliz. in debt London, 457, is cited, where a rent-charge was granted by deed to a *feme sole* for life, the rent was arrear, the woman took Sharp to husband, the rent was again in arrear, the wife died, Sharp brought an action of debt against the defendant, heir of the grantor (tenant of the land charged), for all the said arrearsages, as well before as after marriage; and in that case it was resolved, that for the arrearsages incurred before the marriage the husband had no remedy by the common law, but for the arrears which incurred during the marriage, the husband in that case might have an action of debt at the common law. If that be so, it becomes unnecessary to discuss the law of covenants running with the land.]

That is so, and in 3 Bl. Com. p. 231, it is stated as follows—"Other remedies for subtraction of rents or services are, first, by action of *debt*, for the breach of this express contract, of which enough has been formerly said. This is the most usual remedy, where recourse is to be had to any action at all for the recovery of pecuniary rents, to which species of render almost all free services are now reduced since the abolition of the military tennures. But for a freehold rent, reserved on a lease for life, &c., no action of debt lay by the common law during the continuance of the freehold out of which it issued, for the law would not suffer a *real* injury to be remedied by an action that was merely *personal*."

[BLACKBURN, J.—In *Sir W. Loringe's Case* (8) A. granted a rent to B. for life, out of the manor of C., and afterwards enfeoffed D. of the manor, who took G. to husband, and then B. died, and his executors brought debt against G. It was adjudged—That for all arrears incurred after the coverture debt lies against the husband, or if he were dead against his executors. That is an authority for the

plaintiff in the present case. If debt will lie the plaintiff is entitled to judgment.]

Yes, the remedy by action of debt would apply, if it was not for the rule that a real action was the proper remedy. Now all real actions are abolished as before-mentioned, and the plaintiff is entitled to recover in the present action.

[BLACKBURN, J.—In *Varley v. Leigh* (9), Pollock, C.B., expressed an opinion that the remedy by action real for the recovery of a rent in fee having been abolished, there ought to be a remedy by action of debt.]

Cole, in reply, was asked to distinguish *Sir W. Loringe's Case* (8), and the opinion expressed by Pollock, C.B., in *Varley v. Leigh* (9), but he admitted that it was difficult to do so.

BLACKBURN, J.—I think that all that we need decide is whether or not, a number of houses having been conveyed under the Statute of Uses to the use of David Cotter, his heirs and assigns, subject to a rent-charge issuing from them, and then the houses becoming vested in the defendant, the plaintiff, the grantee of the rent-charge, is entitled to charge him the *terre tenant*, and require of him, in the present personal action, to pay the arrears. Under the old law, where a freehold rent-charge or annuity was created, the proceeding to recover it was by a real action or writ of annuity, and so long as the freehold existed, an action of debt could not be brought. *Sir W. Loringe's Case* (8), which is referred to in *Oguel's Case* (7), decides that where a rent has been granted for life out of a manor, which was afterwards conveyed to a woman who takes a husband, and then the grantee dies, his executors may maintain an action of debt against the husband, the assignee of the manor, for the arrears. The life having dropped, there was no longer a remedy by real action, and then the action of debt would lie. This is exactly what the present plaintiff is seeking to do. Real actions are abolished by 3 & 4 Will. 4. c. 27. s. 36, and the question is whether

(8) Fitz. N.B. 121, note d.

(9) 2 Exch. Rep. 446; s. c. 17 Law J. Rep. (N.S.) Exch. 289.

we ought not to follow what the common law has said. It seems to me that we ought. This would be in accordance with the opinion expressed by Pollock, C.B., in *Varley v. Leigh* (9). It was not necessary in that case to decide the point, and it is true that Rolfe, B., was not satisfied that debt would lie in consequence of 3 & 4 Will. 4. c. 27 having abolished real actions. The old cases were not cited before him when he expressed such doubt; perhaps if they had been he would have considered that the reasoning was not so far from satisfactory as he thought. At all events it is satisfactory to me, and I think it follows from what Pollock, C.B., said, that the objection of the remedy being by real action is gone, and consequently that an action of debt will lie, and against the assignee of the land just as much as against the original grantor of the rent-charge. The question is not whether the covenant sued on is one which runs with the land, but whether the grantee of the rent-charge may not in this action sue the *terre* tenant, although he was not the original grantor. According to authority, good reason and justice he may do so.

QUAIN, J.—I am of the same opinion. The distinction in the old books appears to be this: If an annuity were granted for years debt would lie for it; if it were granted for life, in tail, or in fee, debt would only lie for arrears after the freehold had determined. When it had determined by death debt would lie, the reason given being that as a question of remedy you must take your freehold remedy while the freehold exists, as the law will not suffer the real injury to be remedied by a personal action. Would debt lie for this rent-charge except for the remedy by real action? Would it lie against the assignee, who is in possession of the same estate as the grantor of the rent-charge? In *Sir W. Loringe's Case* (8), cited in *Ognel's Case* (7), it appeared that Sir W. Loringe was grantee for life of a rent out of the moiety of a manor, of which moiety a man was sued *jure uxoris*. The rent was in arrear when the grantee died, and the executors brought an action of debt against the husband

only for the arrears, and it was resolved—first, that by the death of the grantee the grant for life was turned into the nature of debt; secondly, that forasmuch as the husband took the profits of the land charged with the rent when it was in arrear, that he only (without his wife), shall be charged in an action of debt, &c. The action therefore was an action against a person who was called the pernor of the profits of the same estate as the grantor had held, and I apprehend that the reason was the old one given by Wilson, J., in his judgment in *Mills v. Auriol* (9), viz., that debt is maintainable because the land is debtor. Then, although the 3 & 4 Will. 4. c. 27. decides that real actions shall be abolished, the action of debt will lie against the pernor of the property, just as if a real action had been brought against him before the Act passed. I quite agree that there is no necessity for going into the great question of covenants running with the land.

ARCHIBALD, J.—I agree in thinking that there is no necessity to go into the question of what covenants run with the land. This is altogether a question of remedy. When we come to enter into the full reason why debt would not lie for the recovery of the arrears of a rent-charge, it is quite clear that the real actions were not abolished without providing for cases of this kind. The old law would not suffer the right injured to be remedied by an action merely personal. It is quite clear from *Loringe's Case* (8), that where that rule did not apply, the action of debt would lie, and inasmuch as the abolition of real actions has removed that remedy altogether, I quite agree that this action of debt is maintainable.

Judgment for the plaintiff.

Attorneys—Rickards & Walker, agents for Rodway & Mann, Trowbridge, for plaintiff; Wollocott & Leonard, agents for Abbott & Leonard, Bristol, for defendants.

(10) 1 H. Black. 433; s. c. 4 Term Rep. 94.

1873. }
June 16. } THE QUEEN v. PAWLETT.

*Quarter Sessions—Rule of Practice—
Entry of Appeals.*

Upon appeal to quarter sessions from the refusal of a license at the special licensing sessions it appeared that the preliminaries introductory to an appeal required by 9 Geo. 4. c. 61. s. 27 had been observed, but that the appeal had not been entered and the grounds of appeal deposited with the clerk of the peace three clear days before the first day of sessions, pursuant to a rule or standing order of the sessions. The Sessions thereupon refused to allow the appeal to be entered, and made an order on the appellant for costs:—Held, that the order of sessions must be quashed, for the rule was one which they had no power to make inasmuch as it did not merely relate to the practice of the sessions, but added to the conditions prescribed by the statute with regard to appeals.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 157.]

1873. }
June 17. } STOCKS v. ELLIS.

*Interrogatories—Cross Interrogatories—
Discrediting Witness in a Foreign Country
—1 Will. 4. c. 22. s. 4.*

An action having been brought against the defendant for the unskilful spinning of yarn, the defendant obtained an order for the examination by interrogatories of a person whom he had employed as manager of his works, and who had gone to America. The plaintiff proposed to examine him upon cross-interrogatories, several of which were directed to the question whether or not he had left his wife and children in England, and whether or not he had taken another woman with him to America:—Held, that as these questions were not relevant to the issue, and had a tendency to deter the witness from coming to England to give evidence, they could not be allowed.

This was an action brought by the plaintiffs against the defendants to recover

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damages for carelessly, unskilfully and improperly spinning yarn which the defendants had contracted to spin for the plaintiffs. Thomas Ashworth had been employed as manager of the defendants' spinning business. He had gone to America, and the defendants had obtained leave to administer interrogatories to him. It was proposed by the plaintiffs to administer cross-interrogatories to the said Thomas Ashworth. Such of the cross-interrogatories as were material to the point now to be reported, were proposed to be as follows—

1. When did you leave Bradford, Yorkshire, England?

2. Did you leave Bradford to go to America?

3. Had you not a wife and ten or twelve or how many children living at that time?

4. Had you up to that time lived with them at Bradford?

5. When you went to America, did you leave your wife and children ignorant of your departure and unprovided for, and did you induce a woman who was not your wife, and who had a husband and children living, to accompany you to America or how otherwise?

6. How have you been employed since you arrived in America?

7. What wages are you now earning per week, and what is about the average amount per week you have earned since your arrival?

8. Have you sent your wife any and what portion of such earnings?

The rest of the cross-interrogatories related to the way the spinning of yarn had been performed.

A rule *nisi* had been obtained calling upon the plaintiffs to shew cause why the above cross-interrogatories should not be struck out as irrelevant.

Waddy now shewed cause against the rule.—The Court has no power to disallow these questions which it is proposed to put to the witness, although a Judge might refuse to allow them to be put at the trial. Even if they are apparently not relevant to the issue, they may be put as cross-interrogatories. A Court of Equity would not strike them out as being scandalous and impertinent. They

may be relevant to the question of the character of the witness. The statute does not give any authority to the Court to deal with them now. See 1 Will. 4. c. 22.

[BLACKBURN, J.—Section 4 of that statute gives a very wide discretion to the Court; power is given to “give all such directions touching the time, place and manner of such examination, as well within the jurisdiction of the Court wherein the action shall be depending, as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just.” Why should not such power extend to cross-interrogatories as well as to interrogatories?]

The Court cannot now tell what may be the relevancy of questions put upon cross-examination. The questions go to the character of the person whom the defendant proposes to call as a witness.

Wilberforce in support of the rule.—The effect of these questions will be that the witness may be deterred from giving evidence. The Commissioner before whom the witness will be examined is simply a ministerial officer, who has nothing to do with cautioning the witness or with checking his answers. This Court has clear jurisdiction to strike out the questions.

[BLACKBURN, J.—If the questions are improper we must have power to disallow them, but we will speak to the other members of the Court. It seems to be an attempt to abuse the privilege conferred by the statute.]

The question whether such questions ought to be allowed in cross-examination is touched upon in 2 *Taylor on Evidence*, 5th ed. p. 1,267.

BLACKBURN, J.—We have consulted some of the other members of the Court, and we think these cross-interrogatories should not be allowed. The effect of the interrogatories to be administered to the witness is to ascertain whether the yarns had been spun in a proper manner. It is proposed that amongst other cross-interrogatories, eight in number should be administered to him requiring him to give certain particulars as to his conduct to his wife and children. My

brother Denman referred the matter to the Court. We have no doubt that the Court has jurisdiction to say whether or not such questions should be allowed to be put by way of interrogatory, just as a Judge would have jurisdiction to decide whether such questions could be put to a witness upon the trial of a cause. In such a case the Judge generally appeals to the good feeling of the counsel not to put such questions unless it be necessary to do so, but it is clearly laid down that questions which tend to affect the credit of a witness may be put. The limits within which that may be done are extremely difficult to define. Looking at these proposed questions, we cannot say that they would not be allowed on cross-examination as tending to affect the credit of the witness, but then we must remember that it is proposed to put them to a witness who is abroad, and who cannot be compelled to come forward to give evidence. The effect of such interrogatories would be to disincline him from coming forward as a witness, and if it be proposed to examine him upon these matters with the intention of deterring him, it is quite clear that the questions ought not to be put. It is certain that such might be the effect of them, and probably they are proposed for that purpose, which is illegitimate. It is a matter for our discretion, and we think that they should be disallowed.

ARCHIBALD, J.—I am of the same opinion. When we consider that the witness is in America, it becomes apparent that injustice might be done by allowing these cross-interrogatories, the effect of which might be to prevent the defendant obtaining the evidence of the witness. The witness may thereby be intimidated and deterred from coming forward to give evidence.

Rule absolute.

Attorneys—Johnson & Weatherall, agents for Rawson & Co., Bradford, for plaintiff; J. W. Sykes, agent for Watson & Dickon, Bradford, for defendant.

1873. }
June 4. } FITZPATRICK v. KELLY.

Adulteration of Food—Proof that Article was represented to be Unadulterated—Guilty Knowledge—35 & 36 Vict. c. 74. ss. 2, 3.

The *Adulteration of Food, &c., Act*, 35 & 36 Vict. c. 74, recites that the practice of adulterating articles of food and drink and drugs for sale in fraud of her Majesty's subjects, and to the great hurt of their health and danger to their lives, requires to be repressed by more effectual laws. By section 2, every person who shall sell any article of food or drink with which to the knowledge of such person any ingredient or mineral injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as unadulterated any article of food or drink, or any drug which is adulterated, shall be liable to certain prescribed penalties. By section 3, any person who shall sell any article of food or drink, or any drug, knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser thereof, before delivering the same, and no other, shall be deemed to have sold an adulterated article of food or drink or drug, as the case may be, under this Act.

The appellant went into the shop of the respondent, a provision and butter dealer, and asked for a pound of butter at sevenpence. A pound of butter was handed to him, in the presence of the respondent, which was afterwards found to be adulterated with different fats, not necessarily injurious to health:—

Held, first, that there was sufficient evidence under section 2 of a sale of the butter as unadulterated; secondly, that it was not necessary under section 3 to prove that the respondent knew the butter had been mixed with some substance, with intent fraudulently to increase its bulk.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 182.]

1873. { THE QUEEN v. FORDHAM AND
June 16. { OTHERS (JUSTICES OF HERTFORDSHIRE).

Poor Law Audit—Proceedings against Overseer to recover Sum certified to be due—Certificate of Treasurer—Duty of Justices—11 & 12 Vict. c. 91. s. 9.

By 11 & 12 Vict. c. 91. s. 9, in any proceedings to be taken by an auditor before justices to recover sums certified by him to be due, it shall be sufficient for him to produce a certificate of his appointment, and to state and prove that the audit was held, that the certificate was made in the book of account of the union, and that the sum certified to be due had not been paid to the treasurer within seven days after the same had been so certified, nor within three clear days of the laying of the information, of which non-payment a certificate in writing, purporting to be signed by the treasurer, shall be sufficient proof on the part of the auditor.

Upon an application to justices under this section to issue their warrant to levy the amount due from the assistant overseer of a parish, the evidence prescribed by the above section was adduced, but the justices refused to treat the certificate of the treasurer as conclusive, and allowed the overseer to prove payments made by him between the date of the certificate of the auditor and that of the treasurer:—

Held, that in issuing their distress warrant, the justices had not a mere ministerial act to perform, and were right, as the section made the treasurer's certificate *prima facie*, but not conclusive evidence.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 153.]

1873. } THE QUEEN v. CURZON AND
June 2. } OTHERS.

Beerhouse having License on May 1, 1869—Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19.

By the *Wine and Beerhouse Act*, 1869 (32 & 33 Vict. c. 27), s. 19, where, on the first of May, 1869, a license is in force

with respect to any house for the sale of beer to be consumed on the premises, it shall not be lawful to refuse an application for a certificate in respect of such house, except on one or more of the grounds specified in section 8.

By the *Intoxicating Liquors (Licensing Suspension Act)*, 1871, 34 & 35 Vict. c. 88. s. 3, it was declared that, where a license had by forfeiture or lapse of time ceased to be in force, the justices might in their discretion refuse a certificate upon any ground on which they might refuse a certificate with respect to any house as to which a license was not in force on the first of May, 1869.

By the *Licensing Act*, 1872, 35 & 36 Vict. c. 94. s. 75, the Act of 1871 is repealed, and section 19 of the Act of 1869 is made perpetual:—

Held, that, notwithstanding the repeal of 34 & 35 Vict. c. 88. s. 3, the justices had a discretion to refuse a certificate in the case of a house licensed on the first of May, 1869, where the license had lapsed before application was made for renewal.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 155.]

1873. { THE TRUSTEES OF MARKET HAR-
April 30. { BOROUGH AND BRAMPTON
TURNPIKE TRUST (appellants)
v. THE KETTERING HIGH-
WAY BOARD (respondents).

Turnpike Trust—Arrears of Interest due to Mortgagees—Application of Tolls—Contribution under 4 & 5 Vict. c. 59.

A Local Turnpike Act, 4 Vict. c. xxxv., after reciting that the principal sum borrowed on the credit of the tolls under former Acts still remained unpaid, together with arrears of interest thereon, by s. 18 directed that "all moneys received by the trustees should be applied in the first place in paying and discharging any interest which might from time to time be owing in respect of any money borrowed on the credit of the tolls; secondly, in maintaining and keeping the road in repair; and thirdly, in reducing and paying off the principal sums borrowed." An application was made by the trustees

to justices for an order on the highway board to contribute, under 4 & 5 Vict. c. 59, out of the highway rates towards the repairs of a turnpike road:—Held (QUAIN, J., dubitante), that the Act did not authorize the payment of arrears of interest before repairing the road.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 137.]

(In the Second Division of the Court.)
1872. }
June 10. } THE QUEEN v. ARMITAGE AND
July 6. } ANOTHER, JUSTICES, ETC.

Bastardy—Evidence—Death of Mother—Hearing at Petty Sessions—7 & 8 Vict. c. 101. s. 3.

The evidence of the mother of a bastard child, who is an applicant for an affiliation order against the putative father, is necessary at the hearing of the summons before justices sitting in petty sessions under the 8 & 9 Vict. c. 101. s. 3. Therefore, if the mother die after making her application for a summons, and before the hearing of the summons at petty sessions, the justices have no jurisdiction to make an order thereon.

Semble, it may be otherwise on the hearing of an appeal against an affiliation order under 8 Vict. c. 10. s. 6, if the mother die after the hearing of a summons at petty sessions, and if she has been examined in the presence of the defendant and might have been cross-examined by him at the Petty Sessions.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 15.]

1872. { THE QUEEN ON THE PROSECUTION
May 7. { OF JUSTICES OF MIDDLESEX (re-
spondents) v. TAYLOR (appellant).

Alehouse—License for Sale of Exciseable Liquors—Application to Special Sessions after unsuccessful Application to General Sessions—Neglect to Appeal—New Tenant—9 Geo. 4. c. 61. s. 14.

A house in Middlesex, kept for some years as an inn, under 9 Geo. 4. c. 61, was in February, 1872, left by the licensed tenant, who gave up possession to T. In March following, at the annual general licensing meeting, application was made for a license on behalf of T., but this was refused, and no appeal was made from the decision. The license expired on April 5th when the house was shut up, and in May T. applied under s. 14 to the special sessions for a license, who refused it on the ground that the application had been already disposed of at the general licensing sessions:—Held, that after an unsuccessful application at the annual general licensing meeting, T. could not afterwards renew his application at the special sessions.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 13.]

1873. } *BELL (appellant) v. CRANE (re-*
May 28. } *spondent).*

Rate—Sunday and Ragged Schools (Exemption from Rating) Act, 1869, 32 & 33 Vict. c. 40—Discretion of Rating Authority.

Under "The Sunday and Ragged Schools (Exemption from Rating) Act, 1869," 32 & 33 Vict. c. 40. s. 1, by which rating authorities may exempt from their rates buildings used as Sunday or ragged schools, the rating authority has a discretion and is not bound to exempt any such school.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 122.]

1873. } *THE QUEEN v. THE ABNEY PARK*
June 7. } *CEMETERY COMPANY.*

Poor-rate—Occupation—Rateable Value—Cemetery—Sale of Plots of Land—Conveyance.

The appellants, a cemetery company, in the year 1869, according to their usual custom, sold certain plots of land to purchasers. The plots were respectively conveyed to hold unto the said purchaser, his heirs and assigns for ever, upon trust and to the intent that he the said purchaser, his heirs and assigns, may (subject nevertheless to the rules and orders for the time being of the company for the management and regulation of the cemetery) erect or construct a vault or mausoleum in or upon the same, and may use the said plot as and for a place of burial, &c., and for no other purpose whatsoever; and subject to the intent aforesaid in trust for the said trustees and directors, their heirs and assigns for ever, as part of the property of the company. The purchaser covenanted to repair the grave, mausoleum, &c., and to observe the rules and orders made by the company for the management and regulation of the cemetery. Part of the working expenses of the company was the keeping in order the said plots for the purchasers. The gates of the cemetery were closed at specified times, after which the purchasers were not admitted. In rating the company to the poor's-rate, the sum received in the year 1869, as purchase money for the sale of the plots of land, was treated as part of the annual value of the occupation of the cemetery by the company in that year:—Held, first, that the company were liable to be rated as the occupiers of the whole cemetery, including the plots; secondly, that the sum received was properly treated as part of the annual value.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 124.]

CASES
ARGUED AND DETERMINED
IN THE
Court of Common Pleas,
AND IN THE
Exchequer Chamber
(ON ERROR AND ON APPEAL FROM THE COMMON PLEAS),
REPORTED BY
WILLIAM PATERSON, Esq., AND GILMORE EVANS, Esq.,
BARRISTERS-AT-LAW;
AND ON APPEAL TO
The House of Lords,
REPORTED BY
EDMUND STORY MASKELYNE, Esq., BARRISTER-AT-LAW.

36 & 37 VICTORIÆ.

MICHAELMAS TERM	1
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CASES ARGUED AND DETERMINED
 IN THE
Court of Common Pleas,
 AND IN THE
Exchequer Chamber and House of Lords,
 ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

MICHAELMAS TERM, 36 VICTORIÆ.

1872.
Nov. 9, 12. { **LEBEAU AND ANOTHER v. THE
GENERAL STEAM NAVIGATION
COMPANY.**

Shipping — Bill of Lading — "Value, Weight, and Contents unknown."

Where, on a closed package being shipped for carriage, a bill of lading, containing an innocent misdescription of its contents is presented to the master of the ship, and he, without asking questions or examination, stamps thereon "weight, value, and contents unknown," there is a contract to carry the package whatever its contents may be. What is the measure of damages for loss of the contents seems doubtful.

This was an action tried in the Lord Mayor's Court.

The first count of the declaration alleged a contract by the defendants, as carriers for reward, to carry and deliver silk broad stuffs, and a breach thereof by non-delivery.

The second count alleged a contract by the defendants, for reward, to safely keep, take care of and re-deliver goods, and a breach thereof by non-delivery.

The particulars were as to two pieces of silk broad stuff.

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At the trial the following were the material facts which appeared. The plaintiffs were shipping agents at Boulogne, and received from Lyons a closed package, to be forwarded to London. They delivered the package on board a ship of the defendants, and tendered a bill of lading, in which there was a written description of the goods as "linen," and the captain asked no questions, but stamped on the bill the words "value, weight and contents unknown," and signed it. On the arrival of the ship it was found that the package had been tampered with, and two out of seven pieces of silk broad stuff, the real contents of the package, abstracted. The jury found that the goods having been safely delivered were lost by the defendants, as carriers, and that they had not been wilfully misdescribed, in order that they might be carried at a lower rate, but had been inadvertently misdescribed, and a verdict having been found for the plaintiffs for the amount of the value of the two pieces lost; and a rule *nisi* having been obtained, pursuant to leave, to enter a non-suit on the ground that there was no evidence of the contract alleged, and that the plaintiffs were estopped from proving delivery to the defendants of the goods mentioned in their particulars—

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Field and Waddy shewed cause.—The contract was to carry the goods in question, and there is nothing to prevent the shippers from shewing what the goods really were and suing the shipowners for non-delivery. For, first, as respects the use of the term "linen," *Bates v. Todd* (1) shews that a bill of lading is only a receipt, and is liable to be re-opened; and, secondly, as respects the printed memorandum, *Jessel v. Bath* (2) (in addition to being to the same effect as the above case), shews that the effect is to abrogate the description and make the bill of lading a contract to carry that which was actually shipped. In that case a professed weight was inserted in the bill of lading, which contained a printed clause, "weights, contents and value unknown," and it was held that the shipowner might shew that a less quantity was in fact shipped. So here, *per contra*, "linen" being inserted, and there being a similar printed clause, the shipper may shew what kind of goods were actually shipped. And if anything be said about hardship in paying freight on linen and recovering value as silk, whatever may be the true damages recoverable, on this rule the question is not open, and if the plaintiffs are entitled to recover anything the rule must be discharged. As respects the point of estoppel, if the above contention be correct, this point also fails. Should *McCance v. The London and North Western Railway Company* (3) and *Knights v. Wiffen* (4) be relied on, it may be observed as to the first that here the description was not the basis of the contract; as to the second, that here it is not found that the position of the parties was altered.

Talfourd Salter and Finlay, in support of the rule.—Where printed and written parts of a bill of lading are contradictory the latter prevails—*Gumm v. Tyrie* (5), *Robertson v. French* (6), *Jessel v. Bath* (2). This description, "linen," was ma-

terial, for the amount of freight depended on the fact, and if it is to prevail, requires the plaintiffs to prove shipment of such goods, and further, even if the printed memorandum is to apply, it applies only to the quality of the linen, and its meaning is that, as the shipowners cannot know what is inside the case, they give notice that they will be not bound by the description, so as to protect themselves should it not be linen, and oblige the shipper to prove it to be linen in order to make them liable. A false description, apart from fraud, is effective to prevent the carrier being liable. Thus it is said in *Kent's Commentaries*, sect. 604, that if by mere carelessness a carrier is deceived as to the contents of a package he is not liable; in *Story on Bailments*, sect. 567, that if he be deceived and a false answer given he is not liable; in *Angell on Carriers*, sect. 262, 264, that it is sufficient if the effect of the statement is to deceive, though not intentionally, because he is deprived of a portion of his reward and takes less care; and in *Smith's Mercantile Law*, 284, citing *Batson v. Donovan* (7) it is said that concealment of the nature and value of the goods exonerates the carrier. Whether questions were actually asked or not makes no difference, for a volunteer statement is as effective as an answer to a question. The result is, that there was no contract, but only an involuntary bailment, though perhaps after actual carriage, reward on a *quantum meruit* might be recovered. The observations of Lord Wensleydale in *Walker v. Jackson* (8) were made with respect to the effect on the carrier, not the intention of the bailor, and in *The Belfast and Ballymena Railway Company v. Keys* (9) it is in argument pointed out that the defendant undertook to carry light carriages with horses across the ferry, and made no stipulation whatever as to what was put into the carriage. Again, *Tyly v. Morrice* (10), *Titchburne v. White* (11), *Batson v. Donovan* (7), and the review of

(1) 1 Moo. & R. 106.

(2) 56 Law J. Rep. (N.S.) Exch. 149.

(3) 3 Hurl. & C. 343; s. c. 34 Law J. Rep. (N.S.) Exch. 39.

(4) 40 Law J. Rep. (N.S.) Q.B. 51.

(5) 33 Law J. Rep. (N.S.) Q.B. 97; s. c. (Ex. Ch.) 34 Law J. Rep. (N.S.) Q.B. 124.

(6) 4 East 130.

(7) 4 B. & Ald. 21.

(8) 10 Mee. & W. 168; s. c. 14 Law J. Rep. (N.S.) Exch. 346.

(9) 9 H.L. Cas. 556.

(10) Carth. 458.

(11) 1 Str. 145.

these and other cases in *Riley v. Horne* (12), shew that value cannot be recovered on the footing of the goods being silk. Further, it may be pointed out, that the liability is sought to be imposed on the defendants in their character of insurers, which is discussed in *Gibbons v. Painton* (13), *Cahill v. The London and North Western Railway Company* (14), *Hollister v. Nowlan* (15), and *Phillips v. Earle* (16), so that the description is especially material. Lastly, there is an estoppel, even if there be a contract, for a false representation has been made, which alters the position of the defendants—*Foster v. Colby* (17), *Howard v. Tucker* (18), *Polhill v. Walter* (19), *Knights v. Wiffen* (4); *M'Cance v. The London and North Western Railway Company* (3).

BOVILL, C.J.—The rule in this case is only to enter a nonsuit on the ground that there was no evidence of the contract alleged and an estoppel from shewing a delivery of the goods contained in the particulars, and not to reduce the damages; and therefore we have only to decide whether the defendants are entitled to enter a nonsuit. The contract is contained in the bill of lading. Now it seems to me that it must be taken that the plaintiffs represented that the contents of the package were linen goods, but that the defendants refused to contract on the footing that this was absolutely so. The effect of this is that it was no part of the contract that the package contained linen, and that the defendants were not bound to deliver linen goods, and in law and fact by the printed memorandum expressly repudiated any contract as respects the nature of the contents of the package. The memorandum was to protect the

shipowners as respect the contents against any liability on the footing that they were what they were represented to be, and therefore according to *Jessel v. Bath* (2) the contract was to carry the package whatever its contents might be. This being so, the defendants must defeat the contract. It has been argued that the statement as to the goods being linen has this effect, but the jury have negatived any fraud or wilful representation, and therefore it must be taken that there was a mere declaration made innocently, inadvertently, and without fraud. If there had been a wilfully fraudulent mis-statement in order to get the goods carried at a cheaper rate, the contract would either be void for fraud, or the amount of damages would be limited by the value on the footing of the contents being linen just as in *M'Cance v. The London and North Western Railway Company* (3) where only the declared and not the real value of the horses was held recoverable. But fraud having been negatived the contract remains, and it having been broken and no question as to the amount of damages being before us, we cannot make this rule absolute to enter a nonsuit. As regards what has been said respecting hardship, the defendants may save themselves by framing their bills of lading differently, so as to protect themselves from a false statement even though there be no fraud, an ingredient which existed in most of the cited cases. If my view be correct, the point as to there being an estoppel is unarguable. There is a statement made by the one party not accepted by the other, there is no contract on the footing that the goods are linen, and though it may be, as I am inclined to think is the case, that, if the point were raised, the plaintiffs might not be entitled to recover larger damages than if the goods were linen, yet this is not before us, and on this rule the defendants cannot succeed, unless they shew that they were absolved from the contract.

BRETT, J.—The plaintiffs, who were forwarding agents, shipped goods on board the defendants' ship in a closed package to be carried from Boulogne to London.

(12) 5 Bing. 212; s. c. 7 Law J. Rep. (N.S.) C.P. 32.

(13) 4 Burr. 2,300.

(14) 10 Com. B. Rep. N.S. 154; s. c. 30 Law J. Rep. (N.S.) C.P. 289; 13 Com. B. Rep. N.S. 518; 31 Law J. Rep. (N.S.) C.P. 271.

(15) 19 Wendall 234.

(16) 8 Pickering 182.

(17) 3 Hurl. & N. 705; s. c. 28 Law J. Rep. (N.S.) Exch. 81.

(18) 1 B. & Ad. 712.

(19) 3 B. & Ad. 114.

The shippers presented a bill of lading for signature, which represented the contents to be "linen." The goods were not linen, but "silk broad stuff," and the freight of such goods would be larger than that of linen, but when the plaintiffs shipped the goods they did not know the goods were silk, and the jury have found that the representation was innocent. The goods having been shipped, and the bill of lading presented the captain did not accept the bill as drawn, but stamped on it "weight, value and contents unknown," and the closed package was not examined. The captain asked no questions of the shippers as to what the contents were. According to the evidence the goods were stolen when on board, and there was no evidence of positive negligence on the part of the shipowners, the only fact being that the goods were not delivered by them, the package at the end of the voyage was there but part of its contents gone. The plaintiffs bring their action, not founded on a charge of negligence, but on a liability of the defendants as carriers to absolutely deliver the goods in the same condition as delivered to them. The question is whether there was evidence to go to the jury of such a liability with respect to the goods actually shipped, i.e. whether the defendants had undertaken a liability as carriers of silk broad stuff, for the rule is to enter a nonsuit on the ground that there was no evidence of the contract alleged in the declaration and an estoppel from shewing the delivery of the goods in the particulars. Now the action is between the shipper and shipowner, and even if there were not the stamped memorandum there would be the fact that the goods were shipped to be carried for reward, and though there were the statement that the goods were linen and no limitation like the memorandum, yet I think (though it is not necessary to and I do not decide this) that between the shipper and shipowner the misrepresentation would not avoid the contract, for an innocent misrepresentation of a material fact does not make the contract void, it is only void if there be a wilful misrepresentation, i.e. a misrepresentation which is known to be one. In other words the bill

of lading between the shipper and shipowner would attach as the contract relating to the goods shipped under it whatever they were. But it is said that here there was a representation which would lay a larger liability on the defendants than if the description in the bill of lading were correct, and that it therefore is to be taken to have been acted on, that it therefore was a basis of the contract, and that it was within *M'Cance v. The London and North Western Railway Company* (3), a representation which binds the plaintiffs, and as the description is linen they are not entitled to shew that the contents were silk. Now it is material to see what is the meaning of the stamped memorandum. The bill of lading is drawn up by the shipper and he innocently misrepresents the goods not to be silk but linen. Did the shipowner act on this? The real meaning of the stamped memorandum is shewn by what is said in 1 *Parsons on Shipping*, 198, and the cases there cited. It is there said: "So it has been held that the shipowner is bound only to deliver the quantity received if the words 'weight unknown' are added, although a specific weight is mentioned in the bill. So, if the weight is stated in writing, and the expression 'weight unknown' is in print," and then in a note it is added, "In *Clark v. Barnwell* (20), the bill of lading contained the usual clause that the boxes containing the goods were shipped in good order, 'contents unknown.' The Court said: 'It is obvious, therefore, that the acknowledgement of the master as to the condition of the goods when received on board extended only to the external condition of the cases, excluding any implication as to the quantity and quality of the article, condition of it at the time received on board, or whether properly packed or not in boxes.'" It seems to me to follow from that case that when there is a closed package, and a representation as to its contents, the shipowner may accept the bill of lading, or may alter it, and if he adds "contents unknown," then, according to *Parsons on Shipping*, the cases cited there, and *Jessel v. Bath* (2), the

meaning is, that he declines to accept the representation, and merely accepts the package as it appears on the outside but not the statement as to what is inside, he does away with the representation, which, if inconsistent, is wiped out, and agrees to a modified bill of lading where there is no binding statement as to the contents, and that he contracts to carry what really is inside. A bill of lading so stamped is reduced to a contract to carry whatever is in the package. If so, the shipowner carries as a carrier whatever is inside, and is liable as a carrier. Whether he is liable on the whole value or only on the footing of linen, is a question it is not necessary to decide, and on which I give no opinion though I do not differ from what has been said by my Lord. It is said that there is an estoppel because the position of the shipowner was altered. Lord Wensleydale, in *Walker v. Jackson* (8), says, as a general rule, "that if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel he is bound to carry the parcel as it is." Here no question as a fact was asked, therefore the case falls within this rule. As between the shipper and shipowner, on the bill of lading as modified by the stamped memorandum in this case, it seems to me that there was a contract to carry, as a carrier, whatever was in the package, and that there was no estoppel.

GROVE, J.—I have some doubt about this matter. If the printed memorandum were out of the case I should be inclined to hold that even in the absence of fraud there was a representation as to the character and quality of the goods, and a contract to carry those only, but then comes the printed memorandum which if alone would take the risk of anything, and I have some doubt as to the question whether this abrogates the first representation. It has been said that these are protective words, not necessarily repudiating the statement, but then it may be said, has the shipowner a right to say to

the shipper, you say the contents are linen, but I know nothing of the contents and so take the goods, and insist on binding you. This may be an answer, and it may be said that *Jessel v. Bath* (2) is in favour of it, but that case may be distinguished on the ground that the printed clause is only for the benefit of the shipowner, but it is putting the shipowner in a very advantageous position to allow him to say I decline the statement in order to protect myself, yet if anything happens I say you must prove the contents are linen. I am rather inclined to think as the rest of the Court, but have doubts. As to the point of the amount recoverable, that is not before us, but the contention that if the contract be in respect of one amount there cannot be a liability as to another, is useful in the argument as respects the meaning of the contract. On the whole I am inclined to agree with the rest of the Court on this point, and as to the estoppel I agree.

DENMAN, J.—After hearing the able arguments in this case I have no doubt, and am of opinion that the rule should be discharged. The true effect of the bill of lading is that it is a contract to carry the package, whatever was in it, and therefore there was evidence of the contract in the declaration. During the argument I suggested that perhaps the expression, "contents unknown," might not go so far as we now hold, and might mean, "I agree to carry linen, but do not bind myself as to its quantity or quality," but my doubts have been removed by the passage in 1 *Parsons on Shipping*, and the cases cited there. It is clear that the words, "contents unknown," are large enough to cover what is necessary here, and I think, therefore, the case is within *Jessel v. Bath* (2), and the general principle laid down by Lord Wensleydale in *Walker v. Jackson* (8). As respects the amount of damages I offer no opinion.

Rule discharged.

Attorneys—Learoyd & Learoyd, for plaintiffs;
Ashley & Lee, agents for Phillips & Pearce, for
defendants.

1872. { THE THARSIS SULPHUR AND COP-
Nov. 14. { PER COMPANY (LIMITED) v.
 LOFTUS.

*Negligence—Action, when Maintainable
—Arbitrator—Average Adjuster.*

Where parties, in order to ascertain average contribution in dispute, agree that an average adjuster for reward shall ascertain and adjust the amount and agree to abide by his decision, such average adjuster, having given his decision, is not liable to an action for carelessness, negligence and unskilfulness, if he has acted in good faith.

The declaration alleged that before and at the time of the retainer and employment of the defendant and of his committing the grievances hereinafter mentioned, the defendant carried on and exercised the business of an average adjuster, that before the said retainer and employment and before the committing of the said grievances, a vessel called *The Emma*, having on board a cargo of copper ore, of which the plaintiffs were the consignees and owners, whilst on her voyage from Huelva to Liverpool met with tempestuous weather and sustained injuries, and her said cargo became damaged and she was thereby compelled to put into a port of distress for repairs and other necessary purposes and incurred certain general average and other losses, charges and disbursements, which said losses, charges and disbursements upon the arrival of the said vessel at Liverpool aforesaid it became and was necessary to adjust and apportion in manner by usage and custom used and approved, and thereupon the master of the said vessel on her arrival at Liverpool aforesaid, as well for and on behalf of the owners of the said vessel as for and on behalf of the plaintiffs as such consignees and owners of the said cargo as aforesaid, at the request of the defendant and for reward to him in that behalf, retained and employed the defendant as such average adjuster as aforesaid, to investigate and examine the vouchers and accounts of the said losses, charges and disbursements, and to settle, adjust, make up and prepare a statement shewing the proportion of the said losses, charges

and disbursements to be contributed and borne by the said ship, her freight and cargo respectively, according to the usage and custom of Lloyds, and the defendant then accepted and entered upon such retainer and employment, and thereupon it became and was the duty of the defendant as such average adjuster as aforesaid, under the said retainer and employment to take due and proper care and to use and employ proper skill and diligence in and about the investigation and examination of the vouchers and accounts of the said losses, charges and disbursements, and in and about settling, adjusting, making and preparing a statement shewing the proportion of the said losses, charges and disbursements to be contributed and borne by the said ship, freight and cargo respectively according to the said usage and custom. Yet the defendant not regarding his duty in that behalf would not take due and proper care and would not use and employ due and proper skill and diligence in and about the investigation and examination of the said vouchers and accounts, and in and about settling, adjusting, making and preparing the said statement, and conducted himself so carelessly, negligently and unskilfully in that behalf, that by and through the carelessness, negligence and unskilfulness of the defendant in that behalf, the said statement so settled, adjusted, made up and prepared by him was incorrect, erroneous and imperfect, and was incorrect, erroneous and imperfect in this, that the proportion of the said losses, charges and disbursements to be contributed and borne by the said cargo of the plaintiffs was stated, adjusted and settled at a much larger amount than the same ought to have been stated, adjusted and settled at according to the said usage and custom, and in this that certain special charges were stated, adjusted and settled as payable by the said cargo of the plaintiffs which were not so payable according to the said usage and custom, whereby and by reason of the premises, the plaintiffs confiding in the defendant's performance of his said duty, and not knowing of the breach of the same as aforesaid, and believing that the said statement so settled, adjusted, made

up and prepared was accurate and correct and properly made up, adjusted and prepared according to the said usage and custom, and that the proportion of the said losses, charges and disbursements in and by the said statement stated, adjusted and fixed as payable by the said cargo of the plaintiffs was the correct and proper portion payable by the said cargo, and that the said other charges were properly payable by the said plaintiffs' cargo according to the said usage and custom paid to the owners of the said vessel the said incorrect and excessive proportion of the said losses, charges and disbursements so stated, adjusted and settled by the defendant in the said statement and the said special charges. And by reason of the premises the plaintiffs have lost and been deprived of the moneys so paid by them over and above what they would otherwise have paid.

The fourth plea alleged that before the making of the said statement by the defendant an agreement in writing was made between Edward James Brown, the master of the said vessel, of the one part, and a certain firm under the style of Messrs. Tennants and Co. as and being the agents of the plaintiffs in that behalf of the other part, which said agreement was in the words and figures following, namely—

"This agreement, made the 28th day of April, 1871, between Edward James Brown, master and owner of the English schooner or vessel, *The Emma*, of the first part, and Messrs. Tennants and Co. (which includes all members of that firm), of 20, Redcross Street, Liverpool, in the county of Lancaster, merchants, being the owners or consignees of cargo by the said vessel, of the second part. Whereas the said vessel, *The Emma*, laden with a cargo of copper ore sailed from Huelva on the 19th day of December, 1870, on a voyage for Liverpool, and on such voyage she encountered a series of heavy storms and seas, and was obliged to put back to Cadiz, and thereby and in consequence thereof considerable damage or loss has been occasioned or sustained to the cargo, and various expenses and disbursements have been incurred, and it will be necessary to have a general average

or contribution in respect thereof, to which the said parties hereto of the second part are liable to contribute. Now these presents witness that in consideration of the engagements and agreements of the said parties hereto of the second part, the said Edward James Brown doth hereby engage and agree with the said parties hereto of the second part, that he the said Edward James Brown will deliver or cause to be delivered at reasonable request and time the said cargo laden on board the said vessel unto the said parties hereto of the second part, their factors, agents and assigns, and permit them to receive and take possession and remove the same according to their rights, possession and ownership in respect thereof on their paying freight and other charges and performing conditions as per bill of lading, charter party or agreement, in consideration whereof the said parties hereto of the second part do hereby for themselves jointly engage and agree with the said Edward James Brown to pay to the said Edward James Brown or his agents not only the freight and charges of the said goods, but also the proper proportion of the general average loss, general contribution, charges and expenses in respect of the said cargo, and all legal charges and other contribution loss expenses to which they are or shall be liable, or for or on assurances of which in the judgment of the parties hereinafter named, contribution ought to be made by the said parties hereto of the second part, or which the cargo ought to bear under the aforesaid circumstances. And for the better computing as well the question of contribution as the amount which the said parties hereto of the second part will have to pay in respect thereof, and that the same may be more readily ascertained, the said parties hereto of the second part do hereby further agree that the same shall be ascertained and adjusted by Mr. Henry M. Loftus, of Liverpool, average adjuster (meaning the defendant), whose decision they, the said parties of the second part, do hereby agree to abide by and perform, the average to be adjusted in accordance with the usage and custom at Lloyd's.

As witness the hands of the parties

hereto of the second part the day and year first above written.

"TENANTS & Co.

"Agents for the Tharsis Sulphur and Copper Company.

"Witness to the signing,

"Thomas Barrett, 20, Redcross street, Liverpool."

And the defendant says that his retainer and employment to investigate and examine the said vouchers, and to settle, adjust, make up and prepare the said statement in the declaration mentioned, was under and by virtue of the said agreement and not otherwise, and the defendant, acting in good faith and under such retainer and employment as last aforesaid, took upon himself the burthen of the said inquiry and investigated and examined the said vouchers and made the said erroneous statement.

To this plea there was a demurrer.

Myburgh, for the plaintiffs.—This case is not like *Pappa v. Rose* (1), for the defendant was not an arbitrator—*Russell on Arbitration*, 3rd ed. 42; *Leeds v. Burrows* (2), and the comments thereon in *Collins v. Collins* (3) and *Boss v. Helsham* (4). The defendant was a mere valuer, and it would be contrary to public policy for an average adjuster acting in his own business to be protected. If he had been employed by one person he would clearly be liable, and he is not the less so because employed by two persons.

[BOVILL, C.J.—Here negligence is averred as well as want of skill; in *Pappa v. Rose* (1), my ruling was confined to want of skill (5), and the decision goes no further.]

Gully for the defendant.—The defendant was in the position of an arbitrator, and not liable for negligence or want of skill—*Russell on Arbitration*, 461; *Re Hall*

and *Hinder* (6); and *Pappa v. Rose* (1) applies, for though it may be that the actual decision is to be taken to be confined to want of skill, yet the reasoning equally applies to want of care or negligence.

BOVILL, C.J.—Where parties agree that a person in the position of the defendant shall settle an amount in question between them, *Pappa v. Rose* (1) is a distinct authority that such person, if he act *bona fide*, is not liable to an action for want of skill; but that case did not raise the question as to whether he would be liable to an action for want of care or negligence; neglect was alleged no doubt in the pleadings, but the direction to the jury and the arguments were confined to want of skill, and the question of want of care was not before the Court (5). Where, however, persons are called on to arbitrate or settle amounts between parties there is no authority to shew that an action for negligence will lie against those whom the parties have agreed shall decide the matter. In *Watson on Awards* (3rd ed.), p. 112, it is said—"It has been said that an arbitrator is liable to an action if he misconducts himself, but I cannot find any case in which such an action has ever been brought." And in *Anonymous Case* 252 (7), Lord Hardwicke says—"Unless there is corruption or partiality in an arbitrator the party cannot set aside his award, and if it should be allowed to make arbitrators defendants, and give them all this trouble to set forth the particular reasons upon which they founded their award it would introduce very great inconvenience and be a discouragement to any person to undertake a reference." I have never known of such an action; it appears there is no precedent for it, and my late brother Watson distinctly states that he could find no such case. If this had been a novel case this might be no argument, but it is a case occurring perpetually, and in which generally one party is dissatisfied, and the spirit of litigation often very strong, and therefore one can hardly believe but that by common consent it was advised that no such action would lie. There is no

(1) 41 LAW J. Rep. (N.S.) C.P. 11; in Ex. Ch. 187.

(2) 12 East 6.

(3) 26 Beav. 306; s. c. 28 LAW J. Rep. (N.S.) Chanc. 184.

(4) 36 LAW J. Rep. (N.S.) Exch. 20.

(5) This ruling is fully set forth in the reports of *Pappa v. Rose* in 41 LAW J. Rep. (N.S.) C.P. 11, in Ex. Ch. 187, in accordance with this observation and the judgment of his Lordship.

(6) 2 Man. & G. 847.

(7) 3 Atk. 644.

precedent; the defendant acted *bona fide*, and the principle of *Pappa v. Rose* (1) applies. It would be very inconvenient that an action for negligence should lie against a person in the position of arbitrator, and as no instance of such an action exists, I am not disposed to rule that it can.

KEATING, J.—I am of the same opinion, and think it would be extremely dangerous to lay down that a person in the position of the defendant was liable to an action for negligence. It would be extremely difficult to lay down what was want of care or negligence; and though the decision in the Exchequer Chamber only goes to the extent that he is not liable for want of skill, yet a frequent alleged ground of negligence is alleged want of skill. In this case the defendant is in the position of an arbitrator, because he is a person by whose decision two parties having differences agree to be bound. The safer rule is, that where parties agree to be so bound, they agree for better or worse, and that if such person acts faithfully, honestly, without fraud or corruption, the parties are to be bound, and it is inexpedient that he should run the risk of an action for negligence.

BRETT, J.—The pleadings shew an agreement to accept the decision of the defendant, which he undertakes to give for reward, and the duty alleged is to take due and proper care, and to use and employ proper skill and diligence in the investigation; and then there is the allegation that he would not take due and proper care, and would not use and employ due and proper diligence in the investigation. The question is, whether there is such a duty in the sense that it is so binding as to make him liable to an action. It is urged that there is—first, because he is an arbitrator; secondly, although he is not one; and thirdly, because he is an average adjuster. As to the first point, it is admitted that an arbitrator is not liable for want of skill, but it is said that he is liable for negligence; it is, however, a strong ground to shew that this is not so, that there must have been a thousand cases in which the

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point might have arisen, and yet there is no case to shew it was ever raised. As to the second point, it is said that the defendant was only to give a decision, but *Pappa v. Rose* (1) decides that he who does so, though not strictly an arbitrator, is yet not liable for want of skill, and though that case only goes so far, yet the reasoning in it goes further, and if an arbitrator be not liable for negligence, so also a person in the position of the defendant is not. As to the third point, the resolution of the law not to inquire into the conduct of an arbitrator applies equally to a skilled or unskilled, a professional or non-professional one, there is no difference, and therefore I think it is not shewn that there is a duty so binding that an action will lie. I think the plea is an answer to the action.

DENMAN, J.—I also am of opinion that our judgment should be for the defendant. The case of *Pappa v. Rose* (1) is only not expressly in point, because the only question there was as to skill, whilst here there is another point, which goes a little further perhaps, because here want of care is charged. I think, however, that though *Pappa v. Rose* (1) is not an express decision, the reasoning in it is on all fours with the present case. Martin, B., there says—"The parties were content to take him for better or worse, and he is not liable for a wrong decision if given without fraud"—a decision no doubt larger than necessary, but his reasoning applies. And Mellor, J., says—"Both the parties to the contract agreed to be bound by the opinion of Mr. Rose, such as it was, provided he acted honestly." Here the parties were bound to abide by the decision of the defendant, and as he acted in good faith the plea is good. There will therefore be judgment for the defendant.

Judgment for the defendant.

Attorneys—Allens & Carter, agents for Simpson & North, Liverpool, for defendants; Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for plaintiffs.

1872. }
Nov. 14. } BEST AND OTHERS v. HILL.

Equitable Plea—Argumentative General Issue—Set-off.

To a declaration for money lent, money paid, commission on payment of bills of exchange, interest, and on accounts stated, it is not a good equitable plea, that the defendant assigned goods to the plaintiff under an agreement that he was to accept and pay bills of exchange against them, make advances, and pay charges, and sell them, and satisfy his claims in respect thereof out of the proceeds, and pay over the balance, that the goods would have been sufficient to satisfy such claims, but by the defendant's negligence the proceeds became insufficient, and the claim in the declaration was for the insufficiency caused by the negligence.

This was a demurrer to a plea.

The declaration was for money lent, money paid, commission on payment of bills of exchange, interest, and, accounts stated.

The fourth plea was as follows—

4. And for a fourth plea, and as a defence on equitable grounds, the defendant says that before and at the time of the agreement hereinafter mentioned the defendant was, and carried on the trade and business of, a rice merchant at Liverpool, under the name and style and firm of Hill & Smith, and that the plaintiffs were also commission agents and factors, and as such carried on business at Liverpool, under the name and style and firm of Roger Best & Co., also at Monte Video, under the name and style and firm of Rogers & Brothers, and also at Buenos Ayres, under the name and style and firm of John Best & Brothers, and thereupon it was mutually agreed by and between the plaintiffs and the defendant, for commission and reward to be received by the plaintiffs in that behalf, that the defendant should consign rice to the plaintiffs' said firm at Liverpool in certain ships there, to the plaintiffs' said firms at Buenos Ayres and Monte Video aforesaid, for sale by the plaintiffs for the defendant at Buenos Ayres and Monte

Video aforesaid, and that the plaintiffs should accept certain bills of exchange drawn by the defendant on the plaintiffs against the said rice and in anticipation of the receipt by the plaintiffs of the proceeds of the sales thereof, and that the said bills should be met and paid by the plaintiffs, and that the plaintiffs should make certain advances against the said rice so consigned, and should pay the charges and expenses in consequence of such consignment, acceptances and sales, and that the defendant should assign and transfer to the plaintiffs the bills of lading in respect of the said rice, and that the plaintiffs should sell the said rice at Buenos Ayres and Monte Video aforesaid, and pay and satisfy out of the proceeds of the said sales such acceptances and several payments by the plaintiffs in respect thereof, also the said advances, charges and expenses, and interest thereon as well as the said reward and commission, and that the plaintiffs should pay to the defendant the balance of the said proceeds after deducting such acceptances, payments, advances, charges, expenses, interest, reward and commission as aforesaid. And the defendant further says that he accordingly consigned rice to the plaintiffs for sale upon the terms aforesaid, and the plaintiffs accepted bills of exchange drawn by the defendant against the said rice as agreed, and made the said payments and advances against the said rice as agreed, and that the defendant duly assigned and transferred to the plaintiffs the bills of lading in respect of the said rice, and employed the plaintiffs to sell the said rice, and to apply and pay the proceeds thereof upon the terms and in the manner aforesaid, and not otherwise. And the defendant further says that the plaintiffs took possession of and held the said rice under and by virtue of the said bills of lading and upon the terms aforesaid, and not otherwise. And the defendant further says that the moneys so mentioned to have been lent and paid, as in the declaration mentioned, were and are the said advances and payments, so made as in this plea mentioned, and that the said bills of exchange in the said declaration mentioned were and are the said bills of exchange

in this plea mentioned, and that the said interest in the declaration mentioned was and is the interest in respect of the said payments and advances so made by the plaintiffs as agreed, and that the commission in the declaration mentioned was and is the said commission in respect of the said sales and consignments and acceptances in this plea mentioned, and that the accounts so mentioned in the declaration to have been stated were stated of and concerning the said advances, payments, commission, reward and interest as aforesaid, and not otherwise. And the defendant further says that the plaintiffs took such negligent, bad and improper care of a part of the said rice whilst the same was in their possession as aforesaid, that the same, when sold by the plaintiffs as hereinafter mentioned, became and was in bad condition, and deteriorated in value, and the same by reason thereof was sold by the plaintiffs at much lower and inferior prices than it might and would and ought to have been sold, and the plaintiffs also negligently and improperly sold the said rice at prices much below the market prices of such several goods when sold, and at which market prices the said rice might, could and ought to have been sold by the plaintiffs, and the plaintiffs before this suit received the proceeds thereof. And the defendant further says that the said rice, before this suit, could and might and ought to have been sold and realised by the sales thereof, and but for such bad and improper care and negligent and improper sales and misconduct would have realised sufficient, and much more than sufficient to have fully paid and satisfied the said loans, payments, reward, commission, charges, interest, acceptances and the whole of the claims of the plaintiffs in respect thereof, and now sued for, if the same had been taken due and proper care of by the plaintiffs as aforesaid, and sold with due and proper care, and that by and through the mere negligence, wilful default and improper conduct of the plaintiffs as aforesaid, the said rice and the proceeds thereof became and were before this suit, and are insufficient to discharge the said acceptances, payments, loans, charges,

reward, commission, interest and moneys now sued for, and the said deficiency, which is the claim for which this action is brought, and no other or different claim, has entirely arisen from the plaintiffs' said negligence, default and misconduct.

To this plea the plaintiffs demurred.

Cohen, for the plaintiffs, argued that as the cross-claim was for unascertained damages, the plea was bad as a plea of equitable set-off, citing *Rawson v. Samuel* (1) and *Story's Equity Jurisprudence*, 656-658, and that it did not amount to the general issue.

Butt (*Bayliss* with him), for the defendant, argued that the plea was a good equitable defence, citing *The Mutual Loan Fund Association v. Sudlow* (2) and *Beasley v. Darcy* (3), and that it amounted to the general issue.

BOVILL, C.J.—In this case a cross-claim is relied on of which the amount has not been ascertained. Such a claim cannot be made the subject of set-off at law; and as to the Courts of Equity, the claim not being ascertained, they could not deal with it, and could not grant an absolute perpetual injunction, but only impose terms, as that there should be a trial at law, the damages ascertained and execution stayed; again, a further difficulty would arise—this would lead to delay, damages might be recovered for it, and there might be terms as to payment into Court. So that the claim is not available as an equitable set-off. And although the two claims arise out of the same transaction this is not enough; and I cannot distinguish the case from *Rawson v. Samuel* (1), for in that case, there being a claim for unliquidated damages liquidated by verdict, and on the other hand a long unsettled account, Lord Cottenham says, "Whatever weight may be attached to this statement of belief as to the probable balance of a long and complicated

(1) 1 Cr. & Ph. 161; s. c. 10 Law J. Rep. (N.S.) Chanc. 214.

(2) 5 Com. B. Rep. N.S. 449; s. c. 28 Law J. Rep. (N.S.) C.P. 108.

(3) 2 Sch. & Lef. 403, note.

account, the case is certainly not one in which the plaintiffs in equity can ask the Court to assume that the balance will be in their favour. The equity, therefore, must rest on the admitted evidence of a complicated and unsettled account. It was said that the subjects of the suit in this Court, and of the action at law, arise out of the same contract; but the one is for an account of transactions under the contract, and the other for damages for the breach of it. The object and subject-matters are therefore totally distinct; and the fact that the agreement was the origin of both does not form any bond of union for the purposes of supporting an injunction." It is impossible to distinguish that case from the present, and the plea therefore is not good as an equitable plea. It is then said that the plea amounts to never-indebted, but such a plea denies there being a debt, whereas here the declaration and plea both shew a debt, and it cannot be said that it was contemplated the payment should be out of the damages for the plaintiffs' breach of contract.

KEATING, J.—I am of the same opinion. It is conceded that unliquidated damages are not the subject of set-off at law, and no authority has been cited to shew that a Court of Equity would deal with them as a cross-claim till ascertained, and in both *Rawson v. Samuel* (1) and *Beasley v. Darcy* (3), the unliquidated damages were first liquidated. As respects the plea amounting to the general issue, I cannot comprehend how it can be urged that there was no debt.

BRETT, J.—The plea is bad at common law, because the claim is for unliquidated damages, and in equity because the claim is unconnected and unliquidated, and a Court of Equity would not grant an unconditional injunction, for which *Rawson v. Samuel* (1) and *Beasley v. Darcy* (3) are authorities. As respects the plea amounting to the general issue, to put the matter most favourably for the defendant, the arrangement is that if there be a deficiency on sale, it is to be paid, but there has been a sale and a deficiency, therefore there is a debt, and the defence set up that

this is the plaintiffs' own fault is the subject of a cross claim.

DENMAN, J., concurred.

Attorneys—Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for plaintiffs; Gregory & Co., for defendant.

1871.	} STEPHENS v. THE AUSTRA- LASIAN INSURANCE COMPANY.
Nov. 20.	
1872.	
Nov. 14, 21.	

Marine Insurance—Deck Cargo—Open Policy—Declaration of Risks.

Where a shipowner was in the habit of receiving shipments of cotton to be carried on deck, sometimes at the request and risk of the shippers, sometimes for his own convenience, and under a clean bill of lading at his own risk, and to protect himself as to jettison in the latter case, entered into open policies of insurance as to which the usage was that he was bound to declare all his risks in order of shipment, and rectify any mistake even after loss known; and his agent, by negligence or mistake, gave a clean bill of lading for a certain shipment and gave no notice to him, but such shipowner on discovering the omission altered his declarations by inserting this shipment though after loss known,—Held, that he had an insurable interest, as at law a written contract cannot be varied on the ground of negligence or mistake, and was entitled to alter the declarations both according to the usage which could not be said to be unreasonable and according to the doctrine to be deduced from decided cases, that by the usages of merchants and underwriters, recognised by the Courts without formal proof, such declarations may be altered even after loss known, if the alterations be made innocently and without fraud.

This was a Special Case argued in Michaelmas Term, 1871, and postponed

for the statement of a supplemental case, which, on the matter coming again before the Court this term, was found immaterial.

The material facts and the arguments of counsel are fully set forth in the judgment.

Holker (Watkin Williams with him), for the plaintiff.

Sir G. Honyman (Bruce with him), for the defendants.

In addition to the cases mentioned in the judgment, *Harman v. Kingston* (1), *Robinson v. Touray* (2), *Kewley v. Ryan* (3), and *Henchman v. Ofley* (4), were referred to.

Cur. adv. vult.

The judgment of the Court (5) was now (Nov. 21) delivered by—

BRETT, J.—In this special case the facts stated, which seemed to be material, are that the plaintiff acted in London as insurance broker for Messrs. Chapple & Co., shipowners; that they were owners of a line of steamers plying between Alexandria and Liverpool; that their agent at Alexandria was Mr. Grace; that during the American war Chapple & Co. were extensively engaged in carrying cotton from the Levant to Liverpool; that part of the cotton was frequently carried on deck; that some cotton was so carried by the request and at the risk of the shipper, and for a less freight; that in such case it was the practice that it should be stated in the bill of lading that the cotton was on deck by the shipper's request and at his risk; that some cotton was carried on deck by the shipowner in order to enable him to carry a larger cargo; that in such case it was at the shipowner's risk; that in such case he gave a clean bill of lading; that shipowners, who carried deck loads for their own convenience and therefore

their own risk, often protected themselves against probable loss by jettison by keeping on foot open policies especially effected to cover the risk by declaring upon them. The case then contained the following statement as to usage—"According to the usage of the insurance business when a policy is effected on goods by ship or ships to be thereafter declared, the policy attaches to the goods as soon as and in the order in which they are shipped; and directly the assured knows of the shipment of the goods he is bound to declare them to the underwriter on the policy, and to declare them in the order in which they are shipped. He is not entitled to declare some of the risks and remain his own insurer as to the others. In case by oversight or otherwise the goods are declared on the policy in an order different from that in which they were shipped, the assured is bound to rectify the declarations, and make them correspond with the order of shipment. The underwriter would require to see the bills of lading, and would insist on the declarations being made to follow the sequence of the bills of lading. The declarations are often thus rectified, and sometimes even after loss." In 1864 and 1865 Messrs. Chapple & Co., through the plaintiff, their broker, effected in London with the defendants and others certain policies on cotton on deck per steamer or steamers from Asia Minor to Liverpool. The first set of such policies were made on the 29th of March, 1864, to the amount of 25,000*l.*, and the second set were made for a further sum of 25,000*l.*, to follow on the 12th of January, 1865. In the autumn of 1864, and at the beginning of 1865, Messrs. Chapple & Co., by Grace, their agent at Alexandria, shipped thence in various steamers cotton on deck at their risk and cotton below. Declarations were made on the cotton shipped on deck on the policies before mentioned in the order of shipments in respect of all the cottons shipped on deck, except in respect of one parcel shipped on board *The Behera*. Such declarations were made in London by the plaintiff upon information of the shipments forwarded by Grace to Chapple & Co. The declarations on the policies of the

(1) 3 Campb. 150.

(2) 3 Campb. 160.

(3) 2 H. Bl. 343.

(4) *Ibid.* 346*n.*

(5) Willes, J., Keating, J., and Brett, J.

29th of March, 1864, were made as follows—

29 Oct., 1864	£3,400	on	68 bales per	<i>Lybia</i> .
29 Nov. "	7,000	"	102 "	<i>Ajax</i> .
10 Dec. "	2,500	"	44 "	<i>Ocean King</i> .
31 Dec. "	1,200	"	20 "	<i>Behera</i> .
9 Jan., 1865	7,000	"	115 "	<i>Nyanza</i> .
16 Jan. "	3,900	"	81 "	<i>Nyanza</i> .

£25,000

Declarations were also made but not to the full amount on the policy of the 12th of January, 1865. It afterwards appeared that under the circumstances stated in the case, Messrs. Chosemi, Mellor & Co. had shipped 102 bales of cotton on board *The Behera* at Alexandria on the 20th of December, 1864, that is to say before the shipment on board *The Behera* of twenty bales on the 31st of December, and before the shipments on board *The Nyanza* of the 9th of January and the 16th of January, 1865. The 102 bales were directed to be received and were in fact received to be shipped on deck at shipper's risk; but by mistake a clean receipt was given for them by the mate, and a clean bill of lading by Grace. He, however, supposing always that the 102 bales had gone at shipper's risk, did not advise the defendants to declare them, and they were not declared. *The Behera* sailed from Alexandria and encountered heavy weather, and on the 15th of January, 1865, the twenty bales and the 102 bales were jettisoned. The loss became known to Chapple & Co. on the 18th of January, 1865. The vessel arrived in Liverpool on the 19th of January. On the 25th of January, 1865, Messrs. Mellor & Co., of Liverpool, claimed payment of the value of 102 bales as being owners of a clean bill of lading given in respect of them. The plaintiff on the 27th of January, 1865, altered the declarations in the policies of the 29th of March, 1864, as follows—He struck out—

£7,000 on 115 bales per *Nyanza*.
3,900 " 81 " "

And replaced those declarations as follows—

9 Jan., 1865 £6,000 on 102 bales per *Behera*.
9 Jan., 1865 4,900 " part of 115 " *Nyanza*.

He at the same time altered the declarations to correspond in the policies of the 12th of January, 1865. A portion of the policies of the 12th of January, 1865, sufficient to cover the loss on *The Behera* deck cargo remained still undeclared, and the plaintiff on the 27th of January, 1865, filled up the said policies by declaring, amongst other declarations,

£6,000 on 102 bales per *Behera*.

On these facts it was argued before us, on behalf of the plaintiff, that Chapple & Co. had an insurable interest; that although the intention of the shippers at the time of the shipment was in fact that the goods should be carried on deck at their risk, and although at the same time it was the intention of the defendants' agent, Mr. Grace, to receive them to be carried on deck at shipper's risk, yet inasmuch as Grace had by mistake or negligence given a clean bill of lading, Messrs. Chapple & Co. could not protect themselves against the holders thereof in respect of the loss by jettison, even though such holders might be identified with the shippers; that Chapple & Co. therefore stood to lose by a jettison by reason of perils of the sea; and were therefore so far interested as to be entitled to insure against such loss. It was further contended on behalf of the plaintiff, that Chapple & Co. were insured against the loss which had occurred on and by virtue of the policies of the 29th of March, 1864; that by the usage of insurance business they were not only entitled but bound to rectify the declarations on that policy as they had done, and that the declarations were to be read as if the shipment of the 102 bales on the 20th of December, 1864, had been declared in due order; and that the declarations might be properly altered after the loss was known. It was contended on behalf of the defendants, that the shipowners, Messrs. Chapple & Co., were not bound by the mistake or negligence of Grace in signing a clean bill of lading; that under the circumstances he had no authority to sign any but a bill of lading expressing that the goods were shipped by the request of the shippers and at their risk; that Messrs. Chapple

& Co. not being bound by the clean bill of lading were at no risk, and therefore had no insurable interest; that if they had such interest, it was not insured; for that by the recognised law of insurance the assured were not bound to declare the goods which they shipped in the order of their shipment; that they were not bound to declare all shipments; that they could not, after they had once declared, alter such declarations; that even if they could at some time alter such declarations they could not do so after the loss and their knowledge of it; that they were bound to declare within a reasonable time after shipment; that if they did not, a subsequent declaration was void; that no declaration could be properly made after loss and knowledge of it; that consequently in this case the loss which had occurred was not insured by either policy. The first point raised by these arguments is, whether Messrs. Chapple & Co. had an insurable interest. We are of opinion that they had. It may be true that Grace was not in one sense authorised to sign a clean bill of lading under the circumstances, but it is in the sense that his duty to his principals required him not negligently to sign in that form; he had the authority so frequently given to agents in his position, that is to sign bills of lading as or for the master of the ship, and therefore his signature was equivalent to that of his principals, Messrs. Chapple & Co., and made the bill of lading their contract and a contract in writing applicable to the goods shipped under it, the effect of which, according to a legal construction of the written contract contained in it to be declared by the Court, could not at law be varied by evidence that it was signed in its existing form by negligence or mistake. The bill of lading, according to its legal construction, made Messrs. Chapple & Co. liable for a loss of goods by jettison the result of their being carried on deck; it follows that Chapple & Co. had an insurable interest.

The next question raised is, whether Chapple & Co. were insured in respect of the risk on the 102 bales of cotton on board *The Behera*. Now the usage stated in the case is a large usage, more comprehensive,

we believe, than it has been proved or assumed to be in any of the cases which are in the books relative to this matter; but if it is not unreasonable, it is binding on the Court in this case. We are not prepared to say that it is unreasonable. It follows that it is binding. Then it seems clear that Chapple & Co. were insured by the policies of the 29th of March; for the 102 bales on board *The Behera* were shipped on board on the 20th of December, 1864, when the policies were not exhausted by prior shipments to which they were applicable, and Messrs. Chapple & Co. were bound to rectify the declarations and make them correspond with the order of shipment. It seems to us that the usage as now stated makes the cases of *Gledstanes v. The Royal Exchange Assurance Corporation* (6) and *Ionides v. The Pacific Fire and Marine Insurance Company* (7) inapplicable. But if that be not so, we still think that the plaintiff on the statements made in this case is entitled to recover. The doctrine to be deduced from those cases is, that, according to the usage of merchants and underwriters, as recognised by the Courts without formal proof in each case, a declaration of this kind, which it is the right of the assured to make without the consent of the underwriter, may be altered even after the loss is known, if it be altered at a time when it can be and is altered innocently and without fraud. If that be a true proposition, and we think it is, and if it be applicable to this case, we think that the alterations made on the 27th of January, 1865, in the declarations in the policies of the 29th of March, 1864, were legally made. At that time the loss of the goods by jettison was known to the assured, but the state of things at the time of shipment was not known to them. They seem to have made the alteration in the *bona fide* belief that their agent had neglected to inform them of the shipment by *The Behera*, and with a *bona fide* intention of rectifying that mistake according to the custom. There is no finding in this special case that they

(6) 5 B. & S. 797; s. c. 24 Law J. Rep. (N.S.) Q.B. 30.

(7) 41 Law J. Rep. (N.S.) Q.B. 33.

acted otherwise than innocently and without fraud. The judgment must therefore be for the plaintiff as upon a loss upon the policies of the 29th of March, 1864, in respect of the loss by jettison of goods loaded on board *The Behera*.

I may add that this judgment is not merely the judgment of my brother Keating and myself, but has the authority of my late brother Willes, as he approved of it after the argument on the original special case, and the supplemental case adds nothing material.

Judgment for the plaintiff.

Attorneys — Westall & Roberts, for plaintiff;
Waltons, Bubb & Waltons, for defendants.

1872. } TAPSCOTT AND OTHERS v.
Nov. 28. } BALFOUR AND ANOTHER.

*Shipping—Charter-party—Demurrage—
Dock—Loading in the usual Manner—Lay-
days.*

By a charter-party it was agreed that the vessel should "proceed direct to any Liverpool or Birkenhead dock as ordered by charterers, and there load in the usual and customary manner a full and complete cargo of coals;" that the vessel should be "loaded at the rate of 100 tons per working day," and that loading should not commence before the 1st of July.

On the 3rd of July the vessel was ready to go to the Wellington Dock, which was the Liverpool dock ordered by the charterers, but she was not admitted into such dock until the 11th of July, because the coal agent employed by the charterers to supply the cargo had then three vessels in that dock and two others booked to come in, and the dock regulations did not allow a coal supplier to have more than three vessels in dock at the same time. Coal agents were usually employed to supply cargoes, and it did not appear that the charterers had made an unreasonable selection of the coal agent they so employed. The vessel entered the dock on the 11th of July, but her turn to go

to the spout, to receive the coals did not arrive sooner than the 23rd of July, and her loading was not begun until after that day. It was the usual practice to load coal at the spout, but it was also not unusual to load from lighters:—

Held, that the lay-days did not begin until the vessel had entered the dock to which she had been so ordered by the charterers, but that they began from that time, and were not postponed until the vessel's turn had arrived to go to the spout.

This was an action for demurrage tried before the Judge of the Passage Court of Liverpool in October last.

The first count of the declaration was for not loading the plaintiff's vessel, *The Emerald Isle*, according to the terms and at the rate mentioned in a charter-party made between the plaintiffs and defendants, by reason of which the vessel was detained a long time. The second count was for breach of a promise by the defendants that they would, within a reasonable time in that behalf, procure for the plaintiffs an order or certificate which would enable the said vessel to enter the Liverpool or Birkenhead Dock as ordered by the defendants pursuant to the said charter-party, and there obtain a berth, and load, whereby the vessel was for a long time prevented from entering the dock into which she was ordered by the defendants, and from obtaining a berth and loading according to the said charter-party. The defendants pleaded *inter alia* pleas denying the agreements and breaches.

The plaintiffs, who were owners of *The Emerald Isle*, chartered that vessel to the defendants on the 11th of June last; and by the terms of the charter-party *The Emerald Isle* was to "proceed direct to any Liverpool or Birkenhead dock, as ordered by charterers, and there load in the usual and customary manner a full and complete cargo of coals," which the charterers bound themselves to ship. "The vessel to be loaded at the rate of 100 tons per working day. Freighters having the option of naming the stevedore who is to take in and store the cargo at ship's expense and under the direction of the master." Demurrage was to be at the rate of 4d. per ton register per diem,

and "loading not to commence before the 1st of July." There were two docks at Liverpool, viz., the Bramley Moore and the Wellington, and one dock at Birkenhead, and there were tips or spouts at each of them for loading. On the 29th of June the defendants sent an order to the plaintiffs for the vessel to go to the Wellington Dock, and on the 3rd of July the vessel was ready to go to such dock and take her cargo. By the regulations of the dock (which were printed) no coal supplier was allowed to have more than three vessels in the dock at the same time. It was assumed to be usual for freighters to employ agents to supply coal cargoes, but Messrs. Brackner & Co., the coal agents employed by the defendants to supply *The Emerald Isle*, did a large business, and on the 3rd of July they had not only three vessels in the Wellington Dock, but two other vessels booked to come in in turn. In consequence of this and of the above mentioned regulations of the dock *The Emerald Isle* was not admitted into the Wellington Dock until the 11th of July, but on that day she entered. As other vessels were being loaded there, she could not go to the spout before the 23rd of July, when her turn arrived; but as no coals were then ready for her, she did not go under the spout until the 29th of July. She went there on that day, and loaded a quantity of coal; and had she stayed to the 8th of August, the whole cargo could have been completed by that time, but on the 7th she was taken out of the dock, and sent to Birkenhead, in order to save the tides; and there was evidence, though contradicted by the defendants, that such removal was done with their sanction. The loading was afterwards completed at Birkenhead on the 15th of August.

The vessel could have been loaded according to the rate fixed by the charter-party in twenty working days, or twenty-three days in all, including the Sundays. Accordingly, the plaintiffs claimed demurrage from the 26th of July, reckoning the lay-days as commencing from the 3rd of July, when the vessel was ready to enter the Wellington Dock. There was evidence that the vessel could have been loaded from lighters in the Wellington

Dock, and that it was usual to load large vessels there from lighters, as well as from tips or spouts.

By arrangement the verdict was entered for the defendants, leave being reserved to the plaintiffs to move to enter a verdict for them for such amount as the Court of Common Pleas should direct, such Court being at liberty to draw inferences from the facts.

A rule *nisi* to that effect was accordingly obtained in the course of this term against which—

Holker and Gully now shewed cause.—The question is when the time for loading began to run. The plaintiffs say it began on the 3rd of July, when the vessel was ready to enter the Wellington Dock, if the dock regulations had not prevented the obtaining an order to enter at that time. The defendants, on the other hand, say that the time for loading did not begin until the 23rd of July, when the vessel's turn for going to the spout arrived. No such promise as that alleged in the second count can be implied. The dock regulations must be known to the plaintiffs as well as to the defendants. The effect of such regulations must be sometimes to postpone the entrance of a vessel, and therefore if the shipowner wishes to avoid such regulations, he should take care that there is some express stipulation in the charter-party to provide for this. Even if the vessel in this case had entered the dock on the 3rd of July, she would have been in no better position for loading than she was when she entered on the 11th of July, for her turn for going to the spout did not take place until the 23rd of July, so that it really is immaterial whether or not an order could have been given which would have enabled her to get into the dock before the 11th of July. It is said that the vessel might have been loaded when in the dock from lighters, but the fair result of the evidence shews that the ordinary and usual mode was to load from the tips or spouts, and since by the charter-party it was expressly agreed that the vessel should load in the dock to which she was ordered by the defendants "in the usual and customary manner," she was therefore to load at the spout, and that must

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be in her turn, according to the custom of the dock. The cases of *Robertson v. Jackson* (1), and *Leidemann v. Schultz* (2), are directly in point as to this, and therefore the time for loading only commenced on the 23rd of July. But even supposing the defendants to be wrong in this respect, and that her time began before the 23rd of July, still the plaintiffs ought not to reckon the time between the 8th and 15th of August, when the delay which prevented the vessel being completely loaded, arose from her being taken out of the Wellington Dock on the 7th of August. It is true that if the vessel had remained there after that day she would probably have been detained there for several days, in consequence of the state of the water, but the charterers are no more liable for demurrage on that account than they would be if the vessel had been detained by a hurricane.

Herschell and Myburgh, in support of the rule.—The delay arose from the defendants employing Messrs. Branchner as their coal agents for supplying the coal required for the cargo. If the charterers choose to select as their coal agents persons whose business is of that magnitude, that by reason of their having so many vessels to supply with coal at a particular dock, no other vessel can be allowed to enter such dock to be supplied by them with a cargo until after a delay of several days, the charterers and not the ship-owners must suffer for such delay.

[DENMAN, J.—The dock rules shew that it is usual to load through a coal agent.]

No doubt that is so, but have the charterers a right to select an agent who has so many as three vessels in the dock, and others booked to enter before the plaintiffs?

[DENMAN, J.—What evidence is there that the selection here was capricious or unreasonable? BOVILL, C.J.—In *Kell v. Anderson* (3) the detention of the vessel by the harbour-master before she

was allowed to go to her place for discharging her cargo arose from the factor placing the vessel in the meter's list, but because it was the usual course to have a meter on the sale of a cargo, the loss from the delay was held to fall on the shipowner. Therefore it comes here to the question only whether it was usual to employ a coal agent.]

At all events the working days commenced from the 11th of July, when the vessel actually entered the Wellington Dock, and not from the 23rd of July when the vessel might have gone to the tips to load. This is established by *Brown v. Johnson* (4). There the vessel after arriving at Hull, her port of discharge, entered the dock, but was unable to get to the place of unloading until two days afterwards, in consequence of the full state of the dock, and it was held that the lay-days were to be calculated from the period of her arrival in the dock, and not at the place of unloading.

[BOVILL, C.J., referred to *Parker v. Winlo* (5).]

If by the charter-party it was stipulated that the lay-days should only commence from the arrival of the vessel under the tips the plaintiffs would not be entitled to claim demurrage. The difficulty arises from the words "ordinary and customary manner;" but they refer to the mode of loading, and not the place of loading—*Lawson v. Burness* (6); besides the evidence here shewed that it was also usual to load from lighters, so that the plaintiffs cannot be said to have contracted to take their vessel to the tips for loading; all that they contracted was that the vessel should go to the usual place of loading, and she did so when she entered the dock named by the charterers.

BOVILL, C.J.—The question in this case turns on the construction of the charter-party. The charter-party provides that "the vessel shall, with all possible despatch, proceed direct to any Liverpool or Birkenhead dock as ordered by charterers,

(1) 2 Com. B. Rep. 412; s. c. 15 Law J. Rep. (N.S.) C.P. 28.

(2) 14 Com. B. Rep. 38; s. c. 23 Law J. Rep. (N.S.) C.P. 17.

(3) 10 Mees. & W. 498; s. c. 12 Law J. Rep. (N.S.) Exch. 100.

(4) 10 Mees. & W. 331; s. c. 11 Law J. Rep. (N.S.) Exch. 373.

(5) 7 E. & B. 942; s. c. 27 Law J. Rep. (N.S.) Q.B. 49.

(6) 1 Hurl. & C. 396.

and there load in the usual and customary manner a full and complete cargo of coals."

The question which has arisen is when the working days are to commence. There is no express stipulation in the charter-party with respect to the time at which the loading is to commence, except that it is not to commence before 1st of July. Then what is the ordinary rule under such circumstances, where the port, but no particular place in such port to which the vessel is to proceed, is named? It means that the time is to commence from the arrival of the vessel at the usual place of loading in that port. This does not mean when the vessel gets to her berth in a dock, but when she arrives at the dock, which is the usual place of loading, and if she cannot get to her berth, owing to the dock regulations, the loss from any such delay is one which falls on the charterer, and not on the shipowner. Now by the charter-party in the present case the vessel was to proceed to any dock at the port of Liverpool to which she should be ordered by the charterers, and therefore when the charterers selected the Wellington dock it became the same as if that dock had been mentioned in the charter-party, and as if, therefore, it had been that the vessel was to proceed direct to the Wellington dock, and there load the cargo stipulated for. Great stress was made during the argument on the words "usual and customary manner," but they apply in my opinion to the mode of loading, and not to the place of loading. In *Lawson v. Burness* (6), Pollock, C.B., says, "It appears to me that the words 'customary manner' mean the mode of loading, whether by a lighter or at the wharf," and that shews, I think, that these words, "usual and customary manner," do not apply to the place of loading. The cases which have been relied on by the counsel for the defendants are clearly distinguishable from the present case, because in each of those there was an express stipulation in the charter-party beyond the agreement to load in the ordinary and customary manner. In *Robertson v. Jackson* (1) it was stipulated that the time should be from the vessel being ready "in turn to deliver," and in *Leidemann v.*

Schultz (2) the expression was, "proceed to the river Tyne, and on arrival there be ready forthwith in regular turns of loading." So also in *Lawness v. Burness* (6), there was an express stipulation that the cargo should "be loaded in regular turn." In the charter-party in the case now before the Court there are no such words, but there is a stipulation in effect that the vessel shall proceed to the Wellington dock, and there load her cargo. Therefore the lay-days do not commence until she has got into the Wellington dock. If by reason of the dock regulations she cannot enter into that dock before a certain time, the loss by such delay must fall on the shipowners. The charterers had a right to name the dock, and having done so they are not answerable for the vessel not being able to get in so soon as it might otherwise have done but for such regulations. In this respect the case resembles that of *Kell v. Anderson* (3). Then it has been contended by Mr. Herschell that though the charterers had a right to select the dock, they had no right to select a particular coal agent, and that the delay was caused by reason of their having selected such agent. It must, however, be taken on these facts, that it was usual to employ coal agents, and that therefore the charterers in this case did no more in that respect than was usual. I observe that in *Leidemann v. Schultz* (2), Jervis, C.J., said, "If the captain may choose at what spout he will load, he may next choose what articles he will load with. It was not left to the jury to say whether the charterer had sent the ship improperly to an encumbered spout." So here I say, if the plaintiffs intended to rely on an improper selection of an agent, they should have had the matter left to the jury. They did not do so, and there has been no finding that the selection which the defendants made was an unreasonable one. Therefore there can be no claim for delay, because they selected one agent instead of another. The lay-days, for the reasons I have before mentioned, commenced on the 11th of July, and the charterers are responsible for any delay after their expiration, calculated from that time. With respect to the taking the ship from the

Wellington dock to Birkenhead, if the shipowners did so for their own convenience, they could not claim demurrage for the delay, but from the circumstances of this case, especially after reading the letters, I draw the inference that the ship was taken to Birkenhead by an agreement with the charterers, to prevent the more serious loss which might have arisen if she had remained in the Wellington dock; and the plaintiffs are therefore entitled to recover the amount due for twelve days' demurrage.

DENMAN, J.—I am of the same opinion. The question turns on the proper construction of the words of the charter-party in this case. I think that on the 11th of July the plaintiffs had done all that was incumbent on them to do, and that they were not then bound to do anything more. At first I thought the words in the charter-party, "in the usual and customary manner," might have a larger construction than I now think they properly bear. The vessel is to "proceed direct to any Liverpool or Birkenhead dock, as ordered by charterers." *Prima facie* that undertaking on the part of the shipowners is fulfilled the moment the vessel reached the dock named by the charterers. Then she was to load there "in the usual and customary manner," and it is said that she could do so only at a particular spout in the dock, and that therefore the charterers are not responsible for delay until she had reached that spout. I do not however think that the evidence bears that out, because it appears that the vessel might have been loaded by other ways, as for example, by lighters, and though the loading at the spout is the most usual, the loading by lighters is not unusual. I will only further add, that I agree with the Chief Justice that the charterers in this case are liable for demurrage from the 3rd to the 15th of August.

Rule absolute accordingly.

Attorneys—W. W. Wynne, agent for Forshaw & Hawkins, Liverpool, for plaintiff; Chester, Urquhart & Co., agents for Norris & Sons, Liverpool, for defendant.

1872. }
Nov. 25. }

SMALE v. BURR.

Bill of Sale—Successive Bills of which last alone Registered.

Where a bill of sale is given for good consideration, but not registered, and before the expiration of the time for registration it is annulled, and a similar bill of sale given which also is not registered, and, after this process has been repeated several times, at last a bill of sale is duly registered, such last bill of sale is valid against execution creditors if made bona fide with the intention of passing the property comprised in it.

This was an interpleader issue in which a claimant under a bill of sale from one Price was plaintiff, and an execution creditor of Price was defendant.

It appeared at the trial that the plaintiff Smale advanced 20*l.* to Price in June, 1871, and took an absolute bill of sale of his goods; that Price remained in possession, and such bill was never stamped or registered; that before the expiration of the twenty-one days allowed by the Bill of Sales Act for registration a new and exactly similar bill of sale (date excepted) was executed; that this process was regularly repeated; but that the last bill of sale given on the 15th of July, 1872, was duly registered on the 1st of August, 1872; and that on the 3rd of October, 1872, when execution was levied, Price was still in possession of the goods. The learned judge, Byles, J., left it to the jury to say whether the last bill of sale was honest or fraudulent between Smale and Price, and they found a verdict for the plaintiff.

M'Intyre now moved for a new trial on the ground of misdirection.—First, there was no valid consideration for the last bill of sale, inasmuch as the property had passed previously from Price by the first bill, and therefore the subsequent ones were void as against creditors. And *Hollingsworth v. White* (1) is no authority against the defendant, inasmuch as here the bills of sale are by way of absolute

(1) 6 Law Times N.S. 604.

conveyance, whereas there they were by way of mortgage and were supported on the ground of their being exercises of the right of redemption. Secondly, the jury should have been directed that these successive unregistered bills of sale were evidence of a fraud against creditors within *Edwards v. Harben* (2) and *Martindale v. Booth* (3).

BOVILL, C.J.—I much regret that we are obliged by our decision to give sanction to a practice which is a fraud on the revenue and a deception to creditors. But the first bill of sale being valid between the parties and for a valuable consideration, and each subsequent transaction amounting to an annulling of the previous bill of sale, the original consideration remained and was enough, and the property passed under the new bill so that if the requirements of the statute be fulfilled, as here they were on the last bill of sale, such new bill is valid against execution creditors according to the decision in *Hollingsworth v. White* (1). For though it is true that in that case the bills of sale were by way of mortgage, yet the decision must have turned on each subsequent transaction being an annulling of the previous bill of sale and the Court so treat it, so that the principle of that case applies. And in addition to that case there is the case of *Edwards v. English* (4), which though not in point confirms what I have said and enunciates the same principles.

BRETT, J.—In this interpleader issue the defendant is an execution creditor of Price, and has seized goods originally belonging to Price, and the plaintiff is a claimant under a bill of sale given by Price in 1872 and registered. It is suggested that this bill of sale is void, first, as being without consideration, secondly, as being intended to defraud creditors. Now, as respects the first point, it is clear that the registered bill of sale in question

was given as a final bill of sale after a series of other bills of sale which were not registered and each of which was cancelled as its successor was given, and that there was an original consideration of 20*l*. My brother Byles was asked to direct the jury that under these circumstances there was no consideration for the last bill of sale. But *Hollingsworth v. White* (1) is an authority to shew that the real meaning of the transactions was this, that the first bill of sale was intended to pass the property for consideration, and when the second and others were given, the meaning was that the bill given up was annulled on the terms that the 20*l*. should still remain a debt, and that the goods should become the goods of the debtor until reconveyed, such reconveyance to be immediate. It seems to me that it was competent for the parties, if they chose thus to annul the original bill of sale, and pass back the property to the debtor till the second was given, because there would in each case be an intention to pass back the property in the goods and the person to whom such property was to pass was in possession of the goods, and as the debt still existed each bill of sale was also still good and given for a sufficient consideration, and so on to the last bill. As respects the second point, viz., the objection on the ground of fraud, my brother Byles was asked to tell the jury that the fact of the previous bills not being registered, was conclusive evidence that the bill of sale now relied on was fraudulent and intended to defraud creditors, but he left it to the jury to say whether it was fraudulent as between the plaintiff and Price, i.e. whether on the last bill the property was intended to pass, and that direction was right. If it was intended by Price on the last occasion to pass the property, there was no fraud within the statute of Elizabeth, and its being fraudulent as against creditors was immaterial, as there is no bankruptcy.

GROVE, J.—I have reluctantly come to the same conclusion. There was originally a valid transfer, and the parties may tear that up if they please and execute a new transfer, and if the last be registered, as is the case here, it is enough.

(2) 2 Term Rep. 587.

(3) 3 B. & Ad. 498.

(4) 7 E. & B. 564; s. c. 26 Law J. Rep. (N.S.) Q.B. 193.

DENMAN, J.—I am of the same opinion, though I should be glad if I could decide otherwise; as, however, I cannot, I think this rule should not be granted.

Rule refused.

Attorney—G. M. Wetherfield, for creditor.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Common Pleas.)

1872. }
Nov. 28. } JEWESBURY, P.O. v. MUMMERY.

Executor—Action—Plene administravit—Devastavit—Estoppel from denying Assets.

The plaintiff (a creditor of the testator) having recovered judgment for his debt in an action against the executor after issue found for the plaintiff on a plea of plene administravit, sued the executor in an action on such judgment, suggesting a devastavit:—Held, that the defendant could not shew that the acts of waste complained of were committed by him before such judgment with the concurrence of the plaintiff, as that would amount to no assets as between the plaintiff and defendant and would therefore negative the judgment, which the defendant was estopped from doing.

The plaintiff was the public officer of the Gloucestershire Banking Company, which company in 1868, in the name of its then public officer, Lindsay Winterbotham, sued the defendant, as the executor of William Shackleford, deceased, on a covenant by the testator for the payment of such moneys as he might be indebted to the bank on the balance of account. To that action the defendant pleaded (*inter alia*) *plene administravit*, and issue was taken thereon. The cause was afterwards referred to an arbitrator, who found all the issues for the plaintiff, assessed the sum due to the plaintiff, on behalf of the bank, at 2,374*l.* 9*s.*, and found and adjudged that the defendant at the commencement of the action and since had assets to be administered to the value

of the sum so assessed to be due, where-with he might have satisfied the plaintiff. Judgment having been signed for the amount awarded the plaintiff brought the present action on such judgment, suggesting a *devastavit*.

To this action the defendant pleaded not guilty, and thirdly a plea, for defence upon equitable grounds, that the acts complained of in the declaration were committed by the defendant with the full knowledge, approbation, privity and concurrence and leave of the said banking company, and that the said company acted as the agents of the defendant in committing the same.

The plaintiff took issue thereon, and the cause came on for trial before Willes, J., at the London sittings after Michaelmas Term, 1870, when the judgment having been proved in the usual way with the writs of execution and return of *nulla bona*, the defendant proposed to give evidence relating to the testator's estate and its administration at a time previous to the said former action, and to shew the nature of the evidence on which the arbitrator had made his award, and in particular he proposed to shew that it had appeared before the said arbitrator, that a banking account had been opened by the executors of the testator (of whom the defendant was the survivor) with the said banking company to which account the banking company transferred a sum of money (the residue, after discharging the balance due from the testator on his current account of the produce of a certain policy of assurance, by which the said current account was secured), that sums of money had been paid into the said account to an amount exceeding the debt remaining due to the said company from the testator's estate, and that the said company had permitted the whole amount so paid in to be drawn out by cheques more than six years before this action instead of applying the same to the payment of the testator's said debt, that some of the said cheques appeared by their form to be payments on account of other than specialty debts, and further that the defendant and his co-executors had not had in his or their actual possession any assets of the

testator within six years before this action. The learned Judge however ruled that the defendant was estopped by the said judgment from denying that at the date thereof he had assets out of which he might have satisfied the plaintiff's debt, and that the proposed evidence could not be given.

A verdict was accordingly directed to be entered for the plaintiff with leave to the defendant to move to set the same aside, and enter instead thereof a verdict for the defendant; and pursuant to such leave, a rule *nisi* to this effect was obtained on the ground that the defendant was misled by the conduct of the plaintiff in the distribution of assets, and was at liberty to shew of what the *devastavit* consisted, and was not estopped from doing so by the judgment.

Cause was shewn against this rule in Trinity Term, 1871, when the Court of Common Pleas discharged the same. From this decision the defendant now appealed.

Giffard, for the appellant.—The question is whether the defendant was estopped from giving evidence to shew that the assets, though not duly administered according to law, had been applied under such circumstances, that the bank, whom the plaintiff represents, could not complain. No doubt if this defence could have been made to the first action it could not be raised in this action on the judgment. It could not, however, have been made in the first action, for that was against the defendant in his representative character only, and the only questions under the plea of *plene administravit* could have been whether the defendant had had assets, and had administered them in due course of law. Here the action is against the defendant personally, in which he is charged with having wasted the assets. As appears from the notes to *Wheatly v. Lane* (1), whether the proceeding be by a *scire fieri* inquiry, or by an action on a *devastavit*, the execution may traverse the *devastavit*. If he may traverse, why may he not confess and avoid?

(1) 1 Wms. Saund. 219c.

[BLACKBURN, J.—What you have to make out is that what you rely on as a defence to the present action on the *devastavit* could not have been shewn in the former action. It is found by the arbitrator that the defendant at the time of that action had assets.]

What was involved under the plea of *plene administravit* was whether the assets had been administered in due course of law, and the defendant could not have shewn that they had been misappropriated with the plaintiff's consent.

[BLACKBURN, J.—It is stated in 2 *Williams on Executors*, p. 1815, 6 ed., that "if an executor or administrator pleads *plene administravit*, and the plaintiff replies that the defendant had assets at the commencement of the suit, whereupon issue is joined, the burthen of proof lies upon the plaintiff, who must prove that assets existed or ought to have existed in the hands of the defendant at the time of the writ sued out," and for this is cited *Mara v. Quin* (2). If that be accurate it bears very much on this point. As I understand what Tindal, C.J., says in *Richards v. Browne* (3), with respect to a creditor having misled an executor in his distribution of assets, that learned Judge considered that such conduct of the creditor would have been a good defence by the executor in that action, had there been evidence to sustain it.]

No question arose there as to the pleadings or form of proceeding.

Anstie appeared for the respondent, but was not called on.

KELLY, C.B.—I am of opinion that the judgment of the Court below should be affirmed. The Gloucestershire Banking Company, suing by its public officer, brought an action against the defendant as executor, to recover a debt due from his testator; and the defendant, amongst other pleas, pleaded *plene administravit*, and issue was taken on that plea. The cause was referred, and the arbitrator found for the plaintiff on all the issues,

(2) 6 Term Rep. 1.

(3) 3 Bing. N.C. 493; s. c. 6 Law J. Rep. (N.S.) C.P. 95.

and judgment was entered for the plaintiff. Proceedings on such judgment have been since taken against the defendant suggesting a *derastavit*, and the defence which the defendant has raised is a defence upon equitable grounds, to the effect that the assets which had come to the defendant had been disposed of in such a way, with the concurrence of the Banking Company, that as between them and the defendant it did not amount to a *derastavit*; and at the trial the defendant proposed to give evidence of this, but as it was matter which existed at the time of the former action, the question which now arises is, whether it might not have been given in evidence on the trial before the arbitrator, in support of the plea of *plene administravit*. If the facts amount to an answer to this action on the *devastavit*, by shewing that the moneys were lawfully parted with as against the plaintiff, so in like manner, in my opinion, they might have been given in evidence in support of the plea of *plene administravit*, because, if they were so lawfully parted with, they would not then be assets, and such lawfully parting with (being the same as fully administering), would entitle the defendant to have the plea of *plene administravit* found for him. For these reasons I think the defendant was estopped from setting up such matter in evidence on the trial of this action, since it would go to negative the judgment in the original action.

BRAMWELL, B.—I am of the same opinion.

CHANNELL, B.—In the former action the defendant pleaded *plene administravit*, and issue was taken on that plea. Now, if the defendant had previously fully administered, he would not have had assets at the time he pleaded that plea; if, on the other hand, he had not done so, he would have had assets at that time. Then if the defendant could shew that he did what is alleged in the equitable plea to this action, either with the authority of the Banking Company, or because he was misled by them, he would do that which would go to shew that the sums in dispute were not assets in his hands. It appears to me that he had an opportunity of setting this up in the former action,

and that he was therefore precluded from setting it up in the present action.

BLACKBURN, J.—I am of the same opinion.—It has not been conceded by Mr. Giffard that if the defendant had an opportunity of raising at the trial of the first action what is sought to be set up as a defence to this action, he is precluded from setting it up now. The case of *Ramsden v. Jackson* (4) shews that the same law equally holds good in equity. Therefore the question is, whether this defence could have been given in evidence in the former action. The defendant seeks to shew that what would be no answer to an action by an ordinary creditor, was an answer to the plaintiff, because the plaintiff, or rather the bank, which he represents, was precluded from saying that there had been a misappropriation of assets, as what had been done by the executor had been done with the consent of the bank. In *Cooper v. Taylor* (5), Maule, J., shews that the effect of a plea of *plene administravit* is to deny that the executor has assets available towards payment of the plaintiff, and in *Richards v. Browne* (3), Tindal, C.J., lays it down "that if in the distribution of assets a creditor does mislead an executor either by laches or express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets." That seems to be good sense and law, and therefore, if the defence now relied on be good for anything, it might have been raised in the former action, and consequently the defendant is precluded from raising it now.

CLEASBY, B., and ARCHIBALD, J., concurred.

Judgment affirmed.

Attorneys—Stevens, Wilkinson & Harries, for appellant; W. H. Tattam, for respondents.

(4) 1 Atk. 292.

(5) 6 Man. & G. 989; s. c. 13 Law J. Rep. (N.S.) C.P. 92.

(Appeal from Revising Barrister's Court.)
 1872. } COOKE (appellant) v. BUTLER
 Nov. 13. } (respondent).

Parliament—County Vote—Occupation
 Franchise—30 & 31 Vict. c. 102. s. 6—
 Rateable Value.

The rateable value of the premises required by section 6, sub-section 2 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), for the 12l. occupation franchise in counties, is the real rateable value (which the Revising Barrister is at liberty to ascertain for himself), and is not necessarily the value at which such premises are rated in the rate-book.

At a Court held at Luton, in the county of Bedford, before the barrister appointed to revise the list of voters in the election of knights of the shire for the county of Bedford, John Hubbard, of No. 101, Wellington Street, in Luton aforesaid, whose name had not been placed by the overseers on the list of persons entitled to vote as owner or tenant of lands and tenements within the said parish of Luton, of the rateable value of 12l. or upwards, claimed to have his name inserted in the said list as being the occupier of premises of the rateable value of 12l. or upwards.

It was proved or admitted that the said John Hubbard being of full age and not subject to any legal incapacity, had occupied for a sufficient time on the 31st day of July last the said premises, and that he paid an annual rent of 14l., which it was proved was a fair rent for the same premises; that he was the occupier thereof on the 31st day of July last, and had been such occupier for twelve months immediately preceding; that he had been duly rated and had paid all poor-rates in respect of the premises, and that the premises were in an improving neighbourhood. It was also admitted that the premises of the said John Hubbard were not rated at a lower rate than similar premises occupied by other persons in the said parish.

It appeared from the poor-rate book that the gross estimated rental of the premises was there stated to be 14l. 9s. 0d., and the rateable value 11l. 12s. 6d. It

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was objected by the said appellant that inasmuch as the said premises were stated in the poor-rate book to be of the rateable value of 11l. 12s. 6d. only, and the respondent had paid rates upon that assessment, the respondent was not entitled to be registered as a voter in respect thereof.

The Revising Barrister held that the property was of the rateable value of 12l., and allowed the claim, and inserted the name of John Hubbard on the said list.

There was another case relating to another voter which depended on the same point, and which was consolidated with the appeal in the present case.

Gorst, for the appellant.—According to section 6, sub-section 2 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), the qualifying premises must be of "the rateable value of 12l." The question is whether the rateable value is that which the Revising Barrister may determine, or that which appears on the rate-book; in other words, whether the Revising Barrister is bound to take the value at which the premises are rated in the rate-book, as conclusively shewing what is the rateable value, or whether he can, notwithstanding what appears in the rate-book, receive evidence and determine for himself the rateable value. The appellant contends that the rate-book alone shews at what the property is rated, which is what the statute meant. There have been some doubts about this amongst revising barristers, and the point has been raised in the present case, in order to have the matter settled. Mr. Davis in his work on *Registration and Elections*, p. 231, in commenting on this part of the Representation of the People Act, 1867, says, "there may be some question, however, whether rateable value means rateable value on the rate-book, or the true rateable value, to be ascertained, if disputed, by the barrister, like the value 'of a 10l. occupation.' It certainly would have been better to have said the rateable value as appearing on the rate, and that will probably be the interpretation put upon the words."

Bulwer appeared for the respondent, but was not called upon.

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BOVILL, C.J.—I am opinion that this matter was correctly decided by the Revising Barrister. The words of the statute are "lands or tenements within the county of the rateable value of twelve pounds or upwards." It is clear that there is a marked distinction between lands of the rateable value of 12*l.* and lands rated at that value. It has been argued that the enactment means lands rated at such value, but I am of opinion that that is not correct; and that the Revising Barrister put the right construction on the words of this enactment. The lands in this case were found by him to be of the rateable value of 12*l.*, and therefore the voter was entitled to the franchise. With regard to what has been stated as to some revising barristers having refused to receive evidence of the real value of the lands, I am opinion that they have not taken a correct view of the matter, and that what is the rateable value is not to be considered as concluded by the rate-book.

BRETT, J.—I am of the same opinion. The sixth section, sub-section 2, says that the person who is entitled to the occupation franchise in counties must be the occupier "of lands or tenements within the county of the rateable value of 12*l.*," and the question is whether that means the real rateable value or the value put thereon in the rate-book, assuming that the last is not the rateable value. The words of the enactment are "rateable value of 12*l.*," but if the appellant is right they must mean the same as "rated at 12*l.*," but in the next sub-section the Legislature says, "has during the time of such occupation been rated," so that a distinction is taken by the Legislature in the same section between being rated and rateable value. It has been suggested by Mr. Davis in his work on *Registration and Elections*, that it would have been better if the statute had said "the rateable value as appearing on the rate." That seems to me to be a question of politics and not of law, but in either way I disagree with that writer, for if the value is to be taken only according to what the property has been rated at in the rate-book, it would follow as a necessary consequence that the right to the franchise would depend on the view

as to value taken by the overseers, and they would have the power of enfranchising or disfranchising large numbers of voters.

GROVE, J., and DENMAN, J., concurred.

Decision affirmed.

Attorneys—A Saunders, agent for Whyley & Piper, Bedford, for appellant; Williams & James, for respondent.

(Appeal from Revising Barrister's Court.)

1872. } BESWICK (appellant) v. ALKER
Nov. 13. } (respondent).

Parliament—County Vote—Qualification for Borough Vote—2 Will. 4. c. 45. s. 24.

A., a minister of a church, was stated to have, as minister, such a freehold interest in the rents received from the letting of pews in the church as entitled him to a vote for the county. He occupied as such minister the parsonage house, and in respect of such occupation acquired a right to a vote for a borough:—Held, that there was no such unity of occupation as would, according to section 24 of 2 Will. 4. c. 45, disentitle A. to the county vote.

Consolidated appeal from the Revising Barrister for the North-Western Division of Lancashire.

The appellant duly objected to the name of the respondent being retained on the list of persons entitled to vote in the election of members of parliament for the said division in respect of property situate in the township of Preston.

The qualification of the respondent was set out in the said register as follows—

"Alker, George: Lisbon Hall, Fishwick: freehold land and pew rents: St. Mary's Church, St. Mary's Street."

The respondent is minister of St. Mary's Church, which is situated within the parliamentary borough of Preston. No profit has accrued to him or is likely to accrue from the above-named land, but under the "Sentence of Consecration" of the said church, he is entitled to the rents of cer-

tain pews and sittings, which are let by the churchwardens according to a certain scale, which scale the churchwardens for the time being may, with the consent of the bishop, alter from time to time as occasion may require, and after deducting yearly two several sums of 8*l.* 15*s.* and 5*l.* for the services of the church, the said churchwardens pay the residue of such pew rents to the minister for the time being of the said church, to be received by him for his own absolute use and benefit by way of stipend. The sum which the respondent has so received from the above pew rents has always exceeded 100*l.* in the year. The house mentioned on the register as the respondent's place of abode, is the parsonage-house of the minister of St. Mary's, and the respondent occupies and is rated for it, and in respect of it has acquired the right to vote for the borough of Preston. It was objected that the said house was a part of his benefice, which benefice could not be divided so that any part of it could confer on the respondent the right to vote for the said division, and that, therefore, his name should be expunged from the said register.

The revising barrister decided that the respondent was entitled to have his name retained on the said register.

Leofric Temple, for the appellant.—By section 24 of 2 Will. 4. c. 45, it is enacted that no person shall be entitled to a vote for the county "in respect of his estate or interest as a freeholder in any house," &c., "or other building occupied by himself, or in any land occupied by himself together with any house," &c., "or other building, such house," &c., "or other building being either separately or jointly with the land so occupied therewith of such value as would, according to the provisions" of the Act, "confer on him the right of voting for any city or borough." The respondent occupied the parsonage-house, in respect of which he had the borough vote, only because he was the minister of the church, so also his right to the pew rents and land is dependent on his being such minister. The question, therefore, is whether there is not a unity of title in respect of the house, the pews and the land, within the meaning of such

24th section, and which prevents the respondent from dividing them so as to acquire thereby both a county and borough vote.

[BOVILL, C.J.—The case is imperfectly stated, but taking it as it stands, we must assume that by some way or another the respondent has a county qualification in respect of the pew rents. Then if so, how can the pew rents be land, so as to make it possible to say that the respondent occupies land and building within the meaning of the 24th section?]

The pew rents are profits arising out of the land. The case of *Cupell v. The Overseers of Aston* (1) shews that the claimant cannot sever what was held under one title so as to acquire both the county and borough vote. There the claimant occupied as owner freehold land in one parish in a borough, and also occupied as tenant a house in another parish in the same borough, and having thus distinct qualifications held under different titles, he was held entitled to be registered as a voter for the county as well as for the borough, but the reasoning for that decision shews that the result would have been different if the qualification for each were acquired under the same title.

[BRETT, J.—There is nothing in the 24th section as to unity of title. It is where there is unity of occupation.]

Here there were both unity of title and unity of occupation.

Gorst appeared for the respondent, but was not called upon.

BOVILL, C.J.—The question raised in this case is not whether the respondent be entitled to a vote for the county, but the objection, and the only one which is taken to his being so entitled, depends on the question which has arisen on the construction of section 24 of 2 Will. 4. c. 45. Now, upon the case as stated, I am of opinion that the appellant has not brought it within that 24th section. There is nothing to shew that the respondent was in the occupation of anything in the county but land which was of no value. It is said that he was in the occupation of

(1) 8 Com. B. Rep. 1; s. c. 19 Law J. Rep. (n.s.) C.P. 28.

pew rents, but there was no occupation by him of these in the sense in which the occupation of land is used in this enactment. It has been contended that he was in the occupation of the pews themselves which were on the land, but there is no such statement of this in the case; on the contrary, it would seem that the pews were in the possession of those who rented them or of the churchwardens. What is the interest which the respondent has in the pew rents, or how they give him a right to vote, is not stated in the case, but the only point raised is whether, assuming the respondent to be otherwise entitled, the case is within the 24th section. On the facts as stated, I am of opinion that the case is not brought within that section, and that, therefore, this appeal must be dismissed with costs.

BRETT, J.—It is difficult to gather from the statement what are the real facts of this case, but it seems to be taken that the claimant had such a freehold interest in respect of the pew rents as would entitle him to a vote for the county. It is not a right to vote in respect of the occupation of anything, but in respect to a right of pew rents. Then there is a statement in the case of the occupation by the claimant of the parsonage house in respect of which he has acquired a vote for the borough. He claims to be entitled to a vote for the county in respect of the pew rents, and the only way in which he could be so entitled would be by his having a rent charge, or of his having a freehold interest in the church, the profits derived from which consisting of the pew rents. Assuming that he is entitled by having a freehold interest in the church, and that he has also the parsonage-house, the objection is that he is not entitled to vote for the county in respect of such freehold interest in the church, because he occupies the parsonage-house which gives a vote for the borough. Now, the 24th section of the Reform Act says that he shall not be entitled to the county vote in respect of his interest in building or land occupied by him, together with a house which gives a right to the borough vote. The land which he has is stated to be of no value, and there is no

statement in the case that he occupies the church. He has a vote for the borough in respect of his occupation of the parsonage-house, but such house which he occupies, and the building (the church) which he does not occupy, give two distinct and different qualifications, and under these circumstances, though the two may be held under the same title, I apprehend that he may vote for the borough in respect of the house he occupies, and yet be entitled to the county vote in respect of his interest in the church.

GROVE, J.—I am of the same opinion. I cannot see how it can be said that the respondent occupies pew rents, and that he occupies them together with the parsonage-house.

DENMAN, J.—I also do not think that the parsonage-house is so connected with the pew rents as to bring the case within the 24th section of the Reform Act.

Decision affirmed.

Attorneys—Griffith & Brownlow, agents for Edelston, Preston, for appellant; Kimber & Ellis, for respondent.

(Appeal from Revising Barrister's Court.)

1872. { LITTLE (appellant) v. THE OVER-
Nov. 15. { SEERS OF THE PARISH OF
PENBETH (respondents).

Parliament—County Vote—30 & 31 Vict. c. 102. s. 6—Rating Members of a Firm—Description on Rate—Inaccurate Description cured by s. 75 of 6 & 7 Vict. c. 18.

A., who had been solely rated in respect of the premises occupied by him in his business, got the overseers to alter the rating to "A. & Sons" on the occasion of his taking his two sons into partnership, and carrying on business with them on the said premises under that partnership name of "A. & Sons." When A. retired from the business, which he did some time afterwards, the two sons continued the business under the same name of "A. & Sons," and paid the rates when called for:—Held, that the

sons were rated within the meaning of section 6 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), being described on the rate, though inaccurately, by the partnership name, and that such inaccuracy was cured by 6 & 7 Vict. c. 18. sec. 75.

Consolidated appeal from the Revising Barrister for East Cumberland.

At the Court held before the Revising Barrister for the revision of the list of voters for the parish of Penrith, objection was duly made to the name of George Arnison being retained upon the said list of voters for the said parish. The facts of the case were as follows: The name of George Arnison appeared upon the list in the following form—

PARISH OF PENRITH.

Voters as Occupiers of Rateable Value of 12l.

Arnison, George	Burrowgate, Penrith	Joint occupier of house and shop, of the rateable value of 80l. and upwards.	Devonshire Street
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The said George Arnison had a right to have his name retained upon the said list, provided the Court should be of opinion that under the following circumstances the said George Arnison was duly

rated in respect of the premises occupied by him within the meaning of 30 & 31 Vict. c. 102. s. 6. sub-sect. 3.

The premises in question are described in the rate-book as follows—

Name of Occupier.	Name of Owner.	Description of property rated.	Name or situation of property.	Gross estimated rental.	Rateable value.
N. Arnison & Sons	Nathan Arnison	House and Shop	Burrowgate	£ s. d. 105 0 0	£ s. d. 89 5 0

N. Arnison means Nathan Arnison. He is alive, and was formerly the sole occupier of the premises, where he carried on the business of a draper. He subsequently took two of his sons, the above-mentioned George Arnison and Thomas Bell Arnison, into partnership, and the business was carried on under the name of "N. Arnison & Sons." Nathan Arnison has retired from the business some years ago, and ever since his retirement the business has been carried on by the above-mentioned two sons under the name of "N. Arnison & Sons."

The said two sons are now the sole occupiers. Nathan Arnison has three other sons, but they do not occupy the premises in question, nor do they carry on business with the two above-mentioned.

For the last few years, when the rates have been called for, they have been paid by one or other of the two (George Arnison or Thomas Bell Arnison), and a receipt given for them as received from "N. Arnison & Sons."

With the consent of both parties the Revising Barrister received the statement of the overseer, and it is as follows.

The overseer stated that when he came into office fifteen years ago, "N. Arnison" was solely rated for the premises in question. About seven years ago N. Arnison requested him to alter the rating to "N. Arnison & Sons," but gave no name, and the rating has remained "N. Arnison & Sons" ever since. The Revising Barrister decided that as the said George Arnison was not named in the rate otherwise than as above

appears, he was not duly rated in respect of the premises occupied by him within the meaning of 30 & 31 Vict. c. 102. s. 6. sub-section 3.

The name of the said Thomas Bell Arnison, whose qualification was set out in the schedule annexed, was objected to under similar circumstances.

The Revising Barrister expunged the names of the said George Arnison and Thomas Bell Arnison from the said list.

Campbell Foster, for the appellant.—George Arnison was duly rated under the partnership name of N. Arnison & Sons. Section 6 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), which gives the occupation franchise in counties, requires the voter to have "been rated in respect to the premises so occupied by him" to the poor-rates made in respect of such premises. This is similar to section 27 of the Reform Act, 2 Will. 4. c. 45, with respect to the borough franchise. Then 31 & 32 Vict. c. 58. s. 30, applies to the occupation county franchise under the Representation of the People Act, 1867, the 30th section of the Reform Act (2 Will. 4. c. 45), which enables a party to claim to be rated, who has been altogether omitted from the rate-book, and also section 75 of 6 & 7 Vict. c. 18, which protects the occupier from losing his franchise by reason of any misnomer or inaccurate description in the rate if he has *bona fide* paid all rates he has been called upon to pay in respect of the qualifying premises. Here the claimants were rated, and were called upon to pay, and did in fact pay the rates. Inserting in the rate-book the name of the firm is a convenient mode of rating each member; and section 27 of the Representation of the People Act, 1867, recognises the case of partners, though not more than two, who may be entitled to the county franchise in respect of a joint occupation of the partnership premises. The Revising Barrister finds as a fact that after the sons had become partners the business was carried on under the name of "N. Arnison & Sons," and the overseers evidently intended to rate the firm, including thereby all its members. In *Moss v. The Overseers of St. Mary*,

Lichfield (1) the overseers had inserted in the rate the name of one only of two joint occupiers, and it was held that the case of such omitted party was not within the 75th section of 6 & 7 Vict. c. 18, as that applied only to the case of a misdescription of the person charged by the overseers; but Erle, C.J., said—"If a partnership firm is charged in the rate, each partner is intended to be charged." At most the description in the rate-book is only an insufficient description of the members of the firm, and is, therefore, cured by the 75th section of 6 & 7 Vict. c. 18.

No one appeared for the respondents.

BOVILL, C.J.—It appears from the case that George Arnison occupied the premises in question with his brother Thomas Arnison, and the two brothers carried on there the partnership business, using the old name of the firm, "N. Arnison & Sons." There was no one else using that name and occupying the premises under that name but these two brothers. Then comes the question whether the overseers intended to rate the persons who occupied the premises under the old name of the firm. Now I am unable to distinguish this case from that of any other in which a firm is rated; for instance, if a rate were imposed on the premises occupied by Messrs. Child & Co., the bankers, and the name of such firm were inserted in the rate-book, I should have no doubt but that the overseers intended thereby to rate the persons composing that firm. Then who are here described by "N. Arnison & Sons?" surely the persons who carry on the business under that name; and they are the persons who are rated. In *Moss v. The Overseers of St. Mary, Lichfield* (1), though not a decision upon this point, Erle, C.J., said—"If a partnership firm is charged in the rate, each partner is intended to be charged." In the present case the intention of the overseers was to charge with the rate the persons who carried on the business on these premises under the firm of N. Arnison & Sons. Those persons were the two sons,

(1) 14 Law J. Rep. (N.S.) C.P. 56.

the claimants in this case. The objection to the description is only that of a misnomer, and clearly comes within the 75th section of 6 & 7 Vict. c. 18; therefore the decision of the Revising Barrister must be reversed.

KEATING, J.—I am of the same opinion. I have had some doubt as to whether it was intended to rate the sons, but on the whole I think it was and that the case comes within 6 & 7 Vict. c. 18. s. 75. The father of the sons had been originally rated, and then on the occasion of his taking his two sons into partnership he went to the overseers and desired them to alter the rating to "N. Arnison & Sons." Accordingly that was done. The overseers say that no names of the sons were mentioned. But it appears that after rates had been made on the firm the overseers called on the two sons for and these two partners paid the rates. I think that under these circumstances there is sufficient ground for saying that the overseers intended, under the name of "N. Arnison & Sons," to rate the partners comprising that firm. Undoubtedly it was not an accurate description of these persons in the rate-book, but it is not necessary to say how far a rate so made could have been enforced, because the seventy-fifth section of 6 & 7 Vict. c. 18 was intended to cure a case like this, in which the partners have been *bona fide* rated, but under an inaccurate description. I do not think the case is by any means free from doubt, but on the whole I think the conclusion I have come to is the one I ought to arrive at.

BRETT, J.—The voter claimed to be entitled under section 6 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102) and it was therefore necessary that he should shew that he had been duly rated in respect of the qualifying premises. On turning to the rate-book there is a description of the persons rated in respect of such premises and the question is whether that is sufficient to shew that this voter was rated. It is certainly not an accurate description of him, but it is said the want of such accuracy may be cured by section 75 of 6 & 7

Vict. c. 18. That section is made applicable to the Occupation County Franchise by 31 & 32 Vict. c. 58. s. 30, and the question is whether the present case comes within that seventy-fifth section. The section itself is singularly drawn because it says that where the person occupying the premises and being the person liable to be rated for such premises shall have been *bona fide* called upon to pay certain rates and shall have paid all rates which he shall have been so called upon to pay, such person shall be considered as having been rated and paid such rates, which would seem applicable although he had never been rated at all, but then comes the proviso, "any misnomer or inaccurate or insufficient description in any rate of the person so occupying or of the premises occupied notwithstanding." That seems to assume that there is some description of the person on the rate, but an inaccurate or insufficient one, and it consequently assumes that the person has been rated or intended to be rated. Therefore, it is necessary to shew that the claimant has not only paid the rates, but that he has been rated and that there has been an attempt to describe him on the rate. Now it appears from the case that the father, Nathan Arnison, was on the rate and was solely rated in respect of these premises. He took his sons George and Thomas into partnership and then went to the overseers and requested them to change the name on the rate to "N. Arnison & Sons." There can be no meaning in what he so did, unless he intended that his sons should be rated. The next part of the case tends to shew that he made that intention of his known to the overseers. It is true that it is stated in the case that he gave no names, but there is no statement as to what further information he gave, and there is the fact that the overseers afterwards called on the sons for the rates, and that the sons paid them, and that seems to my mind strong evidence that the overseers when they put the name of the firm in the rate book intended to rate not only the father but any sons of his who might be members of the firm though their names were not given. That is sufficient to shew that the claimant was

rated. Then the question is whether he was sufficiently described on the rate. There was a description of him, though not an accurate one, if, in the description of the firm, as I think was the case, the members of the firm were thereby intended to be described. Then the inaccuracy of the description is cured by section 75. I think that the point on which the revising barrister acted was not so much that the claimant was not intended to be rated, as that he was not named in the rate. But I think that he was intended to be described in the name of the firm, and that therefore the revising barrister was wrong in considering that this was an inaccuracy which could not be cured, and his decision ought to be reversed.

GROVE, J.—I am of the same opinion. I have had some doubts on the point, and should have wished the matter had been argued by counsel for the respondent. The doubts I have had have been whether there was a misnomer, or inaccurate or insufficient description in the rate to which the 75th section could apply, supposing there was no description at all of the claimant. I think, however, that the description, "N. Arnison & Sons," was some description of the sons of N. Arnison. Then when once there is a description the 75th section applies and prevents the person from losing his right of voting by reason of any inaccurate description. I forbear expressing any opinion whether, in the case of persons trading under the name of a firm, the putting that name on the rate would be a sufficient rating of all those persons. Here I think there was a description, though not an accurate one, and that the same was cured by the 75th section.

Decision reversed.

Attorneys Johnston & Co., agents for Harrison & Little, Penrith, for appellant.

(*Appeal from Revising Barrister's Court.*)

1872.
Nov. 15. { EARL BEAUCHAMP (*appellant*) v. THE OVERSEERS OF THE PARISH OF MADRESFIELD (*respondents*).
MARQUIS OF SALISBURY (*appellant*) v. THE OVERSEERS OF THE PARISH OF SOUTH MIMMS (*respondents*).
THE SAME v. BONTEMS (*respondent*).
THE SAME v. BULWER (*respondent*).

Parliament—County Vote—Qualification—Incapacity—Peer of Parliament.

A peer of Parliament is incapacitated by law from voting at elections for members of the House of Commons, and is therefore not entitled to have his name on the register of voters.

These were separate appeals from the several revising barristers appointed to revise the list of voters for the counties of Worcester, Middlesex, Hertford and Essex, and the same question was raised in each, namely, whether a peer of the realm and a lord of Parliament was, as such, legally incapacitated from being registered as a voter for knights of the shire to represent the commoners in the Commons House of Parliament.

In each case, the revising barrister decided that the appellant, being a peer of Parliament, was therefore not entitled to have his name on the register of voters for the county, and rejected the claim of the appellant to be on such register.

Wills (A. L. Smith with him), for Earl Beauchamp, the appellant in the first of these cases.

Manisty, for the Marquis of Salisbury, the appellant in the other three cases.

With the exception of some precedents in early times anterior to the reign of Henry the Fifth, in which peers were parties to indentures of returns for knights of the shire to Parliament, as appears from *Prynne's Brevia Parliamentaria* and *Heywood on County Elections*, p. 316 (but which precedents were relied on in support of the right of females to

the franchise in *Chorlton v. Lings* (1), and were treated by the Court as exceptional), it must be admitted that the authorities are all against the claim made by the appellants in these cases. The statute, 8 Hen. 6. c. 7, would seem to support the idea that peers might have been concerned in the elections of knights of the shire to Parliament, for the electors are there spoken of in the most general and large terms as people dwelling within the county, and there is nothing in the terms there used to shew that peers were excluded. But the text books are certainly the other way. In 1 *Black. Comm.* 158, after describing the Lords it is said, "The Commons consist of all such men of property in the kingdom as have not seats in the House of Lords, every one of which has a voice in Parliament either personally or by his representatives." So in 4 *Institutes*, p. 2, Lord Coke says—"And whosoever is not a lord of Parliament and of the Lords' House is of the House of the Commons either in person or by representation, partly coagmentative and partly representative." And again in 2 *Institutes*, 29, Lord Coke states the following: "The general division of persons by the law of England is either one that is noble and in respect of his nobility of the Lords House of Parliament, or one of the commons of the realm, and in respect thereof of the House of Commons in Parliament, and as there be divers degrees of nobility, as dukes, marquises, earls, viscounts and barons, and yet all of them are comprehended within this word *peers*, so of the commons of the realm there be knights, esquires, gentlemen, citizens, yeomen and burgesses of several degrees, and yet all of them of the commons of the realm."

The capacity of peers to vote for members of the House of Commons is a matter relating to the law of Parliament, and with reference to such law it is stated in 1 *Black. Comm.* 163, "that the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that

house to which it relates and not elsewhere.' Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess, nor will either house permit the subordinate courts of law to examine the merits of either case." To the same effect is 4 *Institutes*, p. 15. No doubt the House of Commons cannot alter the qualification of a voter as required by law, or by any resolution declare that persons possessing such qualification shall no longer be entitled to vote, but when the House sat on election petitions it sat judicially, and its resolutions on these occasions may be viewed as declarations of what was the law relating to the question then raised before it. In that sense may be treated the resolution of the House of Commons in 1669, when the House was trying the validity of the Malden election, and it had been proved before it that the Earl of Manchester had voted for the sitting member. The House rejected such vote and passed the resolution that no peer hath a right to vote at elections. This resolution has been repeated at the commencement of every session, together with a further resolution that if a peer or lord lieutenant of a county concerns himself in elections it is an infringement of the liberties of the commons. Lord Chief Baron Comyns in *Com. Dig. Parliament*, D. 10, recognises these resolutions as law, and they are also given in *Elliot on Registrations*, p. 261, where the Malden case and the other cases in which peers have voted and their votes have been struck out are referred to, as shewing that a peer has no right to vote at elections.

Serjeant Heywood, in his work on *County Elections*, p. 316, admits that for centuries peers have not been allowed to vote for members of the House of Commons, though he considers that the returns preserved by Pryne indicate that in the earlier periods of our history they had exercised that privilege, and that it is not clear when they were first excluded from voting.

In the debate on the Tynemouth election, in the House of Lords, June 7, 1853, Lord Brougham having referred to this

(1) 38 Law J. Rep. (N.S.) C.P. 25; s. c. Law Rep. 4 C.P. 374.

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question as a vexed one, whether peers might interfere at all at elections, and having disputed the validity of the resolution of the House of Commons, Lord Campbell said as a question had been raised which "he had frequently and deliberately considered he thought himself bound to express his opinion upon it. The question was, whether a peer had any right to vote for a representative in the Commons House of Parliament? He was clearly of opinion that a peer had no such right or power. He placed no importance at all upon the resolution of the House of Commons. That House could not make laws. It might declare what the law was, but it could not, by any resolution it might pass, alter the constitution of the country; and the case of lords lieutenant shewed that the resolution against the peers by itself had no weight. But irrespective of that resolution—by immemorial usage, by authority and by reason—he was clearly of opinion that not one of their Lordships who sat there by hereditary right, or by grant of the Crown, had any right to interfere in any election of a representative of the people," and Lord Brougham thereupon added that he "hoped Lord Campbell would not believe that he entertained the notion that a peer had a right to vote in the election of a member of the House of Commons. He never dreamt of such a thing. All he wished to protest against was the presumed validity of the resolution of the House of Commons as such that it was a breach of privilege for a peer to interfere in an election."

It appears also in a note to *Sir E. May's Parliamentary Practice*, 6th ed. p. 604, that upon another occasion, in July, 1858, "Lord Campbell said, 'a peer has no right to vote by the common law of England for the election of the House of Commons, the resolution of the House only declares the common law,' and again, 'since the Reform Bill peers have frequently sought to register their votes for the election of members of the House of Commons, but the revising barristers had invariably and most properly refused to allow them,'" for this is cited 151 *Hans. Deb.* 3 session, 926, 927. It is clear that the House of Commons and its committees

have always acted on this as the law, and though by the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), their jurisdiction has been transferred to the Election Judges and the Court of Common Pleas, still by section 26 of that Act, "the principles, practice and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions" are to be observed by the Court or Judge in the case of election petitions under that Act. Therefore if a peer had voted, the Election Judge and this Court would be bound to disallow the vote, and after this it becomes impossible to contend successfully that a peer has a right to vote.

Henry James and *G. Browne* appeared for the different respondents, but were not called upon by the Court.—They however referred to *Rogers on Elections*, p. 177, 10th ed., and the statute 1 Hen. 5. c. 1.

BOVILL, C.J.—From the course which has been taken and properly taken by the learned counsel on the arguments of these cases the Court cannot pronounce any other judgment than that of affirming the decisions of the revising barristers. The right of peers to vote at elections is in my opinion precluded by the authority of Parliament. There is the express opinion of the House of Commons, pronounced judicially as to the validity of a vote given by the Earl of Manchester at the Malden election in 1669, when that House passed a resolution in these terms—"that no peer of this kingdom hath any right to his vote at the election of any member to serve in Parliament." It was a resolution not merely expressing the will of the House, but deciding upon the right of peers to vote. This resolution has been repeated every session to the present day, and in addition to this another resolution was passed in 1802, and has been since continued, "that it is a high infringement of the liberties and privileges of the commons of the United Kingdom for any lord of Parliament, or other peer or prelate, not being a peer of Ireland at the time elected, and not having declined to serve for any county, city, or borough of Great Britain, to concern himself in

the election of candidates to serve for the Commons in Parliament, except only any peer of Ireland at such election in Great Britain respectively where such peer shall offer as a candidate, or by himself or any others be proposed to be elected, or for any lord lieutenant or governor of any county to avail himself of any authority derived from his commission to influence the election, of any members to serve for the Commons in Parliament."

It is not now necessary to enter into the reasons why peers are excluded from being voters, and it is sufficient to say that such is the law. The resolution of the House of Commons on the occasion of the Malden election was not a resolution as to who ought to vote, but was declaratory of the law as to the right to vote, and was passed by the House sitting judicially as a Court empowered to try election petitions. Committees of the House, appointed to enquire into the validity of elections, have from time to time acted on the law as declared by such resolution, and the uniform course up to the present time has been to exclude peers from voting at the election of members of the House of Commons. Has that been submitted to by the House of Lords? It has, and for upwards of 170 years no instance can be found of any peer being allowed to vote, whilst every text-book on the subject lays down the proposition that no peer of Parliament is entitled to vote. There is the authority of Lord Coke, of Chief Baron Comyns, of Mr. Justice Blackstone, and of Lords Campbell and Brougham to the same effect; and therefore, in whatever way the question is looked at, it would seem to be conclusively settled against the existence of any such right; and that view of the law has been uniformly acted on for upwards of a century and a half. Independently of the Parliamentary Elections Act, 1868, I have no hesitation in declaring my opinion that a peer has no right to vote at the election of members of the House of Commons. Formerly, if a peer had voted, and the matter had gone, as the practice was originally, before the House of Commons, or, as the practice was afterwards, altered before a committee of that House, the vote would certainly have been

struck off. What, in such a case, could an Election Judge now do? He would have no power to act otherwise than in accordance with what had been the practice of committees of the House of Commons, and must strike off the vote. Abstaining, as I desire to do, from saying what is the proper construction of the 26th section of the Parliamentary Elections Act. My opinion is, that peers have not the right which they have claimed in these cases, and that these appeals must be dismissed.

KEATING, J.—I am of the same opinion. There can be no doubt that the authorities are all one way. We have, in the first place, the authority of the House of Commons declaring the law on this particular point. I do not suggest that the House of Commons alone has any right to make the law, but looking at the resolution it passed on the occasion of the Malden election as a declaration of what the law was, it is, I think, entitled to every respect. There is, moreover, authority corroborating it, because before it there was the statute 1 Hen. 5. c. 1, by which it is enacted that the knights of the shire are not to be chosen unless they be resident within the shire; "and that the knights and esquires and others which shall be choosers of those knights of the shire be also resident," &c. That seems to shew that the electors, who were to be knights and esquires and others, were not to be of a higher rank than knights, and appears to be an authority for supposing that at that time Peers were excluded from voting for knights of the shire. There is also the authority of Lord Coke justifying the resolution of the House as a correct declaration of what was the law. Furthermore, the resolution itself has been imported into his digest by Chief Baron Comyns, and it has therefore received the stamp of his high authority. There is also the authority of Lords Campbell and Brougham, confirmed by the strongest of all authorities, uninterrupted usage for a very long period, against the right of a peer to vote at parliamentary elections. Counsel have not been able to discover a single authority in favour of such right, except what is stated in *Heywood on County*

Elections as to the right having once existed, but which, when traced to its source, viz., *Prynne's Returns*, is of no weight. Indeed; the authorities seem all one way. Reference has been made to the 26th section of the Parliamentary Elections Act, 1868, but I do not put my judgment on that, for notwithstanding the large word, "principles," in that section, I think it doubtful whether it was intended to fetter the Court or Judge beyond what was a matter of procedure before the committees of the House; and I state this because in the case of *The Norwich Election Petition—Stevens v. Tillett* (2) this Court did not (as I understand that case), give any judgment on the effect of that 26th section as at first I supposed it had. For the reasons I have mentioned, I agree with my Lord that the revising barristers were right in their decisions in these cases, and I only wish to add that I entirely approve of the course pursued by the learned counsel for the appellants in candidly admitting that the authorities were against them, and in bringing all the authorities they could find before the Court; for I am not aware that counsel can have a higher or more important duty than that of properly assisting the Court in coming to a right determination.

BRETT, J.—I cannot but think the Court has been put in a very difficult position by the course which the counsel for the appellants have taken in these cases, and I am sorry to have to express any judgment upon these cases, because the counsel have stated everything against the proposition which they had to make out, and have in fact admitted that they had no case. I agree with my brother Keating that it is the duty of counsel to assist the Court, but I think when they feel they have no case, their better course is to withdraw it altogether, without making any statement whatever; and I think, moreover, they are sufficiently masters of the case to entitle them to do this, unless they be expressly forbidden by their clients. Now it is said that peers have no right to vote at elections for members of the House of Commons; and that this is

so, is shewn, firstly, by the common law, that is to say, by immemorial usage; and secondly, though it be not so shewn by the common law, that still the committees of the House of Commons have so held it as a matter of principle, and that by the 26th section of the Parliamentary Elections Act, 1868, the Election Judges and this Court are therefore bound to uphold it. If our decision depended on this last ground, I for one should hesitate to be a party to it, for I doubt if the 26th section be intended to refer to anything more than matters of procedure, because it contemplates rules being made pursuant to the 25th section, and these could only be made as to procedure, and not for the purpose of altering the franchise. The first ground, however, is the one we must consider. It is said that there is immemorial usage against the right and that this is proved by a judicial decision of the House of Commons given on the Malden election petition; and assuming that before the Grenville Act (10 Geo. 3. c. 16), the decisions of the House on election cases were judicial, I apprehend the decision in that case would be entitled to the highest respect, although it would not be binding on this Court. Now it may be that the resolution then come to was intended as a decision of what the law was at common law; and if so it is entitled to the respect I have named. On the other hand it may be that the House intended to decide on such resolution as a resolution only of the House. If the last be the case, I protest against the idea of its being binding as such resolution on this Court, or of this Court adopting it. I must own that I think it doubtful that the resolution was a judicial decision, or was so intended by the House, because it has been repeated every session, and that too after the Grenville Act and after the House had given up deciding election petitions, and that it might have been well argued that it was not a judicial decision. But it has been admitted by the counsel for the appellants that it was a judicial decision, and after that and the statement of counsel for the appellants, that with all their researches they have not found any authority before

(2) 40 Law J. Rep. (N.S.) C.P. 58; s. c. Law Rep. 6 C.P. 147.

such resolution in support of the right of peers to vote at elections, I think there is strong evidence in favour of immemorial usage against the existence of such right. Therefore, irrespectively of the resolution, I think that the decision of the House of Commons on the Malden election petition was right, and that it is the law of this country, and was so before such resolution was passed, and for that reason and for that alone, I acquiesce in the judgment of this Court. I agree that if peers have no right to vote, they have no right to have their names on the register of voters, and that the decisions of the revising barristers should be affirmed. GROVE, J.—I concur in the judgment, but I abstain from giving any reason, as I find it difficult to pronounce a judicial opinion when only one side and one of the case have been presented before us.

Decisions affirmed.

Attorneys—Young, Maples & Co., agents for Goldingham & Parker, Worcester, for appellant and respondents; Nicholson & Herbert, for Marquis of Salisbury.

(Appeal from Revising Barrister's Court.)
1872. } BROWN (appellant) v. TAMPLIN
Nov. 20. } (respondent).

Parliament—Consolidated Appeal—Notice to respondent.

A consolidated case of appeal, naming the returning officer of a borough as respondent, was signed on the 31st of October; notice of appeal was not given to him till the 4th of November; the first day appointed for hearing appeals was the 13th of November:—Held (the respondent not appearing), that the appeal could not be heard.

This was a consolidated case on appeal stated by the revising barrister for the borough of Marylebone, in which the respondent did not appear.

The case was on the 31st of October signed by the barrister, who therein named Tamplin, the returning officer, respondent, as no one was willing to un-

dertake that office. Notice of appeal was not given to Tamplin till the 4th of November; and the first day appointed for hearing appeals was the 13th of November.

Sir J. Karslake (Tindal Atkinson with him) now moved that the appeal be heard, relying on an affidavit which disclosed the following facts: that the respondent was not appointed till the 30th of October, and there was a discussion as to whether he could be appointed against his will; that the barrister required to compare the schedule with the lists; that the appellant's attorney promised not to deposit the case till the 4th of November, before which day the barrister was satisfied the schedule was correct, and no one agreeing to be respondent, made no alteration; and that such attorney did not know for certain till then whether some other person would not be appointed respondent.

BOVILL, C.J.—I should be glad if it were open to us to allow this appeal to be heard, and if the point now arose for the first time I do not say that I should not be inclined to do so. But our jurisdiction is defined by statute, and not only are we bound by the statute, but also by the decided cases, in all of which it has been held that we are bound to strictly follow the statute, and have no discretion. In *Aldworth v. Dore* (1), Wilde, C.J., says, "I have a strong opinion upon the necessity of adhering strictly to the provisions of this Act of Parliament, and we ought not to hold that the power in the 64th section applies, except upon substantial grounds." And again in *Palmer v. Allen* (2), he says, "The jurisdiction created by this Act of Parliament has been long enough in existence to enable all parties interested to become acquainted with the practice. Ignorance is no excuse. This case might have been arrived at on the first day appointed for the hearing of these appeals . . ." The question we have now to deal with arises on the proviso to section 64 of 6 Vict. c. 18, interpreted according to the decisions. Now term beginning

(1) 5 Com. B. Rep. 89; s. c. 2 Lutw. 67.

(2) 6 Com. B. Rep. 51; s. c. 18 Law J. Rep. (n.s.) C.P. 265.

on the 2nd of November, the 13th of November was appointed for hearing appeals. Was there then reasonable time to give notice to the respondent? If there had been a willing respondent, no difficulty would have arisen, but here no one was willing. The decision, however, was well known before the case was settled. During the time of settling it there was time to determine who should be respondent, no one was willing, and therefore the revising barrister was bound to name one, and the statute saying that certain public officers shall be appointed, here Tamplin, the returning officer, on the 31st of October, was distinctly nominated respondent, and the consolidated appeal signed. The appellant then had to act on it, and, amongst other things, to give notice; there was a respondent, no application to appoint another, no difficulty in complying with the requirements of the statute and decided cases; the next day notice might have been given, but the appellant fails to do so, and there is no ground for saying there was no reasonable time, for it is not

because the matter was overlooked that we are to give a different decision as to what is reasonable time. If we had any discretion I should be glad, but after the decisions our hands are tied.

KEATING, J.—I am of the same opinion, though I come to that conclusion reluctantly. Whether there was reasonable time is the only question, and there was.

BRETT, J.—The 13th of November was appointed for hearing appeals, the ten days' notice was not given, and therefore the case is within the prohibitive words of the section, and so the question arises as to the proviso. I am of opinion that it does not appear that there was not reasonable time, as the respondent was named on the 31st of October, and this was known, and there were thirteen days to the 13th of November.

DENMAN, J.—I am of the same opinion. We are bound by the cases.

Appeal dismissed.

Attorney—Augustus Beddall, for the applicant.

(Appeal from Revising Barrister's Court.)

1872. { WEBSTER (appellant) v. THE
Nov. 19. { OVERSEERS OF ASHTON-UNDER-
LYNE (respondents).
ORME'S CASE.

Parliament—County Vote—Rent-charge
—Actual Possession—2 Will. 4. c. 45. s. 26.
—Statute of Uses, 27 Hen. 8. c. 10.

A rent-charge was granted to A., B. and C. to hold to the said A., B. and C., to the use of the said A., B. and C., their heirs and assigns for ever, as tenants in common:—Held, that such grant took effect at common law and not by the operation of the Statute of Uses (27 Hen. 8. c. 10), and that therefore

neither A., B. or C. had the actual possession of such rent-charge as required by the 2 Will. 4. c. 45. s. 26, to entitle him to be registered as a voter in respect of his interest in the same until he had actually received such rent or some part thereof.

Consolidated appeal from the decision of the Revising Barrister appointed to revise the list of voters for the south-eastern division of the county of Lancaster.

The appellant duly objected to the name of Robert Byron Orme being inserted on the list of voters for the said division of the said county.

The claim of this Robert Byron Orme was as follows:

Orme, Robert Byron.	Stamford Street, Ashton-under-Lyne.	One-third share of rent-charge issuing from freehold land and buildings.	Fleet Street, William Orme, owner.
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The following facts were established by the evidence. By an indenture made and dated the 30th of October, 1871, and made between William Orme of the one

part and the said Robert Byron Orme, Enoch Lawton and James Kerfoot of the other part, the said William Orme being seised in fee simple in possession of

certain lands, messuages and hereditaments in Ashton-under-Lyne aforesaid, granted unto the said Robert Byron Orme, Enoch Lawton and James Kerfoot, one perpetual yearly rent-charge of 9l. to be payable clear of all deductions (except property or income tax) by equal half-yearly payments, on the 5th of April and the 5th of October in each year, and the first payment to be due on the 5th of April then next, and to be issuing from and out of and charged and chargeable upon the said lands, messuages and hereditaments, to hold the said rent-charge unto the said Robert Byron Orme, Enoch Lawton and James Kerfoot, their heirs and assigns, to the use of the said Robert Byron Orme, Enoch Lawton and James Kerfoot, their heirs and assigns for ever, as tenants in common and in equal shares.

There was a covenant by the said William Orme with the said Robert Byron Orme, Enoch Lawton and James Kerfoot, to pay the said rent-charge at the times and in manner appointed for payment thereof, and a power of distress over the said lands, messuages and hereditaments, in case of non-payment.

The moiety of the said rent-charge of 9l., due on the 5th of April, 1872, was paid by the said William Orme to, and equally divided between the said Robert Byron Orme, Enoch Lawton and James Kerfoot.

It was contended by the said objector, that the said Robert Byron Orme was not in the actual possession of the said rent-charge for six calendar months previous to the last day of July, 1872, as required by the 2 Will. 4. c. 45. s. 26.

It was contended by the party objected to, upon the authority of *Heelis v. Blain* (1), that the Statute of Uses, 27 Hen. 8. c. 10, operated to give to the said party objected to, and the said Enoch Lawton and James Kerfoot, the actual possession of the said rent-charge on the execution of the said indenture.

The Revising Barrister held, upon the authority of that case, that the claim was good.

(1) 18 Com. B. Rep. N.S. 90; s. c. 34 Law J. Rep. (N.S.) C.P. 88.

Herschell, for the appellant.—The cases of *Murray v. Thorniley* (2), and *Hayden v. The Overseers of Twerton* (3), decide that the actual possession required by 2 Will. 4. c. 45. s. 26, is possession in fact and not merely possession in law, and that therefore the grantee of a rent-charge, where the conveyance of the rent-charge takes effect at common law, is not entitled to be registered in respect of his interest in such rent-charge until he has been in the actual receipt of it for six months before the last day of July. In *Heelis v. Blain* (1), it was decided that that is different where the rent-charge is by a conveyance under the Statute of Uses (27 Hen. 8. c. 10. s. 1), because when the use is then executed the *cestui que use* is by virtue of that statute in actual possession. The question is, whether the present case is not distinguishable from *Heelis v. Blain* (1), because this is not a case to which the Statute of Uses applies. The statute applies only where the grant is to one person to the use of another person. Here the rent-charge is granted to R. B. Orme, E. Lawton and J. Kerfoot, to the use of the said R. B. Orme, E. Lawton and J. Kerfoot. It is the same as a grant to A. to the use of A., when the Statute of Uses would clearly not operate. The conveyance of the grant is therefore a conveyance at common law, and the case is within *Murray v. Thorniley* (2) and *Hayden v. The Overseers of Twerton* (3), by which it must be governed.

Mellor (*Digby* with him), for the respondents.—The deed operated here under the Statute of Uses, and the case of *Heelis v. Blain* (1) applies. There is a distinction between a grant to A. and his heirs, and to A. to the use of A. and his heirs. In *Williams on Real Property*, 9th ed. p. 154, it is said, “suppose a feoffment to be now made simply to A. and his heirs, without any consideration. We have seen that before the statute the feoffor would in this case have been held in equity to have the use for want of any consideration to pass it

(2) 2 Com. B. Rep. 217; s. c. 15 Law J. Rep. (N.S.) C.P. 155.

(3) 4 Com. B. Rep. 1; s. c. 16 Law J. Rep. (N.S.) C.P. 88.

to the feoffee, now therefore, the feoffor having the use shall be deemed in lawful seisin and possession, and consequently by such a feoffment, although livery of seisin be duly made to A., yet no permanent estate will pass to him, for the moment he obtains the estate he holds it to the use of the feoffor, and the same instant comes the statute and gives to the feoffor who has the use the seisin and possession." So in *Gilbert on Uses*, p. 89, 3rd ed.—"The mere alteration of the possession does not in equity give a right, but it shall be to the use of the donor, unless in two cases: first, where the use is expressed, and secondly, where there is a valuable consideration." "Suppose again," says Mr. Williams, in his work on Real Property, p. 181, "a person should wish to convey a freehold estate to another person, reserving to himself a life interest—without the aid of the Statute of Uses, he would be unable to accomplish this result by a single deed. But by means of the statute he may now make a conveyance of the property to the other and his heirs, to the use of himself (the conveying party) for his life, and from and immediately after his decease to the use of the other and his heirs and assigns. By this means the conveying party will at once become seised of an estate only for his life, and after his decease an estate in fee simple will remain to the other." In *Heelis v. Blain* (1), the deed was similar to the present. John Heelis was one of the parties to whom the rent-charge was granted, and it was granted to the use of himself as well as to the use of the other four persons, and yet John took under the Statute of Uses; if not he would have been in a different position from the rest, and that the Court never intended should be the result of their decision. Then if the Statute of Uses was executed in that case it is difficult to draw a distinction between that and the present case. Why here may not each of the three persons be trustee to pass the possession to the others and so the statute apply?

Further, looking at the first part of the *habendum* in the deed in the present case, the grant is a grant to the three persons as joint tenants, but the use declared is to the three as tenants in com-

mon. The two are inconsistent with each other, the use is different from the estate and therefore the party entitled under it takes by virtue of the statute and not at common law. The case of *Jenkins v. Young* (4) will probably be relied on by the other side. There lands were given to a man and his wife *habendum* to the said husband and wife to the use of them and the heirs of their bodies, and it was held that the husband and wife had an estate tail. The distinction between that case and the present is, that there the *habendum* would have given only an estate for life. The deed was an obscure one and the Court had to look to the intention of the parties.

[GROVE, J.—That case is cited in *Gilbert on Uses*, p. 127, 3rd ed.]

In *Cruise's Digest*, Title xi. Use, ch. 3. s. 36, it is said, "There are, however, some cases where the same person may be seised to a use and also *cestui que use*. Thus, if a man makes a feoffment in fee to one to the use of him and the heirs of his body, in this case for the benefit of the issue, the statute, according to the limitation of the uses, divests the estate vested in him by the common law and executes the same in himself by force of the statute: and yet the sense is out of the words of the statute, which are, 'to the use of any other person,' and here he is seised to the use of himself. But the statute hath been always beneficially expounded to satisfy the intention of the parties, which is the direction of the use according to the rule of law." For this is cited *Bacon on Uses*, p. 63, and *Sammes' Case* (5). In *Bacon on Uses*, p. 65, it is laid down, "But if I enfeoff J. S. in fee to the use of himself in tail and then to the use of J. D. in fee or covenant to stand seised to the use of myself in tail and to the use of my wife in fee; in both these cases the estate tail is executed by the statute; because an estate tail cannot be re-occupied out of a fee simple, being a new estate and not like a particular estate for life or years, which are not portions of the absolute fee." This is referred to in *Sanders on Uses*, p. 95, 4th ed. No doubt in *Sanders*

(4) Cro. Car. 230, *nom. Meredith v. Jorns*, p. 244.

(5) 13 Rep. 56.

on *Uses*, p. 94, 4th ed., it is said "If an estate be conveyed to A. B. and C. and their heirs 'to hold unto the said A. B. and C., their heirs and assigns, to the use of the said A. B. and C. for and during the natural lives of them and the life and lives of the survivors and survivor of them,' it should seem that this is not a use, but that A. B. and C. will take an estate of freehold for their lives by statute to be observed, that the estate created by the use is there exactly of the same kind as the estate in the *habendum*, namely, a joint tenancy, the only difference being a resulting use to the grantor when the life estates are exhausted.

[BOVILL, C.J., referred to *Doe dem. Hutchinson v. Prestwidge* (6).]

That is a different case from the present one. Here if this deed had been construed independently of the Statute of Uses, it would have been held that the grantees of the rent-charge took it as joint tenants in law, and that it was only in equity they would be treated as tenants in common.

Herschell, in reply.—The case in 13 Coke's Reports, 56, is treated as exceptional and in favour of the heirs and as if it had been a grant to one for life and a new grant to different persons, viz., to the heirs of his body. *Jenkins v. Young* is in point, and in a note to *Gilbert on Uses*, p. 128, 3rd ed., Lord St. Leonards says, with reference to *Jenkins v. Young*, "It is not a use divided from the estate, as where it is limited to a stranger, but the use and estate go together; wherefore it is all one as if the limitation had been to them and the heirs of their bodies." "There is a laborious opinion of Mr. Booth on this point in 2nd vol. *Cases and Opinions*, p. 281."

BOVILL, C.J.—In this case Robert Byron Orme claimed to be on the list of voters for the south-eastern division of the county of Lancaster, in respect of a freehold rent-charge. An objection was taken to the claim on the ground that the claimant was not in the actual possession of such rent-charge within the

terms of the Reform Act (2 Will. 4. c. 45. s. 26). It is clear that he was not during the required time in the actual possession or receipt of such rent-charge, and in two cases in this Court it has been decided that he must be in the actual possession in the sense in which those words "actual possession" are ordinarily understood. The first of these cases is *Murray v. Thorniley* (2), in which it was held by this Court, after time taken for consideration, that there must be a possession in fact of a rent-charge by the actual receipt of the rent, or of something in lieu of it to satisfy the requirements of 2 Will. 4. c. 45. s. 26. The other is *Hayden v. The Overseers of Twerton* (3), where the party claiming to be registered instead of being the grantee was the assignee of a rent-charge, and this Court held that that case was governed by *Murray v. Thorniley* (2). It is true that Maule, J., referred to some of the grounds on which *Murray v. Thorniley* (2) proceeded, and stated that he was not prepared to say that he should have come to the same conclusion that the Court did in that case, but he concurred with the rest of the Court in confirming the principle on which it was decided. Now after those two decisions it is impossible for the respondents in the present case to contend that the Court is not bound by what has been treated as the law ever since 1846, that is to say, that the possession of a rent-charge to satisfy the Reform Act must be a possession in fact. In *Heelis v. Blain* (1), the grant of the rent-charge did not take effect at common law, but by force of the Statute of Uses (27 Hen. 8. c. 10. s. 1), and it was held that the person to whose use the grantee was seised was by the effect of the Statute of Uses to be deemed in possession of the rent. That case was one which came within the Statute of Uses, and was argued and decided entirely on that footing. The Court there, so far from dissenting from, adopted the previous cases of *Murray v. Thorniley* (2) and *Hayden v. The Overseers of Twerton* (3), and held that the possession to satisfy the Reform Act, 2 Will. 4. c. 45. s. 26, must be an actual possession, but they decided that the claimant in that case was to be deemed

in such actual possession by the operation of the Statute of Uses. Assuming these cases to have been correctly decided, there are then two classes of cases, one where the grant of the rent-charge takes effect at common law, in which case the grantee or assignee must be in the actual possession by receipt of the rent in order to be entitled to be registered, and the other where the grant of the rent-charge operates by virtue of the Statute of Uses, in which case it has been held that the *cestui que* use is at once to be deemed in actual possession within the meaning of the Reform Act. That brings us to the question whether the grant of the rent-charge in the case now before us operates at common law, or under the Statute of Uses. The matter has been very clearly and ably argued before us by both the learned counsel, and it seems to me that our first duty is to determine what is the true legal effect of the limitations in the deed granting the rent-charge. The deed in effect limits the rent-charge to three persons as joint tenants, but in the *habendum* they are to hold it to them and their heirs to the use of these three persons and their heirs, as tenants in common. If the terms of the *habendum* be divided there would be a grant to three persons as joint tenants, and a limitation of the use to them as tenants in common. Now is the deed to be so read, or is the whole to be read together for the purpose of ascertaining what is the true limitation? The office of the *habendum* is to determine the effect of the deed, and it should "be construed as near the intent of the parties as may be"—1 *Sheppard's Touchstone*, 101. In order so to construe it, it is necessary that the whole deed should be looked at, and if that be done in the present case, there can be no doubt but that the intent of the parties was that there should be a grant of the rent-charge to these three persons as tenants in common. Not only is the rule laid down, as I have mentioned, but instances in support of it are to be found in the books. Thus in *Coke Litt.*, 183b, it is said, "if a lease be made to two, *habendum* to the one for life, the remainder to the other for life, this doth alter the general intendment of the pre-

mises, and so hath it been oftentimes resolved. And so it is if a lease be made to two, *habendum* the one moiety to the one, and the other moiety to the other, the *habendum* doth make them tenants in common; and so one part of the deed doth explain the other, and no repugnancy between them *et semper expressum facit cessare tacitum*." Other instances to the same effect may be found in *Viner's Abr. Grant* I (a) 3, and *Sheppard's Touchstone*, 101-106. Now with reference to determining the true effect of this deed, several authorities have been cited, and *inter alia* the case of *Young v. Jenkins* (5). That case is thus stated in *Sanders on Uses*, p. 91, "M. gave his land to E. R. and his wife, *habendum* to the said baron and feme to the use of them and the heirs of their two bodies, and for want of such issue remainder to E. M. and his heirs; the question was whether the baron and feme had an estate tail or an estate for their lives only? It was argued that the estate, out of which the use should arise, was an estate for their lives, and the use could not make the estate larger than the limitation of the seisin; but the judges conceived that there was a difference where an estate was limited to one and the use to a stranger, for there the use should not be more than the estate out of which it was derived; but not when the limitation was to two *habendum* to them to the use of them and the heirs of their bodies; for this was no limitation of the use nor was it executed by the statute, but it was a limitation of the estate to them and the heirs of their bodies by the course of the common law." That case is important as shewing that the use in the *habendum* was taken as expressing the intent of the parties, and was treated not as a limitation of the use but of the estate, which took effect according to the common law. If this be the right view of that case (and it is this view which was taken of it by Mr. Booth in the *Collection of Cases and Opinions*, vol. 2, p. 291), then it is difficult to distinguish that case from the present. The case itself is cited in *Sanders on Uses*, without disapproval, and it has been acted on as law by conveyancers for a number of years. Is

there any reason why we should not adopt it in construing the limitation of the rent-charge in the present case? If we were not to do so, the result would be a repugnancy between one part of the deed and the other part, because then in one part the limitation would be to the three persons as joint tenants, and in the other part it would be to them as tenants in common. Lord Bacon in his reading upon the *Statute of Uses*, p. 65, says "that the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore the statute ought to be expounded that where the party seized to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law." Suppose the question had arisen here independently of the *Statute of Uses* as to what was the limitation of the grant, could it be doubted that the answer would have been that the object and effect of the deed were that the three persons should take the rent-charge as tenants in common, and if so the *Statute of Uses* does not alter this. There is another case namely *Doe dem. Hutchinson v. Prestwidge* (6) which also has an important bearing on this question. There the limitation of the lands was to Thomas and Henry, and their heirs, *habendum* to them, their heirs and assigns, as tenants in common, and not as joint tenants, to the only proper and absolute use and behoof of them, their heirs and assigns for ever. There was, therefore, a difference between two parts of the *habendum*, the limitation of the use being such as to create a joint tenancy. What was the effect of that? The point was there raised and argued, and further time was given to *Reader*, the counsel for the plaintiff, to consider it, and on a subsequent day "he admitted that Thomas and Henry took as tenants in common," "although if it had been an use executed by the statute, the consequence would be that they were joint tenants." This is a strong authority for shewing that the whole limitation must be taken together, and have a reasonable construction put upon it. That case is cited by various

text writers, and I do not find that it is questioned by any of them, except that in 3 *Bythewood and Jarman's Conveyancing by Sweet*, p. 324, Mr. Sweet says, "this was certainly admitting the principle to a great extent, and it seems that there was ample room for argument." There is also an important passage in the 7th edition of *Sheppard's Touchstone*, by Mr. Preston, at page 106, where that learned conveyancer says, "but if a grant be made to a man and his heirs, *habendum* to him and his heirs to the use of him and his heirs for lives, the *habendum* and declaration of use are one entire limitation at the common law, and the grantee hath merely an estate for the lives," which passage is very applicable to the present case. It is indeed only acting on general principles when it is said that in order to construe a deed one must refer to all the parts of it, especially the *habendum*, and so regarding the deed in the present case it seems to me that it is in effect a grant of a rent-charge to the three persons to take as tenants in common. Then each has a third of the rent, and there being no other person for whose use it is granted, and nothing for the *Statute of Uses* to operate upon, the party claiming in respect of his third share of the rent takes it by force of the common law and not by the operation of the *Statute of Uses*. Consequently the case cannot come within the decision in *Heelis v. Blain* (1) but is governed by the previous decisions of *Murray v. Thorniley* (2) and *Hayden v. The Overseers of Twerton* (3), and the decision of the Revising Barrister must be reversed.

BRETT, J.—In this case the claim to vote was in respect of a rent-charge, and to make the claim good it was necessary to bring it within section 26 of the Reform Act (2 Will. 4. c. 45), and shew that the claimant had been in actual possession of such rent-charge as required by that section. Now in fact he had not received any part of it for the six months previous to the last day of July, and the question has been whether, notwithstanding this, the case has been brought within that 26th section. It seems to me that there are two canons of con-

duct which the Court on these revising appeals ought to observe. The first is to construe the words of these statutes in their ordinary sense, and the second is to adhere loyally to former decisions, unless they be clearly made out to be wrong. Now the first case which is applicable is that of *Murray v. Thorniley* (2), and there it was held that there must be an actual possession in fact, as contradistinguished from a possession in law. There was afterwards the case of *Heelis v. Blain* (1), in which there was the decision that though the grantee of a rent charge under a grant at common law is not entitled to be registered before he has been in the actual receipt of the rent, since until then he has only a possession in law, and not the actual possession required by 2 Will. 4. c. 45. s. 26, it is otherwise where the rent-charge is by a conveyance operating under the Statute of Uses, for then the person to whose use the rent-charge is limited is by virtue of the Statute of Uses to be deemed to be in actual possession. It follows, therefore, if we observe the rule of conduct I have referred to that if the conveyance conveying the rent-charge in the present case operates at common law, the case is governed by that of *Murray v. Thorniley* (2), and if the deed operates under the Statute of Uses, then the case is governed by that of *Heelis v. Blain* (1), as that determines that the possession by the Statute of Uses is to be deemed an actual possession. The whole results, therefore, into this question, namely whether the rent-charge in respect of which the claim is made, operates at common law or by virtue of the Statute of Uses. In the first place it is necessary to construe the conveyance conveying the rent-charge. Now, if the grant and the *habendum* to uses be to the same persons, and the description in the one be general and in the other specific, the specific ought to overrule the general, and the general should be read as if it were specific; then so reading it the conveyance is a common law conveyance, and the Statute of Uses has no application. In *Young v. Jenkins* (4) the grant and *habendum* were in general terms which were not inconsistent with the declaration

of the use, and therefore it was held that the grantees took at common law. In the case in *Sanders on Uses*, p. 91, of an estate to A, B and C, and their heirs to the use of A, B and C for their lives and the life of the survivor, the *habendum* was general but not contrary to the use, and the conveyance was a common law one. In *Doe dem. Hutchinson v. Prestwidge* (6) the *habendum* was to two persons, their heirs and assigns as tenants in common, and not as joint tenants to the use of them, their heirs and assigns, so that the *habendum* was specific but not contradictory to the declaration of the use, and so it took effect as a common law conveyance. This seems to be the result of all the authorities, including the opinion of Mr. Booth, of Lord Bacon, and Mr. Butler. Now apply this to the present case. Here the use which is declared is specific, whilst the *habendum* is general, and is therefore to be read as if it were as specific as the declaration of the use. Consequently, the conveyance is a common law conveyance of the rent-charge to the three persons as tenants in common. I am prepared to go so far as to say that the Statute of Uses does not apply unless the persons, in favour of whom the use is declared, are other and different persons from those mentioned in the conveyance; but it is not necessary to go that length in the present case, but only to state that where as here part is specific and part general, and there is no inconsistency between them, the intention of the parties is to be collected from what is specific. Under these circumstances, I think that the conveyance of the rent-charge operates as a conveyance at common law, and the case is therefore within *Murray v. Thorniley* (2), and not within *Heelis v. Blain* (1), and the revising barrister came to a wrong decision.

GROVE, J.—I am of the same opinion. The question arises on the 26th section of the Reform Act which enacts that no person shall be registered in respect of his estate in any lands unless he has been in the actual possession thereof for the time therein mentioned. *Prima facie* the words "actual possession" would there mean not a constructive possession, but one in

which there was an actual receipt of the rents and profits, and that seems clear from the proviso at the end of the section which excepts cases in which the property has come by "descent, succession, marriage, marriage settlement, devise, or promotion to any benefice in a church, or by promotion to any office," thus shewing the force the statute attaches to the words "actual possession" in the earlier part of that section. This was so held and acted on by this Court in *Murray v. Thorniley* (2), and there would have been no difficulty in the present case, but for the decision in *Heelis v. Blain* (1) where the Statute of Uses applied; the question there was, whether, as the use was executed by the Statute of Uses, the statute did not give the person taking the use such a possession as amounted to an actual possession. It was held it did, and consequently the question which has been argued in the present case has been whether the Statute of Uses applies here, the use being limited to the same persons as those to whom the rent-charge is granted. Now the statute clearly meant only to meet the case where the use was to some other person than the feoffee or grantee. Not only are the words of the statute clear as to this, but the reason for passing it, as appears from the preamble, shews that this is what was intended. The object of the statute was to make conveyances *bona fide* transfers of the land so that the ostensible and real ownership of the estate should be coincident, and in the same person; but we all know how this was got rid of by merely repeating the words "to the use of." The statute, as I have stated, in terms applied only to the case where the use is limited to a different person from that of the feoffee. In construing it one of the exceptions was the case mentioned in 13 *Coke's Rep.* 56, where the enfeoffment was to a person in fee, and the use was to the same person in tail, and the estate tail was held to be executed by the statute. The reason seems to be subtle, but Lord Bacon and Lord Coke consider it to have been so held for the benefit of the issue, and they therefore regard it as an exceptional case. The case in *Bacon on Uses*, 63, and which is given in *Sanders*

on *Uses*, p. 94, 4th ed., is very applicable. It is thus stated—"If an estate be conveyed to A, B and C, and their heirs to hold unto the said A, B and C, their heirs and assigns, to the use of the said A, B & C, for and during the natural lives of them, and the life and lives of the survivor and survivors of them, it should seem that this is not a statute use, but that A, B & C will take an estate of freehold for their lives by the common law." Now in the present case, there are three grantees of a rent-charge, and they are the same persons for whom the use is declared, and we have to say whether the Statute of Uses applies. It has been argued by Mr. Mellor that the grant to these three persons is *prima facie* to them as joint tenants, and as the use in the *habendum* is declared to be to them as tenants in common, that that has so changed the character of the estate to which the use was attached, as to make the whole different, and that the use is therefore executed by the statute. The case of *Doe dem. Hutchinson v. Prestwidge* (6) was the converse of the present, for the *habendum* was to two persons specifically as tenants in common, and the use was so limited to them generally as to give them a joint tenancy, but it was held that the specific words controlled the general, and that those two persons took as tenants in common. Counsel in that case admitted that where the person seized to the use and the *cestui que use* is the same person the statute does not operate, "except there be a direct impossibility or impertinency for the use to take effect by the common law." Now is there here any such direct impossibility or impertinency? Surely not—the specific words shew the express meaning of what might otherwise have been treated as creating a joint tenancy, and enable us to put this construction on the whole conveyance according to the intent of the parties, that it conveys the rent-charge to the three persons as tenants in common. Therefore the Statute of Uses does not apply. There seems to me a difficulty in saying that the possession given by the execution of the use by the statute is different from that possession in law which in *Murray v. Thorniley* (2), was

held to be not enough to satisfy the Reform Act, but it is not necessary to consider that in the present case, for we are not called upon in this case to overrule the decision of this Court in *Heelis v. Blain* (1).

DENMAN, J.—I also agree that the decision of the Revising Barrister should be reversed, for the only question raised by the case which he has stated for our opinion is, whether it comes within the case of *Heelis v. Blain* (1). He decided that it did, but after hearing the case fully argued before us, I am of opinion that he was wrong. The decision in *Heelis v. Blain* (1) carefully left *Murray v. Thorniley* (2) and *Hayden v. The Overseers of Twerton* (3) unaffected by it. It may be called a refined decision in favour of the franchise, but it was this, that the actual possession required by 2 Will. 4. c. 45. s. 26, was satisfied when the conveyance operated under the Statute of Uses. In the present case the question is whether the conveyance did so operate or not. I am of opinion that it did not, because the persons to whom the rent-charge was granted did not hold it to the use of other persons but to the use of themselves. It has been argued that this is not the effect of the declaration of the use, and that the statute applied because the grant was to the three persons as joint tenants, whereas the use declared was to them as tenants in common. I will not say that that is an absurd argument, for I admit that it is as plausible as many that have prevailed, but I think that the current of authorities is against it. The case, therefore, does not in my opinion fall within that of *Heelis v. Blain* (1), but within the previous cases, and the decision of the Revising Barrister ought to be reversed.

Decision reversed.

Attorneys—I. E. Fox, agent for R. Evans, Ashton under Lyne, for appellant; Richards & Walker, agents for J. W. Mellor, Oldham, for respondents.

1872. } MILLS v. THE GUARDIANS OF THE
Nov. 28. } EAST LONDON UNION.

Landlord and Tenant—Breach of Covenant—House taken by Railway—Damages.

Where a railway company give the lessee for years of a house notice to treat, an award is made, and eventually a conveyance executed, and thereupon possession given to them, such lessee is liable to his landlord at all events up to that time, on a covenant to repair and keep in repair, and the measure of damages is the diminution of the market value of the reversion at that time.

This was a SPECIAL CASE stated in an action brought by the lessor against the lessees of a house on covenants to repair and keep in repair; and the following were the material facts—

On the 15th of June, 1859, the plaintiff demised the house to the defendants for twenty-one years (to commence on the 25th March then last past), determinable at the end of seven or fourteen years on notice given by either party, such demise containing certain special covenants as to repair, and also general covenants as to repairing, keeping in repair, and yielding up in repair at the end or sooner determination of the lease.

On the 7th of February, 1866, the Metropolitan Railway Company gave notice to the defendants to treat for the purchase of their interest in the house; on the 16th of April, 1867, an award was made; on the 29th of July, 1870, a judgment was entered on the award; and on the 21st of November, 1870, a conveyance was duly executed, and possession given by the defendants to the company.

On the 19th of June, 1866, a notice had also been given to the plaintiff, who on the 29th of June, 1868, sent in his claim, but no further proceedings had been taken.

The house was out of repair before the 7th of February, 1866, and though some repairs were done by the defendants, continued out of repair till action brought on the 3rd of January, 1871, and 10l. had been paid into Court.

The question was, whether and when the liability of the defendants had ceased.

Sir G. Honyman, for the plaintiff, argued that the defendants remained liable at least up to the time of conveyance, beyond which he did not care to carry the liability, as the damages in the particular case would not be increased thereby, and also argued that the measure of damages was the diminution of the market value of the reversion at that time.

Lewis, for the defendants, argued that the liability ceased at the time of the award, and that the measure of damages was what would then put the premises in repair.

The following authorities were cited: *Hunt v. Tween*, not reported, *Coward v. Gregory* (1), *Rawlings v. Morgan* (2), *Lidgett v. Secretan* (3), *Potter v. Rankin* (4), *Baily v. De Crespigny* (5), *Harding v. The Metropolitan Railway Company* (6), *Smith v. Peat* (7), *Mayne on Damages*, p. 133, *Hodges on Railways*, p. 182.

KEATING, J.—This is a special case stated for our opinion. The following are the facts—On the 15th of June, 1859, the plaintiff demised the premises to the defendants for twenty-one years by a lease which contained the terms that it might be determined in seven or fourteen years on notice given by either party, but no notice was given and the term existed when the dispute arose. On the 7th of February, 1866, the Metropolitan Railway Company gave the defendants notice to treat, proceedings were taken thereon, and on the 16th of April, 1867, there was an award; on the 29th of July,

1870, judgment thereon; and on the 21st of November, 1870, a conveyance and possession given. On the 19th of June, 1866, notice to treat was also given to the plaintiff; on the 29th of June, 1868, a claim was sent in, but no further proceedings were taken. Meanwhile, the premises were out of repair, they were so before the notice to the defendants, and so continued thence till action brought on the 3rd of January, 1871. It is true some repairs were done, a fact, perhaps, not unimportant, but from before the notice till after the conveyance, the premises were out of repair. It is argued, that in consequence of the notice and proceedings thereon, and the conveyance, on the authority of *Baily v. De Crespigny* (5), the defendants cannot be held liable on the covenants, because the case is within the principle there laid down, and it was impossible for the defendants to perform these covenants, and they were therefore discharged by law. But there the facts were different; the covenants were not to assign and not to build; there was notice to treat and a conveyance, and afterwards the buildings were put up by the railway company, and the action was by the reversioners for assigning and building; and the answer was, that the defendant was obliged to convey by statute, and therefore there was no breach in assigning, and the building was after this, and he was held discharged. That case is no authority here, for the want of repair and breaches occurred before the conveyance. Here the defendants have paid 10*l.* into Court and admit the breaches, but say only nominal damages can be recovered, and that they are not liable after the award. We have to say at what date the defendants' liability ceased, and I am of opinion, that the liability of the defendants did not cease before the execution of the conveyance to the railway company and possession given up. It has been agreed that anything after is unimportant, and I therefore give no opinion on this, and merely say it did not cease before the conveyance and possession given up on the 21st of November, 1870, and that till then at all events the defendants were liable. It has also been insisted that the plaintiff cannot so recover, because a claim was

(1) 36 Law J. Rep. (N.S.) C.P. 1; s. c. Law Rep. 2 C.P. 153.

(2) 18 Com. B. Rep. N.S. 776; s. c. 34 Law J. Rep. (N.S.) C.P. 185.

(3) 40 Law J. Rep. (N.S.) C.P. 257; s. c. Law Rep. 6 C.P. 616.

(4) 39 Law J. Rep. (N.S.) C.P. 147; s. c. Law Rep. 5 C.P. 341.

(5) 38 Law J. Rep. (N.S.) Q.B. 98; s. c. Law Rep. 4 Q.B. 180.

(6) 41 Law J. Rep. (N.S.) Chanc. 371.

(7) 9 E. ch. Rep. 161; s. c. 23 Law J. Rep. (N.S.) Exch. 84, and note thereto.

sent by him to the railway company, but this was not much pressed, and clearly does not absolve the defendants. How far the railway company became tenants, &c., it is not necessary to consider. It is only necessary to say, that till the period of conveyance and giving up possession the defendants were liable for breaches of these covenants. What, then, is the amount of the damages recoverable? The damages recoverable are not nominal damages, and I am of opinion that the rule laid down by the recent cases is the sounder rule, i.e., that the measure is the extent to which the reversion was injured at the time in question. No doubt Lord Holt laid down another rule, but the subsequent cases lay down a different one, and though there may be little practical difference, yet I hold the recent rule the sounder.

GROVE, J.—I am of the same opinion. It is not said that if this were an ordinary case of lessor, lessee, and assignee, the lessee would not be liable up to the time of assignment, but it is said that there was here a compulsory taking by statute which put him out or prevented repair after the award. The only cited case is *Baily v. De Crespigny* (5), but that case is distinguishable; for, first, the covenants were different; secondly, there was an actual transfer of possession; thirdly, the damage was done by the railway company, not the lessee, after possession given. Here there was no change of possession, and the damage was done when the lessee was in possession. Although from the time of the award there was a binding contract, yet if there was not a legal change of possession, the lessee was not exempt from his covenants, whilst he held he was bound to repair, but when he is turned out, and has no power to repair, he is not liable. On the 21st of November, 1870, when the assignment was made and possession given from that time, the defendants were not able to repair, and therefore by law ceased to have power, but till then there is no reason why they should not be liable. It has been argued that the plaintiff will recover twice over, but it is not necessary to decide this and the arbitrator will look to it. As respects the principle on which the damages should

be assessed, I agree with my brother Keating.

DENMAN, J.—There are two questions. The first is, when did the defendants' liability cease? I am of opinion it had not ceased before the 21st of November, 1870. In argument, the defendants relied on *Baily v. De Crespigny* (5), and *Harding v. The Metropolitan Railway Company* (6), but I think that *Baily v. De Crespigny* (5) does not apply, and that the grounds of the decision rather help the plaintiff than the defendants, and that all the reasons here apply the other way. And *Harding v. The Metropolitan Railway Company* (6) is not only not an authority for the defendants, but the decision favours the other side. It only decides that there is a right to a decree for a specific performance, and in the judgment it is said that there was a right to an indemnity by the defendants, the company, as to acts such as here exist. Therefore the plaintiff had such rights, and therefore it is clear that these cases do not touch the present, except in so far as they are in favour of the plaintiff rather than the defendants. The second question is as to the principle of the assessment of damages. Perhaps there may be little difference practically, but in *Mayne on Damages* the cases are referred to, and it is said that the better opinion is that the proper measure is the diminution of the market value of the reversion, and since that book was written *Hunt v. Tween* and *Coward v. Gregory* (1) have been decided and established that rule, on which therefore we are bound to act, and which will present no great difficulties for the arbitrator.

Judgment for plaintiff.

Attorneys—Thomas & Hollams, for plaintiff;
A. J. Baylis & Son, for defendants.

(Appeal from Revising Barrister's Court.)

1872. } SIMEY (appellant) v. MARSHALL
Nov. 20. } (respondent)—re BENNETT'S
CLAIM.

Parliament—County Vote—Inmates of a
Hospital—Interest in Land—Rent-charge
—Tenement—8 Hen. 6. c. 7.

A hospital, consisting of a master and three "ancient brethren," was incorporated, by the terms of its constitution, as regards regulated by statute, its revenues, received from lands vested in the corporation, paying thereout taxes and other outgoings and reserving one-third to himself, was to pay 25l. to each of the three ancient brethren, 70l. to the chaplain, and after reserving a balance, not exceeding 60l., to meet current expenses, was to divide the residue between certain other brethren called "younger brethren," who were added to the number of the brethren from time to time, as the revenues of the charity increased, but no younger brother was to take under such division more than 25l., and the surplus, if any, was left to accumulate until further additional brethren were appointed:—Held, that the younger brethren had no equitable estate in the lands of the hospital and that the annual payment to which they were entitled, not being a rent-charge nor a free tenement within the statute 8 Hen. 6. c. 7, they were not entitled to the county franchise.

This was an appeal from the Revising Barrister appointed to revise the list of voters for the northern division of the county of Durham.

The claim of James Bennett to be entitled to vote in respect of property, situate within the parish of Gateshead in such division of the county, was duly objected to.

The following facts were established by the evidence. The hospital of King James in Gateshead has existed from time immemorial. Its founder is unknown and the foundation charter has long been lost.

By a re-foundation charter, dated 4th January, 1610, King James the First incorporated the hospital, which then consisted of one master and three brethren,

NEW SERIES, 42.—C.P.

by the title of "The Hospital of King James, Gateshead." The charter provides that the rector of Gateshead should for ever be the master of the hospital, that there should be three poor and needy men, bachelors or widowers advanced in life, sustained, maintained and relieved in the hospital, who should be called the brethren, and should remain, be sustained and relieved during their natural lives. The charter further provides that when and so often as it should happen that any of the brethren should die, or be removed from the hospital for any cause prescribed by the ordinances, provisions and constitutions of the hospital, or in any other manner whatsoever should be removed from the hospital, or should withdraw of his own accord, then the master should within fourteen days nominate and place in actual possession any other fit person. The charter further provides, that the Bishop of Durham and his successors should from time to time revise the ancient statutes, laws, ordinances and constitutions of the hospital, and make such good, fit and wholesome statutes in writing, concerning the government and direction of the master and brethren, as should not be contrary or repugnant to law, and by the charter the hospital, with the garden and other lands (the greater part of which still belong to the hospital), were granted to the master and brethren and their successors, to have, hold and enjoy the same to the sole and proper benefit and use of the master and brethren and their successors, in free, pure and perpetual frankalmoin for ever. It was also provided that after the death of the then master, his successors should have and enjoy for their own use and benefit one full third part of the rents, revenues and profits of all and singular the lands, tenements and hereditaments thereby granted to the hospital, and the brethren and their successors should have and enjoy for their own use and maintenance the other two parts of such rents, revenues and profits.

An Act of Parliament was passed in the 51st year of King George the Third (1811) for enabling the master and brethren of the hospital to grant leases, and to enable the Bishop of Dur-

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ham to make statutes and ordinances for the government of the hospital. This Act recited the re-foundation charter and that the master and brethren were seised of certain lands in Gateshead which are specified in the schedule thereto, and that the Bishop of Durham was the patron of the mastership of the hospital as annexed to the rectory of Gateshead, and that the master of the hospital had the appointment of the brethren in case of vacancy. It also recites that no statutes or ordinances of any kind were then known, and that in respect thereof the estate of the said hospital was capable of considerable improvement. That it was also expedient that statutes should be made for the government of the hospital and that the benefits of the hospital should be extended to a greater number of poor aged men in furtherance of the benevolent intentions of the founder thereof. The Act then, after giving a power of leasing to the master and brethren, proceeds to enact that the Bishop of Durham may from time to time in writing under his hand make and establish such good and convenient and wholesome statutes, laws, ordinances and constitutions, as well concerning the Divine service to be performed in the hospital, and the allowance to be made for the same as touching the government and direction of the master and brethren, and providing for the repairs of the estate of the hospital as also for increasing the number of the poor and aged brethren, and such statutes, laws, ordinances and constitutions from time to time to revise, alter and amend so as the same be not contrary either to the laws of the realm or to the charter, except as to the increase of the number of the brethren. And it further enacts that all such brethren as should be from time to time added as aforesaid, should be named, appointed and admitted, and from time to time for ever be filled up in the same manner as is prescribed by the charter for naming, appointing and admitting the three "ancient brethren," and all such additional brethren should be called "the younger brethren," and should not be deemed or taken to constitute any part of the said body corporate, provided that nothing in the Act should

authorise the making of any statute which should reduce or lessen the income of the then present master and three brethren from the rents and profits of the estate belonging to the hospital, but that they should during their lives receive for their shares of the future rents and profits of the estates as much as they then actually received from such rents and profits, and that the shares of the younger brethren should always be less than the shares of the master and the three ancient brethren.

The schedule to this Act included the whole of the lands which still belonged to the hospital, and in respect of which the younger brethren claimed to vote.

On the 17th of October, 1811, Shute Barrington, Bishop of Durham, made certain statutes and ordinances under the power contained in the Act of Parliament, by which it is ordered (amongst other things), that in addition to the three ancient brethren, who, together with the master, then constituted the corporate body, there should be ten younger brethren who should be entitled to the advantages after-mentioned; that no persons should be capable of being appointed younger brethren except single men of the age of fifty-six and upwards not possessing more means than 20*l.* per annum, of unexceptionable life and conversation, regular attenders of the Church of England and frequenters of the Holy Sacrament; that the brethren should attend Divine service regularly when opportunity offers, and should be sober, discreet and regular in life and conversation; that in case of one or more of the brethren being guilty of drunkenness or any other immorality, the master should certify the same to the bishop, who should proceed, either by himself or by the Archdeacon of Durham, or by other clergymen of the diocese, to examine into the circumstances of the case, and should either remove him from the hospital or subject him to such lesser punishment as he should think fit; that the brethren should from time to time be appointed by the master; that such younger brethren as should reside within a convenient distance of the chapel should have proper seats prepared and set apart for their accommodation, and should regularly attend Divine ser-

vice, except when prevented by illness or other lawful impediment admitted by the master; that for performance of Divine service and preaching in the chapel, a chaplain should be appointed by the master with the approbation of the bishop; that the estates of the hospital should be under the direction and management of the master, who should receive and keep account of the revenues thereof, and should, in the first place, pay thereout the land-tax, income tax, tithes, repairs and all other outgoings affecting the same, and after that was done the master should carry one-third part of the nett rents and revenues of the hospital estates to his own account, and should then pay 25*l.* to each of the three ancient brethren and 40*l.* to the chaplain for his salary, and after making these payments the master should, on the 24th of December in every year, divide the residue of the said nett rents and revenues between the younger brethren of the hospital in equal shares and proportions, yet so nevertheless that no younger brother should take under such division more than 25*l.*, the sum directed to be paid to each of the ancient brethren.

On the 9th of October, 1849, Edward Maltby, Lord Bishop of Durham, made further statutes under the Act of Parliament, by which it was ordained, amongst other things, that to the ten younger brethren ordered to be appointed by the statute of 1811 should be added two more as soon as the funds should admit; that the master should have power from time to time to advance to the younger brethren such sums as the state of the revenues might appear to him to allow; and that he should, on or before the 25th of March in each year, distribute the surplus among them, reserving a balance in his hands not exceeding sixty pounds to meet the current expenses, provided that the shares of the younger brethren should always be less than the shares of the master and the three ancient brethren, and that the chaplain should receive for his services the annual sum of 70*l.*

By a statute made the 8th of October, 1867, by Charles Baring, Bishop of Durham, four more younger brethren were added to the twelve theretofore existing,

and by another statute of the same bishop made the 2nd of April, 1869, other six younger brethren were added. A subsequent statute of the same bishop has since added one other younger brother, the total number at the present time being thus twenty-three.

The claimant, James Bennett, and twenty-two other persons whose names were mentioned in the Case, have duly been appointed, and now are the younger brethren of the said hospital. There is no written form of appointment of a younger brother, such appointment being made by the master entering his name and the date of his appointment in the roll kept by him.

No instance of dismissal of a brother has ever been known.

The number of younger brethren has never been increased, so as to reduce their respective shares below 24*l.* per annum, and, in fact, the share of each younger brother of the nett rents and revenues of the hospital estates has ever since the Act of 1811 amounted to upwards of 24*l.* per annum, which sum, as well as the chaplain's stipend of 70*l.* per annum, has been regularly paid to them by the master.

There is no hospital building at present in existence, and neither chaplain nor any of the brethren actually occupy any part of the property belonging to the hospital.

Upon these facts it was contended by the objector that the amount of annual payments to the claimant could never exceed 25*l.*, and might be less, if the bishop should think fit to increase the number of younger brethren; that the claimant, together with the other younger brethren, was not entitled to the surplus of the lands and tenements in question, or of the rents and profits thereof, after providing for the one-third share of the master, the payments to the ancient brethren, and the chaplain's salary; but that, after deducting the master's share, and paying the 25*l.* a-piece to the three ancient brethren, the chaplain's salary, the claimant and the other younger brethren the 25*l.*, or such lesser sum as for the time being they should be entitled to, the surplus of the rents and profits must

be set aside for any additional younger brethren that might be appointed; and that consequently the claimant could not be considered a part owner of the said lands and tenements, or as having an estate at law or in equity therein. It was also contended that the sum payable to the claimant was not a rent charge, both because it was of uncertain amount and liable to be varied, and because such sum was not a charge upon the said lands and tenements.

On the other hand it was contended for the claimant that, inasmuch as the whole surplus of the rents and profits of the lands and tenements, after deducting the master's third part and the payments to the ancient brethren and the chaplain's salary, must be divided among a certain class, viz., the younger brethren, of which class the claimant was one, the circumstances of the number of such class being liable to be increased, and possibly the payment to each person of that class being liable to be diminished, did not prevent the whole class, although varying from time to time, from being equitable owners of and having an equitable estate in the said lands and tenements; that as the present amount of the payments to each of the younger brothers was above 5*l.* a year, he was entitled, as having an equitable estate for life in the lands and tenements, to be registered as a voter. Also, that if not having such equitable estate in the said lands and tenements, the claimant had a rent charge, or such an interest in the nature of a rent charge, in the said lands and tenements, as to enable him to be registered as a voter.

The revising barrister was of opinion that inasmuch as the claimant and the other younger brethren were not necessarily entitled to the whole surplus after paying the ancient brethren and the chaplain the sums aforesaid, of the nett two-thirds of the rents and revenues of the hospital estates, but were only each entitled to receive thereout an annual payment never exceeding 25*l.* per annum, they had not an equitable estate in the said lands and tenements. The revising barrister also was of opinion that the amount of the payments to the claimant not being a

fixed and certain charge upon the said lands and tenements, was not a rent charge; and he therefore disallowed the claim, and struck the claimant's name out of the list of claimants.

Hugh Shield, for the appellant.—The appellant is one of the younger brethren of the hospital, and as such he is entitled to the county franchise under section 5, sub-section 1, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), by reason of his having an equitable estate for his life in lands of not less than 5*l.* a year. It is not a claim for an equitable estate in any room in the hospital, so that no question need be raised as to the liability of the claimant to have his room changed, or to be subject to any particular restriction or condition; but it is a claim to an estate out of the profits of lands belonging to the hospital, and which are vested in the corporate body in trust for the younger brethren. If the claimant has the estate which he claims it matters not whether the motives of the person granting it were eleemosynary or not—*Roberts v. Percival* (1).

[BOVILL, C.J.—What proportion of an estate in the land do you say the appellant has? BRETT, J.—Can you say the corporation hold the whole of the lands as trustees for the younger brethren?]

The corporation hold the whole as trustees for themselves and the younger brethren, that is to say the corporation are to pay one-third share of the profits to the master, 25*l.* a piece to the three ancient brethren, and to pay the chaplain's salary, and after these have been provided for, they are to pay the residue to the younger brethren. It is true that whenever there is more than enough to pay 25*l.* a piece to the then existing younger brethren the overplus remains to accumulate until there be sufficient funds to increase the number of the younger brethren, but the surplus, whatever it may be, is for a class who may be described by the denomination of "younger brethren," and this distinguishes the present case from that of *Steele v. Bos-*

(1) 18 Com. B. Rep. N.S. 36; s. c. 34 Law J. Rep. (N.S.) C.P. 84.

worth (2), on which the respondent will rely. There, certain fixed payments only were made out of the profits of certain lands to the inmates of a hospital, and the inmates had no right to the surplus income, and therefore such inmates were held not to have an equitable freehold interest in such lands.

[BOVILL, C.J.—According to your argument it is not the elder brethren, who take their 25*l.* a year out of the first portion of the income, who have an equitable estate in the land, but the younger brethren who take their annuities out of the surplus. BRETT, J.—You must be therefore driven to contend that the younger brethren take an equitable estate in the whole, subject to a rent charge in favour of the elder brethren.]

There is nothing absurd in that. The whole surplus is intended to be devoted for the class called “younger brethren.” Next, if the claimant be not so entitled, then he is entitled as having a tenement within the meaning of 8 Hen. 6. c. 7. Lord Kenyon said in *The King v. The Inhabitants of Tolpuddle* (3) that “anything is a tenement which is a profit out of land.” In that case a person who rented twenty cows at 1*l.* 10*s.* each agreed with the farmer that they should be fed in particular fields for a certain part of the year, during which time no other cattle was to depasture there, and it was held that he took a tenement within the 13 & 14 Car. 2. c. 12. The sum to which the claimant in this case is entitled issues out of the land, and though there be no power of distress for it, yet it is a payment for which distress would not be an inappropriate remedy. It is not the less a rent, because it is subject to variations, for it is capable of being made certain—*The Queen v. Westbrook* (4). The inference from *Robinson v. Ainge* (5) is that if in that case the payments had issued wholly out of the realty the

voter's claim would have been sustained. In *Ashmore v. Lees* (6) the annual amount which the inmates of the hospital were absolutely entitled to receive out of the profits was not sufficient to confer the franchise.

Manisty (C. Crompton with him) appeared for the respondent, but was not called upon.

BOVILL, C.J.—By the terms of the constitution of this hospital the legal estate in its lands is vested in the corporation, and the estates of the hospital are under the management of the master, who receives the same and pays thereout the land tax, tithes, repairs and other outgoings, and after that carries one-third of the net revenues to his own account, and then pays 25*l.* each to the three elder brethren and 70*l.* to the chaplain, and when these are paid he divides annually the residue between the younger brethren, but so that no younger brother takes more than 25*l.* According to the terms of this constitution it appears therefore that the younger brethren are entitled only to an equitable right to a share of the money which forms the surplus of the trust funds after the payments directed to be made, and to which I have already referred, have been made. I think the present case is a stronger one against the claimant than that in *Steele v. Bosworth* (2) was against the votes in that case. It is difficult to make out what estate either of the younger brethren here had in the land itself. I think that they were only entitled to receive money, and that they had no estate in land or in money issuing out of land, and that this case is governed by *Steele v. Bosworth* (2), and that the revising barrister was quite right, and his decision should be affirmed.

KEATING, J.—I am of the same opinion. Numerous cases have arisen in which the inmates of a hospital have claimed the franchise, and the question in those cases has always been whether the claimant could make out that he had an equitable interest in any particular portion of the real estate, either legal or equitable. Here

(2) 18 Com. B. Rep. N.S. 22; s. c. 34 Law J. Rep. (N.S.) C.P. 57.

(3) 4 Term Rep. 671.

(4) 10 Q.B. Rep. 178; s. c. 16 Law J. Rep. (N.S.) M.C. 87.

(5) Hop. & Colt. 193.

(6) 2 Com. B. Rep. 31; s. c. 15 Law J. Rep. (N.S.) C.P. 65.

there is a total absence of a defined portion either of the estate or of the proceeds thereof. It appears that after making certain payments out of the proceeds, varying each year, the surplus is to be divided among the younger brethren, but so that the share of each is not to exceed 25*l.* a year. Without overruling *Steele v. Bosworth* (2), we cannot hold that this would give the claimant the franchise. If here there was more than enough to pay 25*l.* to each of the younger brethren, then the surplus would be undisposed of, so that it is impossible to make any distinction between the present case and that of *Steele v. Bosworth* (2). The ground of the decision in that case was that the voter was not entitled to any equitable interest in the land, but only to a certain money payment, and so here the claimant is entitled to a money payment and nothing more, and therefore that case is a direct authority against the claimant's right to the vote. It has been argued that the claimant was entitled as having a rent-charge issuing out of land, but I do not think that Mr. Shield much relied on this, because the sum payable to the claimant was not a definite sum. Indeed, the claimant's right to the vote stands on the same ground as did the claimant in *Steele v. Bosworth* (2), and like him he is entitled only to a money payment.

BRETT, J. — The claimant claims the county franchise in right of his having an estate in land. It is not contended that he has any legal estate, and therefore the question is whether he has shewn that he has any equitable estate in land. He must shew that he has an equitable estate, either in the whole land as tenant in common or else in a specific part of it. Now, can it be said that he is equitable tenant in common with the corporation of the whole land of the hospital? If he be such, then the corporation would have no beneficial estate in the land at all. Is he equitable tenant in common with the elder brethren? That cannot be, for it is admitted that they have not a right to the whole. Then, has he any equitable interest as joint tenant or otherwise in any specific part? Mr. Shield was obliged to say that his

interest (if any) was in the whole land, and that the equitable interest of the elder brethren and master was a charge upon the whole land. That however cannot be maintained. It is impossible to say what is the particular portion of land to which the claimant is equitably entitled, either as tenant in common or as joint tenant. He is entitled to no specific money payment issuing out of land, but after the master has paid himself a third of the rents and revenues, and has paid the sums payable to the three elder brethren and to the chaplain, and after he has reserved a balance to meet current expenses, the claimant is to share with the other younger brethren in the surplus, but he is not to receive more than 25*l.*, and if the amount on such division be over 25*l.* there would be a surplus, to no part of which the claimant would be entitled. The case of *Steele v. Bosworth* (2) is therefore an authority directly in point. It was then urged that the claimant had a freehold tenement within the meaning of 8 Hen. 6. c. 7, but when Mr. Shield was asked to point out what was the freehold tenement, he was obliged to say that it was a freehold rent charge. The amount to which the claimant is entitled is payable out of moneys received by another, and is, therefore, not a rent charge at all; moreover, it is an uncertain amount, for which there can be no power of distress, and that also shews that it is not a rent charge. Therefore it seems that the claimant has neither any legal or equitable estate in land, nor a rent charge; he consequently is not entitled to any vote.

GROVE, J., concurred.

Decision affirmed.

Attorneys—J. W. Hickin, agent for R. Simey, Sunderland, for appellant; Rogerson & Ford, agents for Marshall & Son, Durham, for respondents.

1872. { HUNTER v. GREENSILL.
Nov. 23. { FITZGERALD v. SAME.
 { PAGET, garnishee.

Attachment of Debt—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 61—Bankrupt's Money.

The surplus money due to a bankrupt out of his estate after payment of 20s. in the pound to the creditors under the bankruptcy, is not a "debt" due to the bankrupt from the official assignee (though the bankrupt's estate remains vested in him) which can be attached under the garnishee clauses of the Common Law Procedure Act, 1854, by a judgment creditor of the bankrupt.

These were two rules *nisi* obtained at the instance of Peter Paget, the garnishee, to set aside two orders of attachment which had been obtained under the 61st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to attach all moneys alleged to be due from Paget to the defendant, to answer the judgment debts of the plaintiffs, who were judgment creditors of the defendant. It appeared that the defendant had been adjudged bankrupt in 1867, and that Paget was the official assignee under such bankruptcy and that no creditors' assignee had been appointed. The estate was said to be more than sufficient to pay 20s. in the pound to all the creditors under the bankruptcy, and the surplus money which would be due to the defendant after payment of the debts under the bankruptcy, was what was sought to be attached by the attachment orders. The question raised by the present rules, and which had been referred to this Court by Hannen, J., at chambers, was whether this surplus money was an attachable debt under the statute.

Barrow now shewed cause.—The Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 40, vests the estate of the bankrupt in the official assignee, and declares that he is to be deemed the sole assignee until the appointment of a creditors' assignee, when by section 117 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), all the estate both real and personal would be divested out of the official

and vested in the creditors' assignee. No creditors' assignee has ever been appointed in this case, and therefore all the bankrupt's estate remains in Paget, the official assignee, who in the present instance is a debtor of the bankrupt in respect of the surplus due to the bankrupt after payment of the creditors.

[BOVILL, C.J.—He cannot be sued for it by the bankrupt. Nothing can be paid by the official assignee without an order of the Court of Bankruptcy.]

It must be admitted that that part of the attachment order in each of these cases which calls on the garnishee to shew cause why he should not pay the judgment debt, cannot be carried out, but the order notwithstanding this may still remain a good order for the purpose of attaching the debt and giving the judgment creditor priority over other creditors.

[BOVILL, C.J.—You must shew that the garnishee is a debtor.]

For that the case of *Ex parte Marshall Turner* (1) is an authority in point. There the garnishee clauses of the Common Law Procedure Act, 1854, were held to apply to funds in the hands of an official manager of a joint stock company in process of being wound up, where the company was indebted to the judgment debtor; and Willes, J., at chambers is stated to have made the common garnishee order to attach the money, leaving it to the Court of Chancery to give effect to it. It is true that *Russell v. The East Anglian Railway Company* (2), *Ames v. The Trustees of the Birkenhead Docks* (3), and *De Winton v. The Mayor of Brecon* (4), seem to shew that money in the hands of a receiver appointed by the Court of Chancery is not attachable, but such receiver stands in a different position from that of an official assignee, and is in the position of the Court itself whose officer he is. In *Sparks v. Younge* (5) the Court allowed

- (1) 30 Law J. Rep. (n.s.) Chanc. 92.
- (2) 3 Mac. & G. 104; s. c. 20 Law J. Rep. (n.s.) Chanc. 257.
- (3) 20 Beav. 332; s. c. 22 Law J. Rep. (n.s.) Chanc. 540.
- (4) 28 Beav. 200.
- (5) 8 Ir. Com. Law Cas. 251.

the attachment order to stand, although that part of the order which called on the garnishee to pay was discharged. In like manner it is now asked that so much of the orders in the actions now before the Court which attach the debt may be allowed to stand.

Lumley Smith, in support of the rules.—The case of *Kennett v. The Westminster Improvement Commissioners* (6) shews that the garnishee is entitled to set aside the order if there be no attachable debt. Here there is no debt due from Paget. The official assignee is not allowed to retain the money he receives from the bankrupt's estate, but he has to pay it into the Bankruptcy Court to the credit of the Accountant-General; and even when a dividend is ordered, the official assignee does not pay any money, but he gives the creditor a warrant to the effect that such creditor is entitled to a certain sum, and this enables the creditor to get the money from the bank. The 12 & 13 Vict. c. 106. s. 197, shews that, if there be a surplus, the Court may order it to be paid to the bankrupt; but it could not be paid without such order. The case of *Boyse v. Simpson* (7) is directly in point. There a dividend payable by an assignee in bankruptcy to a creditor who had proved in the bankruptcy, was held not attachable under the garnishee clauses of the Irish Common Law Procedure Act, which do not differ in this respect from those of the English Act. The cases which have been cited as to a receiver in Chancery are applicable; for an official assignee is entitled to the same protection as such receiver—*Griffith and Holmes on Bankruptcy*, p. 852.

BOVILL, C.J.—I am of opinion that the present case does not fall within the garnishee clauses of the Common Law Procedure Act, 1854. Those clauses are directed to the attachment of debts, and the whole machinery of the enactments is applicable only to debts, and those existing debts for which a discharge may be

given. Now it is conceded that under the orders which have been made in the present case the garnishee would not be justified in paying. There is the case where a receiver appointed by the Court of Chancery paid a debt under a garnishee order, and the Court disallowed such payment—*De Winton v. The Mayor of Brecon* (4). It has, however, been contended by Mr. Barrow that notwithstanding the orders cannot be enforced, and the garnishee would not be justified in paying under them, yet the orders may stand for attaching the money. It is, I think, impossible to put a different construction upon the word "debt" in this 61st section from what it must mean in the other sections which relate to the enforcement of the attachment orders. In one sense only, the garnishee in the present case has money belonging to the defendant, that is to say, money which, after payment of the creditors, may be payable to the bankrupt, but whether it will be payable to him or not must depend on the order which may be afterwards made by the Bankruptcy Court. The case of *Boyse v. Simpson* (7) is a strong authority that such orders as those in the present case cannot be made, and the reasons given by Pigot, C.B., in his judgment at page 526 of the report, shew this to my mind most conclusively. Mr. Barrow has relied very much on the case of *Ex parte Marshall Turner* (1), but on carefully examining it I cannot see that it decides anything of the kind for which he has contended. The question there was as to the priority of two creditors, Mr. Smith and Mr. Turner, the counsel for the official manager stating, that the only desire of the official manager was to be rid of the money in his hands; in the result the Court gave effect, not to the garnishee order, but to the priority of the claim of Mr. Smith over that of Mr. Turner. It is said that the decision of the Lords Justices in that case affirmed the validity of the orders, but it appears from the report that the practice at the Judges' Chambers was to refuse to grant such orders against official managers of companies, and that the late Mr. Justice Willes made them on the undertaking of Mr. Turner not to act upon them, except under the order of the Court of Chancery.

(6) 11 Exch. Rep. 340; s. c. 25 Law J. Rep. (N.S.) Exch. 97.

(7) 8 Ir. Com. Law Cas. 523.

The circumstances in that case were very peculiar, and it certainly is not an authority to shew that the money in the hands of the official manager was a debt within the meaning of section 61 of the Common Law Procedure Act, 1854. Indeed, Lord Justice Turner in his judgment considers the attachment in that case as against the company, and says, "It is upon a debt due from the company, and the official assignee has money in his hands to pay the debt independently of any question as to how the fund arises." On the whole, as it seems to me, it was unnecessary there to determine accurately what was the precise effect of the garnishee orders which had been made.

In the present case, I have no hesitation in coming to the conclusion that the sur-

plus money to which the bankrupt may be entitled is not a debt from the official assignee, and that the case is governed by the decision in *Boyse v. Simpson* (7), and consequently that the rules to set aside the orders should be made absolute.

DENMAN, J.—I concur in thinking that this surplus money is not a debt within the meaning of the garnishee clauses of the Common Law Procedure Act, 1854. The case of *ex parte Marshall Turner* (1), which is the only one on which Mr. Barrow could rely, is really not applicable.

Rules absolute.

Attorney—W. W. Aldridge, for the garnishee.

END OF MICHAELMAS TERM, 1872

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND IN THE

Exchequer Chamber and House of Lords,

ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

HILARY TERM, 86 VICTORIÆ.

1873. }
Jan. 11. }

CASELLA v. DARTON.

Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67)—Leave to Appear—Defence in Abatement.

Where a writ is issued under "The Summary Procedure on Bills of Exchange Act, 1855," a defence in abatement that the defendant was joint acceptor of the bill of exchange with another, is a legal defence entitling him to leave to appear under section 2.

This was an application to rescind an order of a Master made under the Bills of Exchange Act, 1855, allowing the defendant to appear. A previous application on appeal had been made to Brett, J., who referred the matter to the Court. The action was against the defendant as acceptor of a bill of exchange, and the affidavit disclosed that one Fox was joint acceptor with the defendant.

Grantham appeared for the plaintiff, and contended that the defence was technical and not meritorious, and therefore not available under 18 & 19 Vict. c. 67. s. 2.

BOVILL, C.J.—I am of opinion that the Master was right. The defence disclosed in the affidavit, though perhaps somewhat

technical, is a legal defence, a defence affecting the rights of the parties and allowed by law, and it was never contemplated that the statute was to take away any legal defence; on the contrary, the statute says that on an affidavit disclosing a legal defence the leave "shall" be given; and here it is clear that a legal defence was disclosed, and therefore it was imperative on the Master to make the order.

BYLES, J.—I am of the same opinion. This was a legal defence, and though it is true that the marginal note to section 2 speaks of a defence on the merits, it seems to me that the marginal note is not part of the Act, and that even if it is, the defence is one on the merits within the meaning of the statute.

KEATING, J.—I am of the same opinion, and I recollect that soon after the passing of the statute Williams, J., laid down that it was not intended to deprive the defendant of any legal defence.

BRETT, J.—The objection made is that, assuming the affidavit true, and that there is a legal defence, yet as it is not a meritorious defence, the Master ought not to have made this order; but the statute does not take away any legal defence even if not meritorious, and I adopt what was formerly said by Williams, J., and think that whenever a legal defence is disclosed

no terms are to be imposed, but the defendant has a right to be allowed to appear. I referred the question to the Court, because it was stated at chambers that there had been doubt on the point and a diversity of practice.

Rule refused.

Attorney—W. A. Cramp, for plaintiff.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Common Pleas.)

1878. } HORN AND ANOTHER v. THE MID-
Feb. 7. } LAND RAILWAY COMPANY.

Common Carriers—Railway Company—Late Delivery of Goods—Non-acceptance of Goods by Consignee—Special Notice to Carrier—Damages.

The plaintiffs in the beginning of the year 1871 contracted to supply, at 4s. a pair, a large quantity of shoes to Messrs. Hickson & Co., who required them to fulfil a contract for the supply of the French army during the late war. The last day for delivery by the plaintiffs was the 3rd of February, 1872, and all shoes not so delivered would be thrown back on the plaintiffs' hands. The plaintiffs delivered a certain quantity of shoes to the defendants at Kettering, consigned to Messrs. Hickson & Co., in London, in time to be delivered on that day. Notice was given to the station master that the plaintiffs were under contract to deliver on that day, and if not so delivered the shoes would be thrown on the plaintiffs' hands, but no further information. The shoes were not delivered by the defendants till the morning of the next day, and were rejected. The plaintiffs, using their utmost endeavours, could only sell the rejected shoes at 2s. 9d. a pair, and in consequence of the cessation of the war the consignees, but for their French contract, could not have sold them at a higher price even if duly received. The defendants paid into Court 20l., which was sufficient to cover the incidental expenses and the ordinary damages to which the plaintiffs would be entitled, but the latter claimed to be entitled to recover

the difference between 4s. and 2s. 9d. a pair:—Held, by the majority of the Court of Exchequer Chamber, affirming the judgment of the Court of Common Pleas, that the plaintiffs were not entitled to recover the said difference.

Whether the rule in Hadley v. Baxendale (9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179) *in its entirety is law seems questionable.*

This was an appeal from the judgment of the Court of Common Pleas, on a Special Case, in favour of the defendants, reported 41 Law J. Rep. (N.S.) C.P. 264.

The Special Case will be found to be fully set forth in the report of the decision of the Court below, and for the purposes of the present report the above statement in the head note will suffice.

Field (Lumley Smith with him), argued for the appellants.

Henry James (Sturge with him), for the respondents.

The following additional authorities were cited—*Riley v. Horne* (1), *Robinson v. Harman* (2), *Smeed v. Foord* (3), *The Great Western Railway Company v. Redmayne* (4), *O'Hanlan v. The Great Western Railway Company* (5), *The Peninsular and Oriental Steam, &c., Company v. Shand* (6), *Behrens v. The Great Northern Railway Company* (7), *The Great Northern Railway Company v. Shepherd* (8).

KELLY, C.B.—I am of opinion that the judgment of the Court of Common Pleas should be affirmed. And before stating the undisputed facts, I will premise, as respects what was the market price of the goods (as to which I believe there is a difference of opinion in the Court), that I think that there is nothing to shew it

- (1) 5 Bing. 212.
- (2) 1 Exch. Rep. 852; s. c. 18 Law J. Rep. (N.S.) Exch. 202.
- (3) 1 E. & E. 602; s. c. 28 Law J. Rep. (N.S.) Q.B. 178.
- (4) Law Rep. 1 C.P. 329.
- (5) 6 B. & S. 484; s. c. 34 Law J. Rep. (N.S.) Q.B. 154.
- (6) 3 Moore's P.C. N.S. 293.
- (7) 7 Hurl. & N. 950; s. c. 31 Law J. Rep. (N.S.) Exch. 299.
- (8) 8 Exch. Rep. 30; s. c. 21 Law J. Rep. (N.S.) Exch. 114.

was, and that looking to the way in which the case is stated, we must assume it was not at any time greater than 2s. 9d. per pair of shoes. The short facts of the case are that the plaintiffs delivered the goods to the railway company, directed that they should be delivered to the Hicksons on the 3rd of February, and further intimated that they should be delivered then, as otherwise they would be thrown back on their hands. And the goods not having been then delivered, and having been thrown back on the plaintiffs' hands, the question is, what is to be the measure of damages. For the defendants it is contended that the case is governed by a plain rule, and that only the difference (which is *nil*) of market value for which they would ordinarily be liable can be recovered, whilst on behalf of the plaintiffs an important question is raised, as to the effect of an intimation that certain special damage will arise from non-delivery, a question, however, which, in my view, need not be decided. Now, it is to be remembered that whatever may be the case as to certain goods, such as jewellery, which are carried under statutory provisions, here the goods were merchandise to which those statutes do not apply, either as to the obligation to accept, &c., or as to the liability for damages, and therefore the case is governed by the common law. Now, first, it seems to me clear that the railway company were bound to accept, convey as directed and deliver the goods, and if they be so bound, suppose an intimation as extensive as that for which Mr. Field contends was made here, *i.e.* not merely an intimation that the goods would be thrown on the plaintiffs' hands, but an express statement of the nature of the contract, and the amount of loss which its breach would entail, what would be the position of the railway company? Would they be the less bound to receive and convey the goods? I think clearly not. Then comes the question what is the effect of the notice. Is it to force the company to contract so as to be liable for any damage sustained by the plaintiffs, although the amount in many cases might be indefinitely large, and although the company was bound to receive? It seems to me that there is no reason and

no authority to support such a liability. I fail to see, even where there is notice of the damage, how without more this increases the carrier's liability. On the one hand the company has no power to say they will not accept the goods unless an extra charge for carriage be paid, nor on the other has the consignor power to compel them to accept an additional remuneration and liability. Neither can impose such a contract on the other. In the absence of an express contract, I cannot see how a notice that the damage will be large can create a contract making the company liable for it. So that even if here there were a notice to the effect contended for by Mr. Field, it seems to me that unless thereon there be in terms, express or implied, a contract that the defendants will be liable, there is no such liability. But whether this be so or not, I am clearly of opinion that here the only intimation to the railway company, and the whole effect of it, is that if the goods were not delivered at the particular time there would be a breach of contract, and a liability to an action, and to have the goods thrown back on the plaintiffs' hands; that the case falls within the principle of the decided cases, that only what the parties contemplate will be the ordinary consequences of non-delivery, is recoverable as damages; and that the natural consequence would be simply a liability depending on the difference between the market prices, and here there is none. Here there was no special contract, express or implied, and if the defendants by notice could be made liable as contended, the plaintiffs to make them so were bound clearly to express that they held them liable for the specific amount, but as the intimation was only what I have stated, no greater liability was cast on the defendants than in an ordinary case. Without clear notice only the simple difference between the market prices and legitimate expenses can be recovered, and as there was no difference as far as appears, and enough paid in to cover nominal damages and the expenses, the defendants are entitled to judgment.

MARTIN, B.—I have had some doubts, but I agree that the judgment should be affirmed. The plaintiffs no doubt lost

what they sue for, but it seems to me they are only entitled to ordinary damages. One test is to suppose the goods were burnt, and in such case I cannot see that the plaintiffs could recover four shillings a pair, but think they could recover only the value of the shoes at the time when they were burnt. As respects *France v. Gaudet* (9), the champagne case, the action there was between vendor and vendee, and further there is, I think, little analogy in the cases on this subject, and each case must stand on its own grounds. Again, suppose another man had sent exactly similar shoes at the same time, and had no such contract as is relied on here, he could only recover the ordinary damages, and how is it possible that by the communication they made the plaintiffs could throw a different liability on the defendants? That is one ground, I think, for deciding in favour of the defendants. Another ground, I think, is that there should be uniformity of damages, otherwise the door would be open for much imposition. And I have come to the conclusion that it would be dangerous, except where there is a contract, to impose on a carrier a greater liability than ordinary.

BLACKBURN, J.—I am also of opinion that judgment should be affirmed, but I am anxious to guard myself and state how far I go. To a certain extent there is no doubt about the law, there is no doubt that if a contract be broken all the damage thereby occurring which might reasonably be expected in ordinary course to follow, is recoverable, and if there be a contract to carry goods and they be lost, the carrier ordinarily must pay their value, though it may be more than he anticipated; whilst there is no doubt on the other hand that if the damage be such as would not ordinarily be expected, it is not recoverable if notice be not given at the time of the contract. If notice of special damage be given it may be that it would be in some cases evidence of a contract to bear the loss, and if such a contract be made of course it binds. But here, even if there be notice, there is no special contract, the contract is to carry

and deliver within a reasonable time, with notice to deliver on the 3rd of February, if reasonable, but we cannot say that there was a contract to deliver on the 3rd of February, or anything to vary the ordinary contract. And indeed if the station-master had made a contract to deliver on the 3rd of February, and, if not, be liable to the specific sum claimed, it would clearly have been beyond his authority. But in fact no such contract was made.

Now comes a question on which I speak with reserve. In *Hadley v. Baxendale* (10) it is said that if special notice be given the damage is recoverable, though there be no special contract, and this has been repeated in various cases, but it is noticeable that there seems to be no case where it has been held that if notice be given abnormal damages may be recovered; and I should be inclined to agree with my brother Martin, that they cannot unless there be a contract. But it is not necessary to decide this question, because here in fact there was no such notice, the notice here given conveys full information that the day is of consequence and that the goods should be delivered on the 3rd of February if the defendants could, from which a contract of sale on which there was a profit might be inferred, but there was no notice that the defendants would have to pay the amount of loss claimed. Therefore it is not necessary to decide whether the dictum in *Hadley v. Baxendale* (10) is law, though I confess that at present I think it a mistake.

MELLOR, J.—I am of the same opinion. I will only say that here there was a contract of carriage in the ordinary terms, with a notice to deliver on the 3rd of February, and that if this were not done the goods would be thrown on the plaintiffs' hands. That was all. There was no notice to bring the case within *Hadley v. Baxendale* (10), for the plaintiffs did not say, "mind you must deliver on the 3rd of February, and if you do not such a sum will be lost and I shall hold you responsible." There was no such notice of an exceptional contract at an exceptional price as to make the defendants liable

(9) 40 Law J. Rep. (N.S.) Q.B. 121.

(10) 9 Exch. Rep. 341; s. c. 23 Law J. Rep. (N.S.) Exch. 179.

within the rule in that case. And as respects the amount of damages the inference I draw from the statements in the case is that there was no difference in the market prices, for the difference between which in such case the defendants would be liable.

PIGOTT, B.—I differ in opinion and think that the plaintiffs are entitled to recover what they have lost. The question is as to the amount of damages recoverable where there has been a breach of contract by a carrier under a special notice. If the company are to be liable for extraordinary damages on notice, I think it is to be taken that they may refuse to carry unless they may charge an adequately increased rate, and as I concede that they can only charge up to their tariff and that would not be adequate, I think, therefore, they had a right to decline to carry. But if they do not decline and accept the goods with notice of the consequences we may, I think, infer that they specially contracted. What therefore was the contract here? It seems to me that the notice here given imports that the plaintiffs were under a contract to deliver by a particular day, that the contract was one of value on which there would be a profit by a due delivery or a loss by a failure to do so, and that the goods were taken for carriage on those terms. It turns out that the loss is 1s. 3d. per pair of shoes, the contract having been made with reference to a special market, and if that be the loss why should the plaintiffs not recover it? It can only be by means of artificial reasoning or on grounds of public policy. The principle which governs the amount of damages is that they must be such as naturally flow from the breach of contract or, according to *Hadley v. Baxendale* (10), such as both parties would ordinarily and reasonably contemplate. Here the contract of sale was at the rate of 4s. per pair, and this price was not exceptional, for the same would have been given to others, there being a demand in consequence of the war, and when the delivery for carriage and breach of the defendant's contract occurred, the price had fallen simply because the war was at an end, which is only to say that the

market had fallen between the times of the contract of sale and delivery to the company. . Why are the plaintiffs not to recover the loss they have sustained? It is said that the defendants could not have contemplated it, but though they may not have known the details, as they accepted the goods they took the consequences of the loss of the contract; there was an opportunity for enquiring into the details, but they do not enquire and accept the goods, and therefore they are liable for the whole of these damages which both parties might reasonably contemplate would flow from the non-delivery, and the case, therefore, is within *Hadley v. Baxendale* (10) and the other cases. It seems to me there was sufficient notice, a loss within the notice, and that the defendants ought to have enquired into the details.

LUSH, J.—I think that the judgment of the Court below should be reversed. I agree that the liability of a carrier ordinarily is to pay such damage as naturally and ordinarily flows from a breach of contract, what may reasonably be contemplated as its consequences. A common carrier cannot refuse to carry, but if it be sought to impose on him an extra liability he may decline to do so, or fix a higher rate. This seems to me deducible from *Riley v. Horne* (1), where Best, C.J., discussed the whole law, and said—"As the law makes the carrier an insurer and as the goods he carries may be injured or destroyed by many accidents against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination, as for the labour and expense of carrying them there. . . . He must take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him. . . . As the law compels carriers to undertake for the security of what they carry, it would be most unjust, if it did not afford them the means of knowing the extent of their risk. . . . A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are and what they are worth.

the carrier may refuse to take charge of them, but if he does take charge of them he waives his right to know their contents and value." And according to *Hadley v. Baxendale* (10), if there be notice of the special circumstances and the carrier consents to carry, he is liable for the consequences, though I agree that there must not merely be notice, and, as was said by Willes, J., in *The British Columbia, &c. Company v. Nettleship* (11)—"That there must be knowledge under such circumstances, that he knows the other party intends him to be liable for the special consequences." Now, I think, that if the plaintiffs had said—"We have such a contract from which we shall get so much if performed, lose so much if not," and the station-master (as to whose authority no question is raised) assented, the defendants would have been liable. If they had said—"The goods must be delivered to-morrow, if not, we shall lose such a sum, and we look to you," and the station-master assented to carry on those terms, the defendants would have been liable. And what here took place amounted to this, that information was conveyed to the station-master, that the plaintiffs were sending the goods under a beneficial contract which would be lost by non-delivery. It is true the plaintiffs did not say how much would be lost, but this was not necessary, for, as was said by Best, C.J., in *Biley v. Horne* (1), "It is the duty of the carrier to enquire of the owner as to the value of his goods, and if he neglects to make such enquiry . . . he is responsible for the full value of the goods, however great it may be;" if he does not ask, it is too late to object. Here enough was said to make it the duty of the station-master to inquire as to the consequences, if he so desired, and therefore the case is the same as if the company knew the whole amount of the loss, and I therefore think there was a special contract, by which the company assented to indemnify the plaintiffs if this loss occurred.

CLEASBY, B.—I agree with the majority of the Court, that the judgment of the Court of Common Pleas should be af-

firmed. The question is, whether there is anything to shew a claim for more than the 20*l.* paid into Court, or in the result, whether the defendants are responsible for the damages arising from the non-completion of the plaintiffs' contract. I say nothing on the general questions as to the effect of notice, or difference between railway companies and other carriers, but affirm the judgment on the ground given in the Court below, which is sufficient and on which we may safely rest, that the notice here given was not of a nature to bind the defendants by the terms of the plaintiffs' contract. No information was given as to the contract price, and consequently, the defendants cannot be said to have contracted with reference to it. Therefore, it is plainly only possible to say in support of the plaintiffs' claim, that enough transpired to make the defendants inquire. But I do not agree to this. For even if the station-master had a discretion to contract to the extent contended by the plaintiffs, which I think he had not, though I do not base my judgment on this, I think there was nothing to put him on inquiry and nothing to shew him there was a contract involving such a loss as here occurred, and as there was no notice of the consequences, there was, no liability.

Judgment affirmed.

Attorney—C. Sawbridge, for plaintiffs; Beale, Marigold & Beale, for defendants.

[IN THE EXCHEQUER CHAMBER.]
(Appeal from the Court of Common Pleas.)

1873. { THE BRECON MARKETS COMPANY
Feb. 10. { v. THE NEATH AND BRECON
RAILWAY COMPANY.

Toll Traverse—Liability of Railway Company to ancient Toll.

The simple fact of a corporation being entitled to an ancient drift toll on waggons passing to, through or from a borough does not support a claim (even if such a claim can be legal) to take toll on railway waggons passing over a railway made through the borough.

(11) 37 Law J. Rep. (N.S.) C.P. 235; s. c. Law Rep. 3 C.P. 499.

This was an appeal from a judgment (reported 41 Law J. Rep. (N.S.) C.P. 257) of the Court of Common Pleas, on a Special Case, in favour of the defendants. The case is fully set out in the report below, and it is only necessary here to say that the plaintiffs claimed to be entitled, by virtue of an ancient right to a drift toll (formerly belonging to the corporation of Brecon and transferred to them), to levy toll in respect of railway waggons passing over the defendants' railway which ran through the borough of Brecon.

Dowdeswell argued for the appellants.

J. O. Griffiths, *contra*, was not called upon.

KELLY, C.B.—The plaintiffs claim a right to a toll traverse for waggons and other vehicles passing into, through and out of the borough of Brecon. Now assume that, if a right to take a toll traverse be established, founded on a grant to the corporation before the time of legal memory, perhaps in consideration of the corporation making roads (and no doubt such a grant would be good and entitle them to toll traverse), and subsequently new highways were made, not by the corporation, on land within the borough which was not their property, toll traverse might be claimed there. Further, assume that, supposing anciently all the borough were the property of the corporation, and at a remote period they aliened in fee the land now belonging to the defendants, the railway company, and reserved a right to make a way, or said if the alienee made a road through it toll traverse should be paid, that toll traverse could be enforced. Assume all this to be law, though I must not be taken to hold that it is; yet here, even supposing the land originally belonged to the corporation, it must have been aliened without any such reservation in fee for a valuable consideration, and is there any shadow of law to shew that if the alienee think fit to make a way for his own accommodation, that the corporation would be entitled to toll traverse for his use of his own land? The consequence would be that if they granted land at the extremity of the borough without such a reservation he could not drive in and out

without payment of toll, a result which is absurd; and further, even if he created a public highway there is no authority to shew that there would be a title to a toll traverse in gross. But the present case goes even further, for the railway company bought land which, even if the corporation originally possessed it, only belonged to them long ago, paying a full consideration for it in fee, and there is no right recognised by law that toll traverse can be enforced as to the land so in their possession. It is not pretended that the company made their railway for the purposes of evasion, but under statutory power they made their railway on the land. This being so I am of opinion that the judgment should be affirmed.

MARTIN, B.—I am of the same opinion. Indeed I do not think a railway waggon is within such a right as this, it is an entirely new machine.

BLACKBURN, J.—It no doubt is correct to say that, if there be a prescriptive toll and a reasonable mode of inferring a valid origin, we are to conclude in favour of its validity, and there are cases as to harbour and market tolls (of which *Rickards v. Bennett* (1) is an example) where the claim has been held to extend to a whole manor, but no case has been cited to support such a claim as this, viz., that if a man makes a way on his own land toll can be claimed, and I do not think it is legal, though it is not necessary to decide this, for I do not see that the corporation are shewn to have used such a right. The mere fact of their being entitled to a "drift toll" does not prove that there has been an immemorial enjoyment of such a right as is claimed, even if it can be legal.

MELLOR, J., PIGOTT, B., LUSH, J., and CLEASBY, B., concurred.

Judgment affirmed.

Attorneys—Wilkins, Blyth & Marsland, agents for J. R. Cobb, Brecon, for appellants; Dean & Taylor, for respondents.

(1) 1 B. & C. 223.

1873. }
Feb. 6. } ROPER AND OTHERS v. JOHNSON.

Damages, Measure of—Breach of Contract to deliver Goods by Instalments—Action before last Instalment.

Where in the case of a contract for the sale of goods to be delivered during certain specified times, the vendee treats a repudiation of such contract by the vendor as a breach of the whole contract and brings his action for such breach before the expiration of the time for its performance, the true measure of damages is the difference between the market and contract price on each of the times when the goods were to be delivered; and if the damages could have been diminished by shewing that at the time such repudiation of the contract was so treated as a breach of it, it was possible to have made another forward contract with some other person for the supply of the goods during the remainder of the times contracted for, it is for the vendor to shew that such other contract could have been made.

Action for breach of contract to deliver coal. The contract was contained in letters which passed between the plaintiffs and the defendant during April, 1872, and was a contract by which the plaintiffs were to buy of the defendant who was to sell to the plaintiffs 3,000 tons of coal to be delivered at the defendant's colliery at Hindley Green, near Wigan, during the months of May, June, July and August, 1872, at 8s. 6d. per ton, less 2½ per cent. discount. There was some misunderstanding between the parties with respect to sending for the coal and the plaintiffs not having applied for coal in May, the defendant on the 31st of that month wrote to the plaintiffs that the contract must therefore be considered cancelled. The plaintiffs wrote in reply, stating that they considered the contract still in force, and they sent their waggons for coal, but after some further correspondence the plaintiffs unequivocally accepted the repudiation of the contract by the defendant, and on the 3rd of July, 1872, brought the present action, which was tried before Brett, J., at the Liverpool summer assizes, on the 13th of August last. The market price of coal

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rose considerably during the time it was to have been delivered according to the contract. In May there was an advance of 1s. 6d. a ton beyond the contract price of 8s. 6d. a ton. In June such advance was 2s. a ton; in July, from the 1st to the 13th it was 2s. 6d.; from the 13th to the 19th it was 3s. 6d., and from the 19th to August 13, it was as high as 5s. a ton, and it afterwards went up still higher. The verdict was entered for the plaintiffs for 505l. 2s. 5d., being the amount of the aggregate of such advanced prices, together with about 19l. for waggon expenses.

Pursuant to leave reserved, *Herschell* afterwards obtained a rule nisi to set aside the verdict and to enter instead a verdict for the defendant, on the ground that the plaintiffs not having performed the contract by taking any coal in May, were not entitled to recover; or to reduce the damages to such sum as the Court should direct.

Holker and Dixon shewed cause against the rule.—

[*Herschell* now admitted that he could not distinguish the present case from that of *Simpson v. Crippin* (1), and that therefore so much of the rule as related to entering a verdict for the defendant must be discharged.]

The only point then is as to the damages (2). It is clear that if the action had not been brought until after August, 1872, when the time for the delivery of the last instalment of the coal had expired, the case of *Brown v. Muller* (3) would have been expressly in point in favour of the plaintiffs, and the true measure

(1) 42 Law J. Rep. (n.s.) Q.B. 28; s. c. Law Rep. 8 Q.B. 14.

(2) During the argument and on the recommendation of the Court, it was agreed between the counsel on either side that since the plaintiffs were not entitled, as their counsel admitted, to damages in respect of the non-delivery in May, nor to the charge for waggon expenses, the sum of 400l. should be considered the proper amount of damages, if they were to be assessed on the principle contended for by the plaintiffs.

(3) 41 Law J. Rep. (n.s.) Exch. 214; s. c. Law Rep. 7 Exch. 319.

of damages would therefore have been the aggregate of the differences between the contract price and the market price at the several times fixed for delivery. The defendant will contend that the damages must be ascertained with reference to the state of things at the time of the breach of contract, which, he says, is when the plaintiffs elected to treat the repudiation of the contract by the defendant as such breach. There really cannot be fixed any time when such election was made, earlier than the 3rd of July, when the action was commenced. Surely the making of such election and so bringing the action before the day when the contract was to have been completed cannot make any difference. As stated by the Judges in *Brown v. Muller* (3), damages are not to be estimated with reference to the time when there was a breach of the contract, but with reference to the times for performance. The same rule is to be found in *Simpson v. Crippin* (1). "I by no means," says Channell, B., in *Brown v. Muller* (2), "desire to interfere with the rule, that where there is a contract to deliver goods on a specific day, the proper measure of damages is the difference on that day between the market and contract prices. But where the contract is to deliver in parcels at definite but different times, as here, at the end of the three months of September, October and November, there I think the difference should be taken at the end of each period. The time when a contract is broken is one thing, the time when it is to be performed may be quite another. Here it was to be performed by three separate deliveries of goods on specified days. And under these circumstances, in order to measure the damages resort must be had to each final day of performance." If the defendant in the present case could have shewn that at the time he refused to perform the contract the plaintiffs could have made a similar forward contract with another person for the supply of coal at an advance of 2s. a ton only beyond the contract price, that might have been the measure of damage, but no evidence of that kind was given at the trial, and as the market was daily rising it is not likely that any such contract

could have been made, and certainly the plaintiffs were not bound to have tried to make such a contract. It is difficult to understand how *Brown v. Muller* (3), can be distinguished from the present case, for the bringing the action on the announcement of the repudiation of the contract by the defendant, instead of waiting the time for its complete performance, can make no difference. *Hochster v. De la Tour* (4) is decisive that the action will lie at once after such repudiation, and the principle of that case was lately applied by the Exchequer Chamber to the case of a promise to marry—*Frost v. Knight* (5).

Herschell and *Baylis*, in support of the rule.—The true measure of damages in a case like the present is at what extra cost the plaintiffs could at the time they treat the defendant's repudiation as a breach of the contract have put themselves in the position they were before such breach. Treating the time when the action was brought as the time of such breach, it was for the plaintiffs to have shewn what advanced rate per ton it would have cost them at that time to have made a forward contract for the supply of coal during July and August, or else they should have shewn that no such contract at all could then have been made. The difficulty which exists here in ascertaining the damages did not exist in *Brown v. Muller* (3), but even there *Bramwell*, B., asked during the argument whether the plaintiff ought not, when the defendant repudiated, to have endeavoured to provide himself with another contract, and therefore, probably, that learned Judge would have considered that the advance at which such similar contract could have been made was the proper measure of damage, but he left the Court before the judgment was given. It is true that *Kelly*, C.B., considered that the plaintiff was not bound to enter into such fresh contract, but such opinion was merely an *obiter dictum*. In *Phillipotts v.*

(4) 2 E. & B. 678; s. c. 22 Law J. Rep. (N.S.) Q.B. 455.

(5) 41 Law J. Rep. (N.S.) Exch. 78; s. c. Law Rep. 7 Exch. 111.

Evans (6) the contract was treated by the plaintiff as still subsisting, notwithstanding the notice of repudiation given by the defendant, and the damages were therefore held to depend on the market price at the time for the performance of the contract, but where the breach is accepted as such by the other side, the contract must then be treated as at an end.

[BRETT, J.—The Judges who decided *Brown v. Muller* (3) overrule that proposition. When the renunciation is accepted by the plaintiffs they do not thereby say that they will not receive the coal under the contract, but that they believe the defendant when he tells them that he will not deliver the coal when the time comes for its delivery.]

If the true measure of damage be such as the defendant contends for, then the *onus* was on the plaintiffs to prove that they could not have made a forward contract at all, and in no case should the damages be assessed beyond the rate of 2s. 6d. a ton in advance of the contract price, as that was the greatest additional rate at the time the action was brought.

KEATING, J.—The question in this case arises upon a contract by the defendant to deliver 3,000 tons of coal to the plaintiffs at 8s. 6d. per ton. The delivery was to be made at the defendant's colliery during the months of May, June, July and August in last year. There is no disagreement between the parties about the facts, and it is clear that soon after the contract was made the defendant intimated to the plaintiffs a determination not to perform the contract, and that repudiation by the defendant of the contract was unequivocally accepted by the plaintiffs on the 3rd of July (for it seems now to be agreed that that must be taken to be the day), and they then brought the present action. The difficulty in this case arises from the action having been thus brought on the 3rd of July, when the time for the delivery of a portion of the coal in fulfilment of the contract extended over the whole of August. But for

that circumstance there would have been little or no doubt in disposing of the question, what is the proper measure of damages in consequence of this admitted breach of contract? Now if the repudiation by the defendant had not been so accepted by the plaintiffs as to constitute a breach of contract before the end of the month of August, and the action, instead of being brought in July, had not been brought until after August, the case would have been precisely within that of *Brown v. Muller* (3), and we should have considered ourselves entirely bound by that authority. That case decides that where the action is not brought until the arrival of the final period for the performance, the measure of damages is the difference between the contract price and each of the times when the delivery ought to have been made. But in the present case the action is brought and the breach occurs before the arrival of the final period to which the contract extends, and it has been argued by Mr. Herschell that in such a case the true measure of damages is the cost of the plaintiffs at the time of such breach, and the mode in which that is to be ascertained is by finding at what price a similar forward contract could then have been obtained by the plaintiffs in the market, and that being the true measure of damages it is the only measure of damages, and consequently it was for the plaintiffs to have shewn damages on that footing or that they were unable to have obtained any such contract at all. Now it appears to me that the plaintiffs cannot necessarily be called upon to give any such evidence, and I further think that the rule laid down in *Brown v. Muller* (3) as to assessing damages is to be applied to the present case in what I may call *cy-pres*. The opinions pronounced in that case by the Chief Baron, and my brothers, Martin and Channell, though undoubtedly mere *obiter dicta*, as Mr. Herschell was justified in saying, are however of great authority, and strongly support the view contended for on the part of the plaintiffs. The difficulty here has arisen from the case of *Hochster v. De la Tour* (4) which was the first case in which it was decided, with reference to an executory contract, that notice of the refusal

(6) 5 Mee. & W. 475; s. c. 9 Law J. Rep. (N.S.) Exch. 33.

by one of the parties would entitle the other to treat it as a breach, and bring his action before the time for performance. *Hochster v. De la Tour* (4) has been recognised by several subsequent decisions and is fairly now established as law, and we must assume it to be law. It has, however, introduced a difficulty which did not before exist as to the assessment of damages. That case was followed by the case of *Frost v. Knight* (5), and though it was not necessary there any more than in *Hochster v. De la Tour* (4) to assess the damages, Cockburn, C.J., in delivering the judgment of the Court, laid down to my mind a similar rule for assessing the damages, as is referred to by the learned Judges in *Brown v. Muller* (3), and that is that the period of time at which the difference between the market and contract price is to be determined is that at which the contract should have been performed if it had continued to exist; in other words, the measure of damages is the difference between the price of the goods if the contract had been performed and the market price at the times when they ought to have been delivered. Such prices are liable to be mitigated by any circumstance which may have that tendency. That seems to me to dispose of the argument on the part of the defendant, that the question whether a new forward contract for coal could have been made was the mode of ascertaining the loss, and the only and true measure of damages, and that therefore it was for the plaintiffs to have shewn what was the loss they had sustained by such new contract or to have accounted for its non-existence by shewing their inability to enter into any such contract. I think that on the plaintiffs shewing that the market prices during the months for the delivery were higher than the contract price, they were entitled to the difference, unless the defendant shewed, or that it appeared in some other way before the jury, that that was not the true loss the plaintiffs had sustained, because another contract on more mitigated terms could have been obtained, or that in some other way such measure of damages could have been reduced. The defendant, it seems to me, might have shewn this, for in estimat-

ing the damages the jury, in my opinion, are entitled to look at evidence of circumstances which, as said by Cockburn, C.J., in *Frost v. Knight* (5), may have the effect of mitigating the loss. This is the conclusion at which I have arrived, and I think it is strongly supported by the opinions of the Judges in *Brown v. Muller* (3), and is generally the safer and better rule to adopt, although I confess that the case is not one free from difficulty. The result is that the rule will be discharged as to entering a verdict for the defendant, but will be absolute to reduce the damages to 400*l.*, and under these circumstances we think that each party should pay the costs of this rule.

BRETT, J.—This action is brought on a contract for the sale of goods which the defendant undertook to deliver at particular times, and the action is for non-performance by the defendant of such undertaking. In the ordinary case of a contract to deliver on a specified day, there is no breach until that day arrives, and therefore the day of the breach and the day for performance are the same day. In that case the rule as to the measure of damages is stated to be the difference between the market and the contract price on the day of such breach. In *Brown v. Muller* (3) it was held that there was a breach on each of the specified days for the delivery of the goods, and so the day of each breach was the same day as that for the performance, and the time of breach and performance were the same, so that the rule of damages could be stated in the usual terms. But after the principle laid down in *Hochster v. De la Tour* (4), and its application to such a contract as the present, by which, when the defendant has stated he will not perform the contract, the plaintiff may treat that as a breach, and sue at once, the case as to the statement of the rule of damages becomes a complicated one. That case has arisen here. In order to recover on this contract, the plaintiffs had to prove a breach, and secondly, that they had suffered damages thereby. Now what *Hochster v. De la Tour* (4) decided is this, that whereas, under ordinary circumstances, the breach cannot take place

until the time for performance has arrived, yet if one of the parties declare that he will not perform the contract, the other party may treat that at once as a breach, and bring his action. In such case the damages are to be the difference between what his position would have been if the contract had been fulfilled and what it was when not so fulfilled. In ordinary cases the damage is said to be the difference between the contract and market price on the day of the breach, because on that day the plaintiff would have had the goods at the contract price, had the contract been fulfilled, and he would, if there had been a breach and he had wanted the goods, have gone on that day into the market, and bought them at the market price, and the difference between the two prices would have been the damage. But such ordinary formula as to the measure of damages is not quite correct, and the more correct one is the difference between the market and contract price on the day when the defendant ought to perform his contract. It follows that, although, in such a case as the present, one party may treat such refusal by the other as a breach of the whole contract, the damages are not the difference between the contract and market price on that day, but on the contrary, on the day when the contract was to be performed. That is pointed out in the case of *Frost v. Knight* (5), where it is shewn that although you may treat the notice of intention not to perform as a breach, yet in assessing the damages, you are to look to the day of the performance, and not to that of the breach. Cockburn, C.J., in the course of his judgment in *Frost v. Knight* (5), thus treats the case of a plaintiff who has brought his action before the day of performance—"In such action," he says, "he will be entitled to such damages as would have arisen from the non-performance of the contract at the prescribed time." That expressly negatives the proposition contended for by Mr. Herschell, and shews the rule is such as I have attempted to enunciate. "Subject, however," the Chief Justice continues to say, "to abatement in respect of any circumstance which may have afforded him the means of mitigating his loss," "and in

assessing the damages for breach of performance," he says in another part of the judgment, "a jury will of course take into account whatever the plaintiff has done, or has had the means of doing (and as a prudent man ought in reason to have done), whereby his loss has been or should have been diminished." It seems to me to follow from this rule that the plaintiff in such a case as the present satisfies all that he is called upon to prove when he shews by evidence the difference between the contract and market price at the several days of performance. On those days the defendant ought to have delivered the goods at the contract price, and the measure of damages is the difference between the market and contract price on each of those days. It is said by Mr. Herschell that there was ground for diminishing such damages, because the plaintiffs might have gone into the market at the time of such repudiation, and made another forward contract with a third person. I doubt if they could have done so in a rising market; but even if they could have done so, the judgment of the Chief Baron in *Brown v. Muller* (3) goes, I think, the length of saying, not as a matter of law, perhaps, but as a matter of fact, that to require a man to go and make such a contract would be putting on him what you have no right to do, and what he is not bound to undertake. It seems to me that if there were no authority on the subject I should give the same judgment in this case as I now give; but I feel bound by the case of *Frost v. Knight* (5), and by the opinions of the three judges who decided *Brown v. Muller* (3), and for these reasons I concur in the judgment of the Court.

GROVE, J.—I have come to the same conclusion as the rest of the Court, but not without some doubt, especially on the first point, as to which I do not express any opinion, as I agree on the second point, which depends on whether there was any evidence, on which the jury could have acted, of there having been any loss other than the difference between the market and contract price at the various times of delivery. I probably should have felt bound by the decision of the judges in *Brown v. Muller* (3), al-

though what they said was as regards the present case only *obiter dicta*, since the action there was not brought until after the whole time for the performance had expired; but it is unnecessary for me to say whether I should have agreed or differed with them, because Mr. Herschell has not shewn the existence of any evidence for the proposition for which he has contended. That proposition is that the damages should be the amount of the extra cost to which the plaintiffs would be put in order to place themselves at the date of the accepted breach in the same condition they would have been had there been no breach. Now is there any evidence in support of that proposition? Is there any evidence that on the 3rd of July last the plaintiffs could have made a similar contract to that which they had made with the defendant? If it could have been shewn, or if it had been taken as an admitted fact, that the plaintiffs could then have got a forward contract at what was the fair market price at that time, then it might have come within what Lord Campbell says in *Hochster v. De la Tour* (4), where, after speaking of its being to the benefit of both parties that the plaintiff on such renunciation should be at liberty to consider himself absolved from future performance, he says, "Thus, instead of remaining idle, and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract." And further on his Lordship says, "In either case the jury in assessing the damages would be justified in looking to all that happened or was likely to happen to increase or mitigate the loss of the plaintiff down to the day of trial." Therefore, if in the present case there had been evidence from which the jury could have seen that without extraordinary trouble the plaintiffs could have got a forward contract with another person at the then market price, they might have come to the conclusion that the difference between that price and the contract price was the loss; but as there was no such evidence, I do not see how the jury

could have come to that conclusion, or how we can reduce the damages on what is really an imaginary point. I may add that the *onus* of proving that which is in mitigation of the damages lies on the defendant, and therefore the plaintiffs having made out a *prima facie* case of what was the amount of damages, it was for the defendant to have reduced it, by shewing that, although the market price at the different times was so and so, yet that the plaintiffs might easily have got a running contract with another person at the then market price of coal. The first point is one of extreme importance, and may be determined at some future time by a Court of Error. At present I express no opinion on it.

Rule discharged as to entering the verdict for defendant, but made absolute to reduce the damages to 400l.

Attorneys—Sewell & Edwards, for plaintiffs;
Paterson, Snow & Burney, agents for E. L. Wright, Wigan, for defendant.

1872.	}	MORS LE BLANCH AND ANOTHER v. WILSON AND ANOTHER.
Nov. 5.		
1873.		
Feb. 10.		

Shipping—Goods carried under Bill of Lading—Lien for Freight although Goods landed—Costs of defending Action.

The defendants shipped goods on board a vessel, chartered by the plaintiffs on a voyage to a foreign port, under a bill of lading, which stated that the goods were to be landed at the expense and risk of the consignee. On the arrival at the port of destination there was no consignee ready to receive the goods, and the vessel was thereby detained there for a considerable time. An action for unliquidated damages for such detention was brought against the plaintiffs by the owners of the vessel, and the plaintiffs defended the action, after giving notice thereof to the defendants, who refused to have anything to do with it. The plaintiffs afterwards sought to recover from the defendants not only the sum awarded in that action

for such detention, but also the costs incurred in defending it. At the trial the judge left to the jury the question whether it was reasonable in the present plaintiffs to have defended that action, and whether they defended it in a reasonable manner. The judge also told the jury that the captain would lose his lien for freight by landing the goods, as it did not appear that there was any warehouse at such foreign port similar to those under the English warehousing statutes. The jury having found for the plaintiffs for the amount claimed,—Held, that the question was rightly left to the jury as to the liability of the defendants to the costs of the action brought against the plaintiffs.

Held also, that the direction of the judge that the captain could not land the goods without losing his lien for freight was wrong, as being too general in its terms, since he might land them and yet preserve his lien for freight if he kept them entirely within his own exclusive control.

Quæro—whether the captain would not lose such lien if the goods when landed were placed in the hands of an independent person, who would have a lien on his own behalf, even though he should undertake to the captain not to deliver the goods to the consignee without being paid the claim for freight.

The plaintiffs having chartered two vessels, one of them *The Pitho*, on a voyage from London to Buenos Ayres, and the other, *The Majestic*, on a voyage from London to Monte Video, the defendants caused a quantity of coal to be shipped on board these vessels during July and August, 1869, under bills of lading in the ordinary form, except that in the margin of each it was stated that the coal was "to be taken from the ship as soon as the master is ready to deliver, or to be landed at the expense and risk of consignee." There were sent under these bills of lading about forty-seven tons of coal by *The Pitho*, and eighty tons by *The Majestic*. Both vessels had other cargoes besides the coal, which being at the bottom would be the last to be discharged. *The Pitho* arrived at Buenos Ayres on the 28th of November, 1869, and on the 23rd of December she was

ready to discharge the coal, but there was no consignee to receive it. The master tried to land it, but he was not permitted there to do so without naming a consignee, and ultimately on the 19th and 20th of January, 1870, he landed the coal to the order of the consignees of the ship.

The Majestic arrived at Monte Video on the 8th of December, 1869, and was ready to discharge the coal on the 24th of January, 1870, but there was in that case also no consignee to receive it, and it was ultimately landed on the 8th of February, under a decree of the Local Commercial Court.

The owners of *The Majestic* sued the plaintiffs for demurrage, in respect of the detention of that vessel at Monte Video for ninety-three days. The plaintiffs saying that such detention was caused by the default of the defendants, informed them of the action, and requested them to come in and defend it, but the defendants refused to do so, and the present plaintiffs alone defended that action. By the charter-party there was no fixed sum for demurrage, and at the trial of that action by the owners of *The Majestic* the jury gave a verdict for fourteen days' detention at 4*l.* a day, amounting therefore to 56*l.*, which the present plaintiffs had to pay; they also paid the costs of the plaintiffs in that action, and their own costs in defending it, and the aggregate of these costs amounted to 208*l.*

The present action was now brought to recover, in addition to the agreed freight, which was 71*l.* in respect of *The Pitho*, and 108*l.* in respect of *The Majestic*, the damages sustained by the plaintiffs by reason of the defendants not receiving the coal when *The Pitho* and *The Majestic* were ready to discharge the same. The cause was tried before Brett, J., at the last Liverpool Summer Assizes, when that learned judge left it to the jury to say what was a fair sum to be paid for the detention of the two vessels beyond a reasonable time; that the jury were to consider what it was reasonable for the captain to have done under the circumstances, there being no consignee on the part of the defendants to receive the coal, and it being necessary for the captain to

keep possession of the coal in order to retain the lien he had for the freight. The jury having asked whether the captain would preserve his lien if he landed the coal, the learned judge told them that by landing the lien would be lost, unless the coal was put into such warehouses as there were at Liverpool, and that there was no evidence that there were any such warehouses at Monte Video or at Buenos Ayres.

With reference to the costs incurred by the plaintiffs in defending the action for demurrage brought against them by the owners of *The Majestic*, and which formed part of the damages sought to be recovered in the present action, the learned judge left it to the jury to say whether it was reasonable in the present plaintiffs to have defended that action, and whether they defended it in a reasonable way.

The jury found that it was reasonable to have defended the action, and that it was defended in a reasonable way, and they found a verdict for the plaintiffs for 499*l.*, being 208*l.* the costs of the action, by the owners of *The Majestic*, including the plaintiff's own costs of defending it, 56*l.* for fourteen days' detention of *The Majestic*, 56*l.* for the like detention of *The Pitlo*, and the 71*l.* and 108*l.* agreed freight. The learned judge reserved leave to the defendants to move to reduce the damages by such 208*l.*, if the question of such costs ought not to have been left to the jury.

Holker (in Michaelmas Term) moved accordingly, and also for a rule to shew cause why there should not be a new trial on the ground of misdirection by the learned judge in telling the jury that the captain would lose his lien upon the coal by landing it, and on the ground that the verdict was against the evidence.—The defendants are not liable for the costs of the action against the plaintiffs by the owners of *The Majestic*. There was no request by the defendants, express or implied, to defend such action—*Short v. Kalloway* (1). The present plaintiffs should either have settled such action or

let judgment go by default, or at all events they should have paid money into Court. The course adopted by the plaintiffs was not a reasonable one, and therefore they have no right to claim the costs so incurred as damages against the defendants—*Tindall v. Bell* (2). Then the learned judge misdirected the jury in telling them that the captain would lose the lien by landing the coal. The bills of lading contained a clause to meet this, by which it was stipulated that the coal might be landed at the expense and risk of the consignee. The Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), enables goods to be landed and placed in a warehouse, subject to the shipowner's lien for freight. The captain might have landed the coals at Buenos Ayres and at Monte Video, with direction to those at the warehouses not to give them up without payment of freight.

BOVILL, C.J.—Upon the point first raised, as to the liability of the defendants for the costs of the former action, it seems to me that the right direction was given to the jury. When it is a question whether a party in the position of the present plaintiffs should defend or not an action for unliquidated damages, such party is often placed in considerable difficulty. He is not recklessly to defend, if he seeks to charge the costs on the party who may ultimately have to bear the loss, and if he places the circumstances before such other party, and the latter withholds his opinion and leaves him to take his own course, it is then a question for the jury whether the defending was a reasonable course to have pursued. This is a matter which must depend upon all the circumstances of the case. I do not see what other question could have been left to the jury than such as was left upon this point by the learned judge. In *Tindall v. Bell* (2), Parke, B., expressed his opinion that it would be a proper question for the jury, whether the plaintiffs had done what a reasonable man could be required to do. It is said that the present plaintiffs should have paid

(1) 11 Ad. & E. 28.

(2) 11 Mees. & W. 228; s. c. 12 Law J. Rep. (N.S.) Exch. 160.

money into Court in the action which was brought against them, or that they should have settled the claim, or have let judgment go by default, but all these are matters which were properly for the consideration of the jury, and I do not see how it was possible for the judge to have determined these as matters of law. I think then there was no misdirection on this point, and therefore as to this there will be no rule; neither do I think there should be any rule on the ground of the verdict being against the evidence, but the point with reference to losing the lien, and the effect of landing the coal upon a bill of lading in the peculiar form of those in the present case, is one which I think ought to be further considered, and therefore upon that point, but on that alone, there may be a rule to shew cause.

GROVE, J.—I am of the same opinion. Cases have occurred and do occur where the person primarily liable cannot do better than give notice to the person who may be ultimately liable, and if such last person returns no answer, what other rule can be laid down than this, namely, that he should act as a reasonable man would act under similar circumstances, and whether he has done so or not must be a question for the jury. The law cannot lay down a criterion as to what is reasonable, because each case must depend on its own circumstances. Here the question went to the jury and they found that the plaintiffs acted reasonably, and therefore upon that point I see no reason for granting a rule, but upon the point whether the lien would be lost by unloading I think a rule *nisi* should go, as that raises a question for discussion.

DENMAN, J., concurred.

Rule refused on the first point.

A rule *nisi* was granted for a new trial, on the ground that the Judge misdirected the jury in telling them that the coal could not be landed without the lien for freight being lost.

Charles Russell and Trevelyan (on February 10th) shewed cause. — The clause in the bill of lading respecting the coal being landed at the expense and

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risk of the consignee is entirely for the benefit of the shipowners, and does not in any way restrict their rights. The direction of the learned judge which is complained of was wholly immaterial even if wrong, for even supposing the master could, under the clause of the bill of lading or without it, have landed the coal and yet preserved his lien, he was not bound to have done so—*Black v. Rose* (3). The question, however, comes to this, whether a master can, under an ordinary bill of lading, land the goods and yet retain the lien for freight. There is very little authority on the point. In the early editions of *Abbott on Shipping*, that learned judge uses very cautious language. He says (5th ed. p. 248): "In England the practice is to send such goods as are not required to be landed at any particular dock to a public wharf, and order the wharfinger not to part with them till the freight and other charges are paid, if the master is doubtful of the payment. And by the law of England, if the master once parts with the possession out of the hands of himself and his agents, he loses his lien or hold upon the goods, and cannot afterwards reclaim them." This passage is repeated verbatim in the 11th edition by the late Mr. Justice Shee, page 333. It is also referred to in *Smith's Mercantile Law*, 8th ed., p. 559, where the law is thus stated: "As a lien is a right to retain possession, it follows of course that where there is no possession there can be no lien. It also follows that where the possession of the goods has once been abandoned the lien is gone, but when the master of a ship in obedience to revenue regulations lands goods at a particular wharf or dock, he does not thereby lose his lien on them for freight, and where they are not required to be landed at any particular dock, the common practice is to land them at a public wharf, and direct the wharfinger not to part with them till the charges upon them are paid; in this case the wharfinger is the ship's agent, and the goods remain in the constructive possession of the latter." The public wharf there alluded to must be a

(3) 2 Moore P.C. N.S. 277.

wharf under an Act of Parliament. In *Meyerstein v. Barber* (4) Willes, J., considers the duty of a master when there was no consignee ready to take the goods on payment of freight, and the case arose before 25 & 26 Vict. c. 63, and when there was no Act allowing the master to warehouse at the risk of the consignee. He might, he considers, have kept the goods in his vessel for a reasonable time. That learned Judge then notices the difficulty and inconvenience this led to, and he refers to the Acts which have been passed to relieve the master. In *MacLachlan's Supplement to his Law of Merchant Shipping*, the Merchant Shipping Act of 1862 (25 & 26 Vict. c. 63) is set out, and under section 66, which is the commencement of the sections enabling the cargo to be landed with the retention of the lien for freight, the following observation is made: "Hitherto, except at certain ports which are privileged by Act of Parliament, it has been a difficulty of great practical moment what course to advise a shipmaster to follow, when, in consequence of differences between the parties concerned, the consignee of the cargo refuses to accept the goods. At one of the privileged ports he could land and warehouse the cargo, subject to his lien for freight, thereby saving all rights at the least possible expense. Elsewhere this could not have been done, because his lien for freight being at common law, as distinguished from a maritime lien, would have been destroyed by the transfer of possession." In the present case there was no evidence of there being a privileged warehouse at either Monte Video or Buenos Ayres, and unless the goods were in such a warehouse, or else they were landed and kept in such a manner as still to be in the possession of the master or shipowner, the lien for freight would not be retained. The warehouseman, or person who receives them, if he be not the mere agent of the shipowner, would be entitled to his lien, but there could not be two liens, and there would be no right to claim both against the owner of the goods—*Somes v. The Directors*

(4) 36 Law J. Rep. (N.S.) C.P. 48; s. c. Law Rep. 2 C.P. 36.

of the *British Empire Shipping Company* (5) and *Syeds v. Hay* (6).

Holker and Baylis, in support of the rule.—If the master can land and yet keep possession of the goods, he retains his lien. This is in accordance with the passages which have been cited from *Abbott on Shipping*, *Smith's Mercantile Law*, and from the judgment of Willes, J., in *Meyerstein v. Barber* (4). The captain did in fact, in the present case, land the goods, and what he so afterwards did, he might have done much earlier.

[BRETT, J.—In *Erichsen v. Barkworth* (7), Crompton, J., says, "Then as to the not unloading after those days the jury would have to estimate the damage, and if they found that there was any vexatious conduct on the part of the shipowner, such as keeping the goods for his own benefit, they would give little damages. After the demurrage days he cannot keep the goods for an unlimited time, and then sue for damages." If he cannot keep them he must put them on shore.]

Yes; that is in favour of the defendant's contention. The particular clause in the bill of lading as to landing is no doubt in favour of shipowners, for it was to enable them to land in such a manner as that the goods should be at the risk of the consignee, and yet the lien for freight be retained.

[BRETT, J.—It would enable the captain to land the goods at once; but you want to carry it further, and say that it obliged him to do so.]

It may be that the defendants are wrong as to that. The direction, however, was too wide, and the jury were misled by it to give a larger sum than they would otherwise have given.

[At the intimation of the Court the counsel for both parties agreed that instead of a new trial, the verdict should be reduced by 56*l.*, the amount given for the detention of *The Piltho*.]

KEATING, J.—The case was summed up by the learned Judge to the jury in a way

(5) H.L. Cas. 338; s. c. 30 Law J. Rep. (N.S.) Q.B. 229.

(6) 4 Term Rep. 260.

(7) 3 Hurl. & N. 894; s. c. 28 Law J. Rep. (N.S.) Exch. 95.

that could not be complained of, and then one of the jury put the question to the learned Judge, whether the captain could have discharged the cargo and yet maintained his lien for freight. I should have thought that meant whether he could have done so under the circumstances which were proved in this case, and, therefore, if the learned Judge had answered that question in the negative, I should have been of opinion that that could not be interfered with, because there was no evidence of the capabilities of the port, or what, under the circumstances, the captain could have done. But the learned Judge certainly appears to have used language which might have induced the jury to think that under no circumstances could the coal have been taken over the ship's side without the lien being parted with. Now I am disposed to think that that is too wide a proposition, because, whatever may be the law, if the goods be taken and lodged in a general warehouse by which another lien may be given to an independent warehouseman, I am of opinion that a captain may land the goods and still preserve his lien, by placing the goods in a warehouse over which he or the owners' consignee has the exclusive control. Therefore I am not disposed to support the statement of the learned Judge to the full extent to which it went. What effect, if any, it may have had on the jury no one can say with certainty—one can only speculate. Mr. Holker no doubt has the right to complain of the direction as affecting the damages, but I am fully persuaded that if it affected the damages to any extent, it did so only to a very small extent. The parties have agreed upon a sum which, as it appears to me, is the outside sum to which such direction could possibly have affected the damages, but still I think they wisely agreed to that sum instead of incurring the expense of a new trial for the purpose of raising what might be a nice question. Under these circumstances the rule will be discharged, the verdict being reduced by consent to 443*l.*, and each party paying their own costs of this rule.

GROVE, J.—I am of the same opinion. Certainly it appeared to me when the rule was moved for, and I have seen

nothing since to alter it, that it could not be law that under no circumstances (however necessary it might be to do so, owing to bad weather or otherwise) could a captain land a cargo without *ipso facto* being obliged to part with his lien for freight. But I think the authorities only go to this extent—that if the captain does land the goods, he must, in order to keep his lien, so land them as to retain an absolute and entire dominion over them, which is what he can rarely and possibly never do in the greater number of cases. With reference to the answer of the learned Judge to the question of the jury, it is no doubt without exception in its terms, except where there exist statute warehouses; but the point on which I should have had some doubt, if the matter had been argued to the end and I had had to consider it, would have been in what sense we ought to take a question so put by a jury after the learned Judge had concluded his summing up. I have a strong opinion that in the present case the jury meant by their question to ask whether if, under ordinary circumstances, a master land the goods at an ordinary landing place, and puts them in an ordinary warehouse, he thereby parts with his lien for freight. Undoubtedly, if the question was put in that sense, the answer would be correct. The question is whether we are bound, because the answer in its terms goes a little further, to assume that the question was not put in that ordinary sense. There is a second question, whether, within the rule laid down in *Orease v. Barrett* (8) and other cases, the Court would grant a new trial where the misdirection has not been conducive to a wrong verdict. In the present case I cannot possibly see, if the direction had been the other way, that the jury could have reduced the damages by more than 56*l.*, which is, I think, the maximum that can possibly be taken off.

BRETT, J.—I am of opinion that the answer I gave the jury was wrong. I think it was wrong because it includes the case of the master landing the goods and depositing them in a place where they are

(8) 1 Cr. M. & R. 919; s. c. 4 Law J. Rep. (N.S.) Exch. 297.

kept under his own control, and that it was incorrect to say that in such a case as that the master would lose his lien for freight. The point, as it seems to me, is not an easy one. This is a case in which the goods when landed would be landed at a foreign place where the English warehousing statutes do not apply. There was no evidence of the foreign law, and therefore the question is, what are the rights of a captain where there is no English warehousing statute, and no evidence of any law different from the law of England.

Now the authority of Crompton, J., in *Erichsen v. Barkworth* (7), seems to me to shew that there may be a case in which the captain can land and yet preserve his lien, because that learned Judge there says, that even where the consignee has neglected to accept the goods (and therefore where it must be assumed he is in fault), the captain cannot keep the goods on board his ship for an unreasonable time. What then must he do with them? It seems to me to follow that there must be some way of landing them by which he can preserve his rights, and I feel now clear that Crompton, J., had in his mind that the captain might land the goods and yet preserve his lien for freight, if he kept them still entirely within his own exclusive control. It seems to me that the authority of Willes, J., in *Meyerstein v. Barber* (4) is to the same effect, and so also I think is the quotation from the later editions of *Abbott on Shipping*, because if the word "practice" means the universal practice of merchants, it becomes, as it seems to me, the mercantile law. Whether a captain can preserve his lien irrespectively of English statutes as to warehouses or of law equivalent to them, by putting the goods into a warehouse owned by an independent warehouseman, is a question which it is not necessary we should now decide. The difficulty against the captain preserving his lien in such a case seems to me that then another and independent lien would exist, and I doubt very much whether if the captain were so to deposit the goods on shore as to give another person a lien, the captain would not as a matter of course lose his own lien, even though

such other person should undertake to the captain not to deliver the goods to the consignee without being paid the captain's claim for freight. But it is not necessary to decide that now.

I therefore think that the answer I gave to the jury was wrong in its terms. I rather suspect that the answer which I ought to have given should have been this—"Under certain circumstances the captain can do so, but there is no evidence that he could have done it in this case." If that had been the answer I should have been prepared to maintain it, but the answer I gave was wrong and likely to lead the jury to a wrong conclusion. I think it might have affected their verdict though to a very small extent, and I doubt whether it could have affected it to the extent of 56l., because it does not at all follow that even if the captain could land the goods so as to preserve his lien, he was bound to land them, and the jury would have had to consider whether, under the circumstances of the case, he had acted unreasonably in keeping the goods on board for the time he did. Still, strictly speaking, the defendants would probably have been entitled to have had the rule made absolute for a new trial, but they have rightly given way, and obtained thereby the full amount of any difference that could have been caused by the misdirection, but under these circumstances I entirely agree with the rest of the Court that each party should pay their own costs of this rule.

Rule discharged on terms.

Attorneys—Gregory, Rowcliffe & Rawle, for all parties.

1873.
Jan. 31.

{ LEBEAU AND ANOTHER v. THE
GENERAL STEAM NAVIGATION
COMPANY.

*Inferior Court—Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.)
—Points reserved for Superior Court—Jurisdiction of Mayor's Court over Cause.*

The 10th section of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.) enables either party to a suit in

that Court, if leave be given to him by the Judge on the trial, to move in any of the Superior Courts to enter a verdict or nonsuit, as the case may be, and gives the superior Court power to make such order therein as it may think proper, and directs judgment to be entered accordingly:—Held, that the disposal by the superior Court of a rule to enter a nonsuit moved for under such 10th section, does not take away the jurisdiction of the Judge of the Mayor's Court to entertain an application for a new trial.

This cause, which was for breach of a contract by the defendants to carry and deliver certain goods, was brought and tried in the Lord Mayor's Court of London, when a verdict was found for the plaintiffs. A rule *nisi* to set such verdict aside and to enter a nonsuit, pursuant to leave given by the Judge of the Mayor's Court, was moved for and obtained by the defendants, under section 10 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), in the Court of Common Pleas, and after argument was discharged by that Court in Michaelmas Term last (see the case reported *ante* C.P. 1). Afterwards, but before judgment was signed for the plaintiffs, the defendant applied for and obtained from the Judge of the Mayor's Court a rule for a new trial, on the ground of surprise and of material evidence having since come to the knowledge of the defendants.

Field (Waddy with him), for the plaintiffs, now moved for a writ of prohibition to prohibit the Judge of the Mayor's Court from again trying the cause.—After the disposal of the rule *nisi* to enter a nonsuit there was an end to the matter, and the Mayor's Court had no jurisdiction except to carry out the order of the superior Court. The 10th section of the Mayor's Court of London Procedure Act, 1857, which gives either party, when leave has been given by the Judge of the Mayor's Court, power to move for a rule in any of the Superior Courts to set aside the verdict or nonsuit, empowers the Superior Court to grant or refuse such rule, and "to make such orders thereupon and as to costs as the same Court shall think proper." The section further enacts that "in case the Court before whom such rule shall be

heard shall order the same to be discharged, the party obtaining any such order may, upon delivering the same or an office copy thereof to the registrar, be at liberty to proceed in any such action as if no such rule *nisi* had been obtained; and if a verdict be ordered to be entered for the plaintiff or defendant, or a nonsuit be ordered to be entered, as the case may be, judgment shall be entered accordingly." No doubt by section 22 it is enacted that "the Judge of the Court," that is, the Mayor's Court, "may at any time within the jurisdiction of the Court hear and grant applications for rules to shew cause in arrest of judgment," "or for granting new trials, and for entering nonsuits and verdicts in causes pending in the Court," but the power given by that section must be limited to the time during which the cause is before the Mayor's Court. Here by the appeal to the Superior Court, under the 10th section, the cause was no longer in the Mayor's Court except for the purpose of carrying out the order of the superior Court.

BOVILL, C.J.—I think that there can be no reasonable doubt as to the construction of the 10th section of the Mayor's Court of London Procedure Act, 1857, and that the Legislature meant thereby to give power to the Judge of the Mayor's Court on the trial of a cause before him to reserve questions for the opinion of any of the Superior Courts at Westminster, and that judgment should be according to the direction of such Superior Court on the points so reserved, but it is only on the points reserved at the trial that the Superior Court has any jurisdiction over the proceedings in the Mayor's Court, and there is nothing in the Act to prevent an application to the Judge of the Mayor's Court for a new trial being made either before or after any motion in a Superior Court under this 10th section.

KEATING, J., GROVE, J., and HONTMAN, J., concurred.

Rule refused.

Attorneys—Learoyd & Learoyd, for plaintiffs;
G. Ashley & Tee, for defendant.

[IN THE EXCHEQUER CHAMBER.]
Appeal from the Court of Common Pleas.

1873. { BAYLEY v. THE MANCHESTER,
 Feb. 10. { SHEFFIELD AND LINCOLNSHIRE
 RAILWAY COMPANY.

*Railway Company—Injury-by removing
 a Passenger from a Carriage under Mis-
 take.*

By the rules and byelaws of a railway company the porters were directed to prevent passengers from leaving trains whilst in motion, and to do all in their power to promote the comfort of the passengers and interests of the company, and specially given powers of removal under certain specified circumstances not applicable to the particular case. And it was found by a case stated in an action for injury to a passenger in his removal from a carriage by a porter under the mistaken idea that he was in a wrong train; that he was violently removed just as the train was moving; that it was the duty of the porters to prevent passengers going by wrong trains as far as possible; but if they were, to request them to alight, and on refusal, report them with a view to charging any excess of fare, but not remove them:—Held, by the Court of Exchequer Chamber, affirming the decision of the Court of Common Pleas, that there was evidence of the porter having acted within the scope of his authority and abused it, and that the company were responsible.

This was an appeal from a judgment (reported 41 Law J. Rep. (N.S.) C.P. 278) of the Court of Common Pleas, discharging a rule to enter a nonsuit or verdict for the defendants.

The action was for injury caused to the plaintiff, a passenger on the defendants' railway, by a porter pulling him out of a train under the mistaken idea that it was the wrong one.

As the case stated on appeal contained various precise statements which were not presented to the Court below on the argument of the rule, it seems advisable to print in *extenso*, the material parts of the case, which were as follows:

3. The plaintiff, after taking a third class ticket by the defendants' line, as before mentioned, proceeded to enter and take his seat in a third class carriage

forming part of the train. Upon his doing so, one of the porters in the employ of the defendants asked him where he was going, to which he replied, "To Woodley, and thence to Stockport and Macclesfield." The porter rejoined, "You are in the wrong train—you must come out;" and immediately and just as the train was moving off, violently pulled out the plaintiff and threw him down on the platform. The plaintiff by the fall, under the circumstances above mentioned, sustained the bodily injuries in respect of which this action was brought. At the time that the plaintiff was pulled out of the carriage and thrown on the platform one of the superior officers of the company was standing near, and called out to the porter, "You Why did you not let the man go? If he was in the wrong train they would have brought him back." The plaintiff was in fact in the proper train and in that by which he intended to travel.

It was proved that it was part of the duties of the porters to prevent passengers going by wrong trains as far as they were able to do so.

4. The rules and bye-laws of the company were put in evidence on behalf of the defendants, and it was further proved that the porters and servants of the company, including the porter whose conduct caused the injury to the plaintiff, were supplied with copies thereof. Copies of these rules and bye-laws accompany and are to be taken as forming part of the case, and may be referred to in the argument.

5. Among the rules and bye-laws are contained the following:—

Rule 71. "Clerks in charge, station-masters, guards, police and porters are on no account to suffer passengers to get into or out of the carriages while the trains are in motion in contravention of the bye-laws; and the names and addresses of any persons persisting in so offending are to be immediately reported to the superintendent of the line."

Rule 92. "Porters are to act under the orders of the clerks in charge, station-masters, station-inspectors and foremen. They are to do the work, and attend to whatever business they may have assigned

to them, exerting themselves for the good order, regularity and cleanliness of the trains and stations where they are placed, and do all in their power to promote the comfort of the passengers and the interests of the company."

Rule 101. "If the clerk in charge or guard has reason to suppose that any passenger is without a ticket, or is not in the proper carriage, he must request the person to shew him his ticket, have any irregularity corrected, and the excess paid, if any is due; and should any passenger wish to change his place from an inferior to a superior carriage, the guard must see the excess fare paid at the station where the change is made."

Rule 105. "The doors of the carriages on the off side are always to be locked, and guards must see that passengers keep their seats in case of any stoppage on the road, except when necessary to alight, and to exert themselves to prevent passengers getting in or out of the train while in motion."

Rule 107. "Smoking in the carriages and at the stations must not be allowed; and in the event of any passenger being disorderly and misconducting himself, the guard must endeavour to stop the nuisance; but in case he cannot succeed by gentle means, he must take such a course as may be considered necessary, and either place the offender in a compartment alone or leave him at the next station, according to circumstances; in all cases obtaining and reporting his name and address, if possible, to the superintendent of the line."

Byelaw 4. "Smoking is strictly prohibited, both in the carriages and on the company's stations or premises; every person smoking in a carriage, or in any station, or in or upon any of the company's premises, is hereby subjected to a penalty not exceeding forty shillings; and every person persisting in smoking in a carriage or station, or upon the company's premises, after being warned to desist, shall, in addition to incurring a penalty not exceeding forty shillings, be immediately, or if travelling, at the first opportunity, removed from the company's premises."

Byelaw 5. "Any person found in the

company's carriages or stations, or on the company's premises, in a state of intoxication, or committing any nuisance, or otherwise wilfully interfering with the comfort of other passengers, is hereby subjected for every such offence to a penalty not exceeding forty shillings, and shall immediately, or if travelling, at the first opportunity, be removed from the company's premises."

Byelaw 8. "Any person who shall enter or leave, or shall attempt to enter or leave any of the carriages while the train is in motion, or at any other place than the regular passengers' platform, or other place appointed by the company for passengers to enter or leave the carriages, shall for every such offence forfeit and pay any sum not exceeding forty shillings."

6. It is the duty of the porters of the company, if passengers are in a wrong train or carriage, to inform them of the fact and request them to alight before the train starts, and in default of their doing so, to report them to the guard with the view of their being charged any excess fare which may be due under the circumstances, but not to remove them from the train or carriage.

7. It was objected on behalf of the defendants that the porter had no authority from the company, express or implied, to drag the plaintiff out of the carriage under the circumstances above stated. That it was, in fact, in contravention of the rules, and not within the scope of his employment, but a wilful and illegal act of his own, done on his own responsibility, for which the company were not liable. The learned Judge gave the defendants leave to move to enter a nonsuit or a verdict on those grounds. The jury found a verdict for the plaintiff with 200*l.* damages.

Hughes argued for the appellants.

M'Intyre, for the respondents, was not called on.

KELLY, C.B.—The result of the cases is the principle that where a servant of a railway company acting within the scope of his employment does even the reverse of what he is directed to do, yet the company are liable. It is here found that it was the duty of the porter to prevent

persons from travelling in a wrong carriage, as far as he was able. It therefore was his duty, if he believed a passenger to be in a wrong carriage, to rectify this, and in doing so he would be acting as he believed in the performance of his duty, and many cases might arise where he would have no other means than the use of force, though here it has been unfortunate. And the case is distinguishable from those cases where there has been one isolated act in direct disobedience to orders. It is true that here among the many duties stated there is one apparently pointed against a porter dragging a passenger out of a carriage, but it must be difficult in many cases to determine what to do, especially with many and conflicting orders, and a porter may forget and think he is performing his duty. Again it is his duty to do his best to promote the comfort of the passengers and interests of the company, and if he believes he can only do his duty by pulling a passenger out of a carriage it is difficult to say he is not acting within the scope of his employment, though disregarding some other order. This case is not within the cases which have been cited, those were cases of isolated acts, here the porter was acting as he *bona fide* believed in discharge of his duty, and therefore acting within its scope. Judgment should therefore be affirmed.

MARTIN, B.—I also think judgment should be affirmed. The case is governed by the law of master and servant, and the rules and byelaws have nothing to do with it, and if a porter on a mistaken idea thinks he ought to pull a passenger out of a carriage the company is responsible.

BLACKBURN, J.—I am of opinion that judgment should be affirmed. The law is clear that where a servant is acting within the scope of his authority, even if he act with great negligence, yet the master is responsible. This was decided in *Greenwood v. Seymour* (1), where there was great excess. Therefore here the question is whether there was evidence that the porter was acting within the scope of his authority, and abusing it. And I think

(1) 30 Law J. Rep. (N.S.) Exch. 327; s. c. *nom. Seymour v. Greenwood*, 7 Hurl. & N. 355.

the Court below decided this on the true ground. One of the rules is that the porters are to do all in their power to promote the comfort of the passengers and the interests of the company. No doubt here the porter made a blunder and did not do so, but he had authority to prevent passengers going by a wrong train. Was there not authority if, as he supposed, the passenger was in the wrong carriage, and would the pulling out be without his authority? I agree with the Court below "that there was evidence of an authority to remove a person in a wrong carriage abused by a blundering servant of the company." But it is clear on the authorities that if a servant be acting within the scope of his authority, though he abuse it, the master is responsible.

MELLOR, J.—I am of the same opinion. It seems to me on the case that there was a general authority as respects persons in a wrong carriage, and that the porter went beyond it and blundered.

PIGOTT, B.—The case is very near the line, but I agree with the judgment of the Court of Common Pleas.

LUSH, J.—I agree, and I base my judgment on the fact that it was the porter's duty to prevent persons travelling in a wrong carriage as far as he was able. He supposed this was the case, did an act he might have done if he had been right, and in doing it supposed he was authorised so to act.

CLEASBY, B.—The rules do not seem to me to touch the case, and the porter must act independently of them. The Court of Common Pleas say, "there was evidence of an authority to remove a person in a wrong carriage." If so, no doubt the company were liable, but in this case stated on appeal, all I can find are the statements in paragraphs 3 and 6. As, however, the rest of the Court are clear as to the statement in paragraph 3 coinciding with the statement in the judgment below, I concur in affirming that judgment.

Judgment affirmed.

Attorneys—Cunliffe & Beaumont, agents for Lingards, Manchester, for appellants; Lewis & Sons, agent for Higginbottom & Barclay, Macclesfield, for respondent.

(In the Second Division of the Court.)

1872. }
 May 31. } M'CARTHY v. THE METROPOLITAN
 1873. } BOARD OF WORKS (1).
 Feb. 7. }

Compensation—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68—Lands injuriously affected—Thames Embankment Act, 1862 (25 & 26 Vict. c. xliii.)—Thames Embankment (North and South) Act, 1868, 31 & 32 Vict. c. cx.

The plaintiff carried on business in premises consisting of a house, warehouse, stables, &c. near a draw-dock leading into the River Thames. The dock was free and public, but was principally used by the plaintiff and certain other persons whose premises were in proximity to it. A roadway existed between the edge of the dock and the plaintiff's premises, which had an enhanced market value by reason of their proximity to the dock. The defendants in making an embankment under their private Acts filled up and destroyed the dock; and thereby the plaintiff's premises became diminished in value in the market:—Held, by the Court of Exchequer Chamber (CLEASBY, B., dissentiente), affirming the judgment below, that the plaintiff was entitled to compensation under 8 & 9 Vict. c. 18. s. 68, as his land had been injuriously affected by the defendants' works.

SPECIAL CASE stated under a Judge's order. The plaintiff resided and carried on business as a carman, and contractor for supplying builders with lime, bricks and other materials, and as a large dealer in sand and ballast, at premises which he held under a lease for 80 years from Michaelmas, 1854.

The premises consisted of a house with warehouse, stables and business premises, and were situate in Whitefriars, in the City of London, near a draw-dock known under the name of the Whitefriars Dock, leading into the River Thames, and which was very largely used by the plaintiff in the way of his business. The draw-dock was a free and open public dock, but was principally used by the plaintiff, the City Gas Company, the Commissioners of

Sewers for the City of London, and the other persons whose respective premises were in proximity to it. The plaintiff had no right or easement in or to the said draw-dock, other than his right as one of the public, nor was there, appurtenant or otherwise, belonging to the plaintiff's said premises, any easement, right or privilege in or to the dock.

The dock at the time of its being stopped as hereinafter mentioned, was of the length of 352 feet and of the width of 46 feet at the outlet upon the River Thames and of 30 feet at its head. It originally and before the plaintiff became possessed of his premises extended to Tudor Street; but about twenty years ago it was shortened to its present length by the Commissioners of Sewers for the City of London, who filled in the end and converted it into a roadway and paved the space so obtained, and have down to the present time kept the roadway in repair. Prior to such filling in, the roadway between the plaintiff's premises and the edge of the dock was about twenty feet wide.

By reason of the proximity of the dock to the plaintiff's premises and access given by the dock to and from the River Thames, the premises were rendered more valuable as premises either to sell or occupy with reference to the uses to which any owner might put them.

In the execution of the works authorised by the Thames Embankment Act, 1862 (25 & 26 Vict. c. xciii.), and the Thames Embankment (North and South) Act, 1868 (31 & 32 Vict. c. cxi.), in the month of October, 1868, a solid embankment was carried along the foreshore of the Thames and permanently stopped up and destroyed the Whitefriars dock. By reason of the stopping up and destruction of the dock and the destruction thereby of the access to and from the River Thames, the plaintiff's premises became, as premises either to sell or occupy in their then state and condition and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value; and the plaintiff alleged that consequently he became entitled to compensation. The defendants

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(1) Coram Willes, J., and Keating, J.
 NEW SERIES, 42.—C.P.

denied that he was so entitled and issued their warrant to the sheriffs to summon a jury, without prejudice to their right to dispute the question. The jury assessed the amount of the injury and damage at 1,900l.

The question for the opinion of the Court was, whether under the circumstances set forth in the case the plaintiff's interest in his premises was injuriously affected within the Lands Clauses Consolidation Act, 1845, so as to entitle him to compensation. If the Court should be of opinion in the affirmative, judgment was to be entered for the plaintiff for 1,900l., with costs of suit. If the Court should be of opinion in the negative, then judgment of *nolle prosequi* was to be entered for the defendants with costs.

Prentice (*Thesiger* with him), for the plaintiff.—This case falls within the principle of *Beckett v. The Midland Railway Company* (2). The premises here, as in that case, were as premises permanently damaged by reason of the stopping up of the dock in the making of the embankment by the defendants. The premises are actually and permanently depreciated as a merchantable article. *Chamberlain v. The London and Crystal Palace Railway Company* (3) is also in point in favour of the plaintiff. That case is not overruled by *Rickett v. The Metropolitan Railway Company* (4), which is distinguishable on the ground that there the plaintiff had suffered no special damage, excepting in degree, beyond the rest of the public, whilst here there is a special damage of a permanent nature to the particular occupier of these premises. *The Queen v. The Metropolitan Board of Works* (5), may be relied upon by the

other side, but this case must be ranged under *Rickett's Case* (4) and not under *Beckett's* (2) or *Chamberlain's* (3) cases. Here an action would have lain for what the defendants did, if they had not acted under an Act of Parliament. Therefore the plaintiff is entitled to compensation.

[KEATING, J.—It used to be said that the test was that where an action would have lain but for the Act of Parliament, there compensation is recoverable, but that is now shaken.]

Yes. In *The Caledonian Railway Company v. Ogilvy* (6), that is stated not to be a conclusive test.

Hawkins (*Philbrick* with him), for the defendants.—In all the cases where compensation has been obtained there has been an interference with the property itself, or with some peculiar private right attached to it. In *Beckett's Case* (2) the road was narrowed, so that the plaintiff sustained a particular private injury beyond anything sustained by the rest of the public. The remedy for the injury but for the Act of Parliament, in the present case, would have been by indictment, and not by action—*Wood v. The Stourbridge Railway Company* (7). The public road was contiguous to the house itself in *Beckett's Case* (2). Here it is found that the dock was a free and open public dock, principally, no doubt, used by the plaintiff and other persons whose premises were in proximity to it, but he had no right or easement other than his right as one of the public. The judgment of Mellor, J., in *The Queen v. The Metropolitan Board of Works* (5), is to the effect that there must be an injury to the house itself or to some interest in the house, and he cites the judgment of Lord Cranworth in *The Caledonian Railway Company v. Ogilvy* (6) to the same effect.

[WILLES, J.—I agree with what Mellor, J., there says, but it is inapplicable to the facts of the present case.]

It is not a ground for compensation that the comfort and value of the property may have been diminished—*Re*

(2) 37 Law J. Rep. (N.S.) C.P. 11; s. c. Law Rep. 3 C.P. 82.

(3) 2 B. & S. 605; s. c. 31 Law J. Rep. (N.S.) Q.B. 201; s. c. in Error 2 B. & S. 617; s. c. 32 Law J. Rep. (N.S.) Q.B. 173.

(4) 5 B. & S. 617; s. c. 34 Law J. Rep. (N.S.) Q.B. 257; s. c. in the House of Lords 36 Law J. Rep. (N.S.) Q.B. 205; s. c. Law Rep. 4 E. & I. App. 175.

(5) 38 Law J. Rep. (N.S.) M.C. 201; s. c. Law Rep. 4 Q.B. 368.

(6) 2 Macq. 229.

(7) 16 Com. B. Rep. N.S. 222.

Penny and the South Eastern Railway Company (8).

Thesiger in reply.—In *The Queen v. The Metropolitan Board of Works* (5) there was no claim for compensation in respect of the premises as premises. There was no statement in that case that the house was damaged in value. The injury there was personal to the claimant and not to the house. [He was then stopped.]

WILLES, J.—It appears to me that this case in effect comes within *Beckett's Case* (2), and that we are bound by that case. Moreover, it seems to me that that was a right decision, and that it is not at variance with *Rickett's Case* (4). In the latter case compensation was claimed for only temporary loss of trade at the house, and there was no permanent injury diminishing its value. This constitutes the distinction between *Beckett's Case* (2) and *The Caledonian Railway Company v. Ogilvy* (6). Lord St. Leonards in the latter case remarks, "In this case I can see nothing by which this gentleman would sustain damage beyond what everybody else sustains. His estate is not damaged." That is to say, it could not be affirmed of that property that it would sell for a less sum in the market on account of what the company had done. One of the judges in *Beckett's Case* (2) observes, "It must be admitted that there is great force in the remarks of one of the noble Lords in *Ogilvy's Case* (6), as applied to a case in which there is no absolute diminution in value of the property, in which it cannot be affirmed that the property will sell for less in the market for a given sum, or that it will attract fewer tenants or let for a less rent. Those remarks appear to me to have no application to a case where the estate itself is diminished in value, for when you talk of damage to an estate, you equally damage it whether you cut off an angle of it which may be the least desirable to a purchaser, or take away from it a substantial advantage in respect of which it will fetch less in the market than it would have done with that advantage." That distinction exists between this case and

Rickett's (4), *The Caledonian Railway Company v. Ogilvy* (6) and *The Queen v. The Metropolitan Board of Works* (5).

The last-mentioned case seems like this at the first glance, but there is no finding in that case that the place in question was diminished in value. Though there was an injury to the pottery, yet the estate in the market might have fetched as large a sum. There was, it is true, in that case a personal injury to the potter, loss of trade at a particular place, and the peculiar use of the land interfered with, but where land is damaged to an extent so as to be worth less to any person or for any use, by reason of a permanent obstruction affecting the land to all time, you have a case distinct from those. The plaintiff's premises were in immediate proximity to the dock, only separated by the road, and by cutting off the road immediately proximate to the premises they were damaged. The premises were thereby rendered more valuable, as premises, either to sell or occupy with reference to the uses to which any owner might put them. Then it is subsequently found that by reason of the destruction of the dock, the premises became, as premises, either to sell or occupy in their then state and condition, and with reference to the uses to which any owner or occupier might put them in their then state, permanently damaged and diminished in value.

I need only refer to *Beckett's Case* (2). The plaintiff there was possessed of a house fronting on a highway. Half the road was taken away and the road narrowed, and the house made less valuable. It was there said that instead of a house the place might be used as a garden, and then there would be no damage, but the Court laid down that the property must be taken into consideration as it was used at the time, and the occupier must not be expected to pull down the house, and that it was in consequence of making the access less convenient by cutting off the half road that the house was diminished in value. That brings this case within *Beckett's* (2). In *Beckett's Case* (2) the further half of the road was cut off and not the immediate and proximate part.

I agree to what was said in *The Queen*

(8) 7 E. & B. 660; s.c. 26 Law J. Rep. (N.S.) Q.B. 225.

v. The Metropolitan Board of Works (5) that there must be an injury to land as distinct from personal injury, such as trade or convenience to individual, but you cannot have an injury to land unconnected with the consideration of him who has the land. You must consider the owner and who has the land. You cannot exclude the notion of individuality entirely. Here it is found that the land was damaged to any owner. The decisions as to inaccessibility caused to premises are referred to by Lord Cranworth in *Ogilvy's Case* (6). In one of the reports of *Beckett's Case* (2) my brother Keating is reported to have said, "I look upon the 68th section of the Lands Clauses Consolidation Act as procedure only."

[KEATING, J.—I never said that. I may have said that it had been so suggested.]

That may be the explanation of the mistake, but the 68th section clearly refers to more than procedure. This damage to land is an injury for which compensation is to be claimed, and a permanent destruction of a natural right giving a value to land in the market is a cause of action, and gives a right to compensation. I have no doubt this is an injurious affection, and an action could have been maintained in respect of it. Looking to the case of the *Duke of Buccleuch v. The Metropolitan Board of Works* (9), the Duke, who, having a private right in respect of a small approach to the river was entitled to recover, I am so satisfied of the absurdity of holding that the Duke should recover, and M'Carthy not, that I am of opinion that our judgment should be for the plaintiff.

KEATING, J.—I am entirely of the same opinion. The case of *Beckett v. The Midland Railway* (2), too, is binding on us and governs this case. *The Caledonian Railway Company v. Ogilvy* (6) is distinguishable and so is *Rickell's Case* (4), as has been pointed out. The cause of injury in the latter case was temporary and to the trade of the person carrying on the particular trade at the time. It does not overrule but recognises *Chamberlain's*

Case (3), which last-mentioned case is on all-fours with *Beckett's Case* (2). Here the obstruction is permanent and is not to a personal right or a particular trade, but to the house itself. It was depreciated in the hands of whosoever it might come to the extent of 1,900l.

WILLES, J., also referred to *The Queen v. The Vestry of St. Luke's, Chelsea* (10).
Judgment for the plaintiff.

The defendants appealed from this judgment, and the appeal was argued on the 28th and 29th of November last, by *Hawkins* (*Philbrick* with him), for the appellants, and *Prentice* for the respondents.

Cur. adv. vult.

The following judgments were now delivered on Feb. 7, 1873—

CLEASBY, B.—The question in this case is whether the plaintiff is entitled to compensation under the 68th section of the Land Clauses Consolidation Act, by reason of his premises being injuriously affected by the Thames Embankment made by the defendants.

I understand that all my learned brothers think the plaintiff is so entitled.

I regret that I cannot agree with them, because the plaintiff appears to have suffered in his trade considerable damage from losing the use of the river; but it appears to me that the case is not brought within the words of the Act of Parliament, nor within the construction which they have received in the Courts and in the House of Lords. If the plaintiff is entitled I cannot see how any person occupying premises in a street communicating with the river, who had for the purposes of his occupation made use of the river (a person for instance who had a coal yard, and who had barges brought up there, or a builder having premises contiguous to the new Courts of Law, and engaged in some contract there) would not have a similar claim, for he could undoubtedly shew that his premises were increased in value by the use of the river. And the multiplicity of claims which this

(9) 41 Law J. Rep. (N.S.) Exch. 137; s. c. Law Rep. 5 H. of L. 10, 418.

(10) 41 Law J. Rep. (N.S.) Q.B. 81.

would give rise to is strongly pointed out by Lord Cranworth in *Rickett v. The Metropolitan Railway Company* (4), as a good reason for not extending the meaning of the words.

The present case, as well as that of others using the river, might have been made the subject of special provision for compensation, limiting the right within certain limits and under certain conditions, but under the general Act such cases are not provided for.

The plaintiff was the occupier of certain premises at Whitefriars of which he had a long lease, and where he carried on an extensive business in bricks and other building materials. The premises were situated at the distance of about 350 feet from the general line of the river Thames, with other premises between them and the river. There was, however, a dock projecting from the river into the land for the distance of 352 feet, as shown on the plan which forms part of the case, and the extremity of this reached to within about twenty-five feet of the corner of the plaintiff's premises, as appears by the scale at the bottom of the plan.

The premises do not therefore adjoin the river or adjoin the dock, so as to give the plaintiff any of the rights of a riparian proprietor.

The case finds, "the plaintiff had no right or easement in or to the draw-dock other than as one of the public, nor was there, appurtenant or otherwise, belonging to the plaintiff's premises any easement, right or privilege in or to the said dock."

It appears to me that if the present question was now raised for the first time, the finding referred to would be conclusive against the present claim. For I do not see how premises can be injuriously affected, unless there is some damage to the premises themselves or to some right belonging to them. The premises themselves would be injuriously affected if there was any structural damage by reason of the execution of the works, or if (not to mention other instances) floods were brought upon them which made them unfit for occupation, whether buildings or land. And the premises would be injuriously affected by loss of or damage to some right belonging

to them in various ways. As, for example, if they were waterside premises and entitled to the flow of a river, and it was taken away, as in the *Duke of Buccleuch's Case* (9), or if right to light and air, or private right of way, or any similar right belonging to the premises, were interfered with, of which the instances are numerous. Another instance may be mentioned, viz., if the premises adjoined a public highway, and in constructing some work, a bridge for instance, either to carry a railway over a public road or to carry the road over it, the level of the highway was altered, it might be several feet or it might be much less, in such a case the alteration of the level might be a damage to the premises. The public in general might be benefited by having a more level and convenient road, and the person occupying the premises might as one of the public share this benefit, but he would have a particular right annexed to his premises of having a certain access from them to the highway, and if this was prejudiced (which would be a question of fact) he would have a right to compensation. The general Act of Parliament does not give compensation to all persons whose premises are made less valuable for occupation in respect of their calling or trade carried on there in respect of general convenience, but only where the premises themselves are injuriously affected, and injuriously affected by the execution of the works. The premises themselves must be taken or injuriously affected by the execution of the works to give a right to compensation. The words, "by the execution of the works," point, as it appears to me, to the direct effect produced upon the premises by the works, the effect of a contiguous cutting upon the fabric, and of embankment upon the light and rights of way, and so on.

This foundation of a particular right interfered with places a limit to claims, which would be almost unlimited if every diminution of value was to be considered sufficient. And as the only reason for the execution of the works by compulsory powers is that they are a great public benefit, any injury which a person suffers in common with the rest of the public

may be regarded as compensated for by that benefit. And there is this further objection to reading the words as signifying a mere deterioration of value, that (independently of this being a matter of opinion) this test of the right to compensation would be fluctuating and uncertain, inasmuch as at one time the premises might appear to be diminished in value, at another, six months afterwards, they might appear to be increased, and thus the title to compensation would depend upon when the claim was made.

But although the reasons already given would have been sufficient, independent of authority, to satisfy me that in the present case the plaintiff was not entitled to compensation, yet as similar questions have already arisen and been the subjects of decision in all the Courts and House of Lords, and especially as the opinion which I have expressed is at variance with that of the Court below, it is proper to consider the effect of these decisions, and to shew that the conclusion arrived at is in entire conformity with what they established. The words, "injuriously affected," in the Lands Clauses Consolidation Act received a construction by the Court of Queen's Bench, in the case of *Be Penny and the South Eastern Railway Company* (8). The words of Lord Campbell are—"The test is whether before the Railway Act passed, authorising the company to do what has been done here, an action would have lain at common law for what has been done, and for which compensation has been claimed. If it would, that act is authorised by the Railway Act, and compensation may be claimed in respect of it; if the land is not taken and nothing is done which would have afforded a cause of action before the Act passed, then, although it may produce a deterioration of the property, it does not injuriously affect the land, and constitute a ground for compensation."

The other Judges, Wightman, Erle and Crompton, J.J., lay down the same rule in almost the same words. It is taken from the opinion of Lord Cranworth in the House of Lords in the case of *The Caledonian Railway Company v. Ogilvy* (6), assented to by Lord St. Leonards, which

is the real foundation of the rule since adopted by all the Courts in dealing with cases of this description. It is unnecessary to refer to the authorities, but as Willes, J., was one of the Judges from whose judgment the present case is an appeal, I may quote his words in *Beckett v. The Midland Railway Company* (2)—"To entitle a claimant to compensation under the Land Clauses Consolidation Act, 1845, two things must concur, viz., that he has sustained a particular damage from the execution by the company of the works authorised by the Special Act, and that the damage was one for which he might have maintained an action, if the work was not authorised by Parliament."

The rule was adhered to and acted upon by the House of Lords in *Bickett v. The Metropolitan Railway Company* (4). It is true that in that case Lord Westbury states his opinion to the contrary, and would extend the meaning of the words, "injuriously affected," by making them include any damage sustained by the occupier in connexion with his occupation, but if that opinion had been adopted, the decision of the House of Lords must have been different, and therefore it must be considered as rejected by the highest tribunal, and by that we are bound.

This test is really the same as that which has been put already in different words, viz., that where there is no injury to the premises themselves, nor to any rights connected with them, there is no claim to compensation, as there can only be an action where there is an injury to a right. In the present case, according to the finding to which I have before referred, there is no injury to the premises, nor to any right belonging to them, nor any damage of a different nature from that which would be sustained by any of the public using the dock regularly or occasionally, and when that is the case, the redress for the obstruction to a navigable river or highway is by indictment, and not by action—*The King v. The Directors of the Bristol Dock Company* (11); *Winterbotham v. Lord Derby* (12). It is

(11) 12 East 429.

(12) 36 Law J. Rep. (N.S.) Exch. 194; s. c. Law Rep. 2 Exch. 316.

true a person injured may remove the obstruction, so far as is necessary to enjoy his rights—*The Mayor of Colchester v. Brooke* (13), but he would do this not as owner or occupier of particular premises, because he does not enjoy the right in that character, but as one of the public.

The plaintiff, besides his right as one of the public to pass along the street in front of his premises, has also the right belonging to his premises to pass from them to that street not altered or interfered with, except so far as the Commissioners of Sewers may have rights over it, with which we have nothing to do; and if the level of the street had been altered by the works of the defendants, or its inclination changed for the worse, or its use as a highway taken away by its being stopped, it might be said the particular right of the plaintiff had been prejudiced, so as to give him a claim for compensation.

It appears to me that the judgment of the House of Lords in *Rickett v. The Metropolitan Railway Company* (4) gives authority to the ground upon which Lord Cranworth puts his judgment. The question in that case was the right to compensation in respect of the obstruction of a public street communicating with a public footway, by the side of which the plaintiff's premises were situated. The case was therefore like the present one. The obstruction here is of a public river communicating with the street adjoining the plaintiff's premises; there it was of a public street.

There is no doubt this distinction: that in that case the obstruction was not permanent; in the present it is. But this, it is submitted, can make no difference in the construction to be given to the words, "injuriously affected." Lord Cranworth says in that case, "Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which but for the statute the complaining party might have main-

tained an action. The injury must be actual injury to the land itself, as by loosening the foundations of buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration." Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the Legislature." And he adds, after a few sentences, "The loss occasioned by the obstruction now under consideration may be greater to the plaintiff than to others, but it affects more or less all the neighbourhood. He has no ground of complaint differing, save in degree, from that which might be made by all the inhabitants of houses in the part of the town where the works for forming the railway were carried on."

Lord Chelmsford's judgment is principally occupied with an elaborate discussion of all the authorities, but before examining them he bases his judgment upon the rule that the act complained of must have been the subject of an action unless legalized by Parliament.

His Lordship in considering whether an action would be maintainable, first adverts in general to the case of personal injury or injuries of that nature arising upon the obstruction of a highway.

In such cases, though no doubt an action would lie, there could clearly be no compensation, and then the subject is not further noticed. He then refers to the cases in which an action is said to be maintainable in respect of damages connected with the occupation of the premises, and after examining the adverse authorities, and referring to *The King v. The London Dock Company* (14), and the judgment of Erle, C.J., in the Exchequer Chamber, in the case before the House, he holds that such damages are too remote to be the subject of an action for a public nuisance, and therefore not the subject for compensation.

Now the words, "too remote," are used in connection with the judgment in *The King v. The London Dock Company* (14)

(13) 7 Q.B. Rep. 339; s. c. 16 Law J. Rep. (n.s.) Q.B. 59.

(14) 5 Ad. & E. 163; s. c. 5 Law J. Rep. (n.s.) K.B. 195.

as being the effect of the judgment there. Those particular words, "too remote," were not used, but the judgment was, that the words injury to an estate and interest in land would be established by such consequences as the following, "as if by their cut or bridge or any other work they had weakened the foundation, darkened the lights, stopped the drains, or done any similar injury to the houses, lands," &c. It is not, therefore, too much to say that by the words, "too remote," his Lordship meant "too remote" from or not connected with injury to the premises themselves, and this would make the opinion of Lord Chelmsford in effect and substantially the same as that of Lord Cranworth already given. His Lordship then goes into a full examination of all the authorities, so that the House may give an authoritative final decision upon the whole case. Lord Chelmsford's judgment was delivered before that of Lord Cranworth, but I do not think that it can be doubted, after reading it through, that if it had followed that of Lord Cranworth he would have assented to Lord Cranworth's language above quoted; and the case was accordingly held to be one in which compensation could not be given; and the judgment of the Exchequer Chamber to that effect was affirmed.

If the view taken of Lord Chelmsford's judgment be correct it would not, I apprehend, be disputed that the decision of the Court below is at variance with the ground of decision of the House of Lords and cannot be supported.

This case was decided in the year 1867, but there was an earlier case in the House of Lords decided in the year 1857, in which a similar question arose—*The Caledonian Railway Company v. Ogilvy* (6). In that case (as I understand the facts from the judgment) a public road, which was the principal access to a residence, was obstructed by a railway crossing it on a level within a few yards of the lodge. Without the Act of Parliament this would have been a nuisance, and the subject of an action at the suit of any person who could shew a particular damage of a different nature from that suffered by the public generally. The jury assessed the damage for the level crossing and severance at

560*l.*, and it was held by the House of Lords that the level crossing gave no claim for compensation, reversing the judgment of the Scotch Court. In that case the obstruction was of a highway, in the present case it is of a public river, which is also a highway, and this is the main distinction between the two cases, with the addition that in the present case the obstruction is complete; in the other it was partial, an addition unimportant in principle if the obstruction was injurious. The case was decided by Lord Cranworth and Lord St. Leonards.

Lord Cranworth thought the case clear, both upon principle and authority, upon the ground that though the plaintiff suffered by the obstruction more than any other person, yet he did not suffer differently, and therefore could not have maintained an action.

He says, "But it would only be a more frequent repetition of the same damage; it would not be any damage different from that which might be sustained by any other subjects of Her Majesty; for all attempts at arguing that this is a damage to the estate is a mere play upon words."

Lord St. Leonards decides the case substantially upon the same ground. But there are passages in his judgment which deserve particular notice. He points out the distinction between the case itself and those cases in which the highway which the premises adjoin is itself interfered with; a distinction of importance in dealing with the two cases upon which the plaintiff mainly relied of *Beckett v. The Midland Railway Company* (2) and *Chamberlain v. The London and Crystal Palace Railway Company* (3). Lord St. Leonards says in reference to the case of *The Queen v. The Eastern Counties Railway Company* (15), "In that case there was an actual injury I should say to the land; at all events there was an injury to the owner of the land, which would give him an immediate right, no doubt, to compensation. From his land he had been enabled to step at once upon the road, which had been lowered by the company, and it had been so lowered that he

(15) 11 Q.B. Rep. 347; s. c. 11 Law J. Rep. (N.S.) Q.B. 66.

lost his access to that road, unless he had new appliances in order to enable him to approach it. There was, therefore, a real injury, there was a ground of complaint there, personal to himself, and which was not open to the rest of the world. It was a general complaint when he got to the road; when he got there he had to sustain an injury in common with all the rest of the Queen's subjects; that is to say, the road might be rendered a great deal less easy to travel upon than it was before it had been crossed. For that he would have no remedy; it is a common inconvenience—all are subject to it; and the power to commit that injury was given by Act of Parliament for the public benefit, and therefore the benefit which is received by the public from the railway, is considered to be the only compensation to which the Queen's subjects in general are entitled in respect of the damage caused at the particular spot over which the railway travelled, or in respect of which the road in that spot had been lowered." He afterwards refers to the case of *The King v. The Directors of the Bristol Dock Company* (11). In that case the person complaining was a brewer, who had carried on his trade by means of water drawn from a navigable river by means of pipes. The defendants in the execution of public works had fouled the river and made the water unfit for brewing, and they were bound to make compensation to persons whose premises were damaged or made useless, or to purchase them at the option of the owner. The brewer endeavoured to supply the defect by procuring other water, but was unable to do so and abandoned the premises. It was held not to be a case within the Act, because the right to pure water was not a particular right belonging to the owner in respect of his premises, but a general right enjoyed by all the public. Lord St. Leonards is unable to distinguish that case in principle from *Ogilvy's Case* (6), and it appears to me, I must say, almost impossible to distinguish it from the present case. His Lordship says, "It was held that he had only a general right; that nobody had any particular personal right to the water, that it was common to all the King's subjects, and that, therefore,

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he was not entitled to recover upon that ground alone. Now where is the difference between a public river and a public road? The rights of both are common. A public river is in point of fact a highway, and a public road is a highway. You use each according to its quality, and if you have only that common right which belongs to all men, you cannot claim compensation in regard to a damage to either the one or the other which is authorised by an Act of Parliament. And if in any such case Parliament ever did intend that compensation should be given, it is perfectly manifest that it would be given generally to all within a certain limit, because there must inevitably be damage to many to a certain extent." The present case is one of the stopping up of the flow of a river at a particular spot, in which the plaintiff has no different right from that of any other of Her Majesty's subjects, and the authorities given, I feel bound to say, appear to me to establish that the claim to compensation in such a case cannot be sustained; to allow it would be to break in upon a rule established by the highest authority upon full consideration, and which prevents the mischief referred to by Lord Cranworth and Lord St. Leonards. It would also introduce very great uncertainty as to the extent of liability to which all bodies executing great public works would be exposed, because their liability would depend, not upon any facts capable of being ascertained, but upon the speculative opinion of surveyors and other witnesses upon the deteriorating effect of the works upon premises situated at a greater or less distance, as to which a case of deterioration by the loss of the contingent advantages of an available navigation might readily be believed in and easily established.

The matter is of such general importance, involving a principle applicable to so many cases, that I have felt bound to give effect so far as I could to my own opinion, though differing from so many of my learned brothers. But although the authorities in the House of Lords are to be considered binding, even though they vary with decisions of other Courts, I ought not to pass by without noticing them, the two cases upon which the plaintiff particu-

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larly relied. *Beckett v. The Midland Railway Company* (2) was one of those cases. In that case the plaintiff's premises adjoined a public highway, and the works of the defendants had narrowed the highway from fifty feet to thirty-five feet, and there was evidence that the consequence was that carriages could not turn opposite his house as before, and that omnibuses, instead of stopping to allow himself and other passengers to alight opposite his house, stopped where they could turn. The evidence was no doubt slight, but still there was evidence for the jury that the plaintiff had not the same beneficial access to the highway in front of his house, which he had before. This was properly considered a particular injury and restriction of the right of the individual in the enjoyment of the house, so as to give a claim for compensation. And the Chief Justice in his judgment puts the decision upon that precise ground. The case is brought within the observations of Lord St. Leonards in connexion with the case of the *Queen v. The Eastern Counties Railway Company* (15), which I quoted at length from their bearing upon *Rickett's Case* (4). The same remark applies to the case of *Chamberlain v. The London and Crystal Palace Railway Company* (3), which being a judgment in the Exchequer Chamber, was mainly relied upon as binding upon this Court. For, although the facts are not so clear as could be desired, sufficient appears to shew that the works of the defendants had deprived the plaintiff's house of the right of being roadside premises adjoining a public highway, as much as if the site of his house had been changed. The case is so much relied on, that I must be permitted to quote what Erle, C.J., says of it, in delivering the judgment of the majority of the Court in the Exchequer Chamber in *Rickett v. The Metropolitan Railway Company* (4). The passage cited and indeed the whole judgment has a close bearing upon the present case.

"The principle is that the value of a house is affected by the relation of its situation to the adjoining highway, that is by the convenience of the private rights of ingress and egress from the one to the

other, and by the circumstances of the highway itself tending to make it useful and agreeable to the occupier of the house. If a house on a level with a commodious, beautiful and well frequented street, either be lifted or sunk by the railway twenty feet above or below the level of that street, the house would be injuriously affected both for pleasure and profit, by reason of the change in the access to and from the house; or if a house fronting to a street of that description should be turned round so as to front to a dark back alley, the house would be injuriously affected. The site of the house would be altered for the worse. In the cases here suggested, the house is supposed to be removed to make the meaning more clear; but if, instead of lifting or sinking the house, or turning its front from a grand street to a bad alley, the street is lifted or sunk or changed in its character, the relation of the house to its highway is affected precisely to the same degree as it would be by altering the relative position of the house itself in respect of that highway. Such is the principle of *Chamberlain v. The London and Crystal Palace Railway Company* (3). The frontage had been to a wide well frequented road leading direct to and from important towns; by the execution of the railway works it was made to front a dumb alley sunk below the level of the substituted thoroughfare over a railway bridge along which the stream of passengers would be compelled to flow. Frontage gives the value to building ground. There the railway company took away valuable frontage and substituted that which was very inferior, and therefore it was held that they had injuriously affected the house both in its frontage and in its access to and from the effective thoroughfare of the locality." After reading the manner in which this Court dealt with the case referred to, can it be regarded as an authority that every house in all the streets leading down to the Thames, and in the streets connected with them, would confer a right to compensation if it could be shewn that it was deteriorated in value by being deprived of the public use of the river?

I do not think it necessary to consider

the cases cited in which persons who have sustained particular injury by reason of the obstruction of a public highway, or by any other public nuisance, have maintained their action for damages. Because that is not, of itself, a test, as is pointed out by Lord Cranworth in *The Caledonian Railway Company v. Ogilvy* (6), and again very distinctly by Lord Chelmsford in *Rickett v. The Metropolitan Railway Company* (4), and by one of the judges in this case in the Court below. Although there is no right to compensation unless an action would have been maintainable, it does not follow that because an action could be maintainable for damages sustained, therefore there is in all cases a right to compensation.

If a man sustained such injury as a broken limb or a damaged horse, he could maintain an action founded upon the unlawful obstruction of the highway, but that would not make it an injurious affecting of his premises however near to the obstruction. The claim is brought into existence by something voluntarily done afterwards, and although the damage may in some measure be connected as to its extent and frequency by the proximity of the premises, that is too remote a connection to constitute an injurious affecting. As this judgment is founded upon decisions in the House of Lords in which these cases are examined it would be superfluous to justify the decisions by a further examination of them. In many of the cases it would appear not to have been sufficiently borne in mind that if premises are injuriously affected so as to give a right to compensation, the remainder man and reversioner would have the same right to compensation as the person in possession, that is, of course, if the injury was of a permanent nature.

BLACKBURN, J.—I will now deliver the judgment of my brother Archibald and myself, in which my brother Channell, before he ceased to be a member of the Court, concurred. In this case the plaintiff is the owner of real property which is much deteriorated in value in consequence of the works of the defendants having shut up a draw-dock which was a public water-way coming near to the plaintiff's

property but not actually touching it, the public highway being between. The plaintiff had no private right of way, but in consequence of the proximity of the public dock his premises were worth more either to sell or occupy. The jury assessed the amount of damage at 1,900*l*. The question is whether the plaintiff is entitled to receive compensation for this deterioration in value of his property. In *Chamberlain v. The London and Crystal Palace Railway Company* (3) the Court of Exchequer Chamber decided that the plaintiff in that case was entitled to compensation for the depreciation of the value of his houses, the arbitrator having found that the stoppage of an old highway seventy yards from the plaintiff's houses had diminished the number of passengers, and so rendered the plaintiff's houses less suitable to be let as shops and so diminished their value. There was no actual touching of the premises in that case more than in this, and if there is any difference in respect of the directness of the damage it is more direct in the present case. If this decision still remains not overruled by the House of Lords it is binding on us, and the plaintiff in the present case is entitled to our judgment.

But after that case, *Rickett v. The Metropolitan Railway Company* (4), was decided in the House of Lords, and the House of Lords by a majority of two peers to one decided that the plaintiff in that case was not entitled to compensation. The decision of the House of Lords, the final Court of Appeal, is binding, not only on all inferior tribunals, but even on the House itself, and fixes the law until the Legislature thinks fit to intervene. We have, therefore, only one duty to perform, and that is to discover whether the *ratio decidendi* of the House in *Rickett v. The Metropolitan Railway Company* (4) does or does not involve in it a reversal of the Exchequer Chamber in *Chamberlain v. The London and Crystal Palace Railway Company* (3). The majority of the Judges in the Exchequer Chamber in *Rickett v. The Metropolitan Railway Company* (4) thought the two cases might stand together, for they reversed the decision of the Queen's Bench, though the decision in *Chamberlain v. The London*

and *Crystal Palace Company* (3) was clearly binding upon them. The distinction which Erle, C.J., made between them is to be found in the judgment he there delivered, and if I understand it rightly, it is that a diminution in the rent which Chamberlain received when letting his houses in consequence of the diminished facility of access deterring passengers from coming that way, and so diminishing the profit which the occupiers of the shops would make was an injury to the houses, but that a diminution in the profit which Rickett received from his own occupation of his house as a public-house from a precisely similar cause was only a personal injury. I cannot, speaking for myself only, at all agree in this distinction. I think it necessarily follows from the facts found in *Rickett v. The Metropolitan Railway Company* (4) that the plaintiff's house would have let for a smaller rent during the twenty months that the obstruction continued; but such a distinction was certainly made.

Whether the diminished value of a house to let or sell, does or does not in itself constitute an injurious affecting of the land is another question. Lord Cranworth in his judgment in *Rickett v. The Metropolitan Railway Company* (4) clearly was of opinion that it did not. He says, "Both principle and authority seem to me to shew that no case comes within the purview of the statute unless where some damage has been occasioned to the land itself in respect of which but for the statute the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundation of the buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the Legislature." If this is the principle of the decision of the House of Lords, *Chamberlain v. The London and Crystal Palace Railway Company* (3) is clearly overruled, for in that case the works of the defendants did not come within seventy

yards of the plaintiff's property. In *The Queen v. The Metropolitan Board of Works* (5) the Court of Queen's Bench thought that this was the *ratio decidendi* of the Lords, and therefore in a case identical in principle with the present gave judgment for the defendant. But in *Beckett v. The Midland Railway Company* (2), the Court of Common Pleas took a different view of what was the *ratio decidendi* in *Rickett v. The Metropolitan Railway Company* (4). They seem to have considered it as proceeding partly on the remoteness of the damage, and partly on the same distinction which was put in the judgment of Erle, C.J., to which I have already alluded, and therefore as not overruling *Chamberlain v. The London and Crystal Palace Railway Company* (3). And in substance the Court of Common Pleas have followed that decision in the present case. Lord Westbury was clearly desirous not only to support the decision in *Chamberlain v. The London and Crystal Palace Railway Company* (3), but to carry it a great deal further; whilst Lord Cranworth, as it seems to us from the passage already cited, clearly decided on a principle inconsistent with the decision in that case; we must look to the opinion of the Lord Chancellor to see whether the House of Lords did overrule that decision or not. The Lord Chancellor did certainly proceed in part on the ground of the remoteness of the damage, but he did not confine himself to it, but proceeded to state his views on the whole case. It is unfortunate that two Courts should have differed as to what these were. But we find that the Lord Chancellor does expressly mention *Chamberlain v. The London and Crystal Palace Railway Company* (3), and treats it as a right decision, apparently adopting the distinction made between that case and the case then at the bar by Erle, C.J., in the judgment delivered by him in the Exchequer Chamber. We think it is not now the question whether that distinction was satisfactory or not, but whether the decision in *Chamberlain's Case* (3) is overruled by the House of Lords or is still a subsisting authority. We think upon the whole it is better to treat it as not yet overruled, leaving it to the House of

Lords, if we have misapprehended the effect of their decision, to correct us. We, therefore, affirm the judgment below.

BRAMWELL, B.—In this case the plaintiff, by the execution of the works of the defendants, has sustained a damage in respect of his interest in certain premises, the value thereof to use being lessened by the execution of these works, which loss could not have been inflicted on him except under the powers given to the defendants by their Act. In short, "he has sustained damage by reason of the exercise, as regards such lands, of the powers of the Act," 8 & 9 Vict. c. 18. s. 68. In reason and justice he ought to be compensated. The only matter urged to the contrary, viz., that the public benefit justifies this uncompensated injury is idle. If the public benefit will not authorize the taking of the smallest piece of land, or the doing of the smallest injury to the structure of a building or its easement, without compensation, neither can it in reason or justice authorize this loss without compensation. Unless it will pay to do the work, including in its cost compensation for losses, the work should not be done. There is no difficulty in ascertaining the compensation, any more than in a case of a partial loss of light. No doubt vague claims may be made and unfounded ones, but justice must be done to A., though at the risk of a fraudulent claim by B. Indeed if the plaintiff's premises had been taken, this source of value would have had to be taken into account and estimated; and this is also a strong argument for the plaintiff. For if the defendants by taking the premises would have to pay the whole value, why are they to do this damage gratis; or could they have first stopped the draw-dock, and then taken the house at the diminished value? The loss, it is to be borne in mind, is by execution of powers given. Because there may be a loss by new works to which this reasoning does not apply, as the diversion of traffic from an old by the making of a new road. But then the damage is not "*caused*" by the exercise of the powers of the Act." Take a plain case, indeed the one I have supposed—a new road is made, traffic is diverted from

an old one. The owners of the soil could, without statutory powers, have dedicated the new road to the public; so the owners of the soil could make a railway if they pleased, and diminish the value of the houses in the town through which the old coach road ran, as at Maidenhead. They could not, indeed, in most cases make the railway without statutory powers, because they would not take land by compulsion, cross and divert roads, and other things; but the railway injures property, not directly by exercise of any of their powers given by the Act, but as an indirect consequence of the exercise of such powers, and of the dealing with land they have purchased, as any owner might have dealt with it if he pleased. And, indeed, railways have been made without statutory powers, as that from Gravesend to Stroud and the Festiniog Railway. But for the powers of the Act, the loss by diversion of traffic would not have occurred, but the exercise of those powers does not cause it. Those powers are certainly not *causa causans*, and hardly a *causa sine qua non*. For the statute means exercise of the powers in relation to the land affected. And, indeed, the loss in such cases is caused, not by the making of the railway, but by its subsequent user. I say, therefore, that in this case there is a direct loss caused to the plaintiff by the exercise of powers conferred by the Act of Parliament, and that there is no reason why the plaintiff should not be compensated. And it seems to me legitimate to say, that the Legislature ought not to have intended this, and legitimate and respectful to say that what it *ought* not to have intended, presumably it did not intend, and that what it *did* not intend, it has not enacted. I approach the consideration of the statute, therefore, with the belief that the true construction is in the plaintiff's favour.

Now I agree that the word "*injuriously*" does not mean "*wrongfully*" affected. What is done is rightful under the powers of the Act. It means "*hurtfully*" or "*damnously*" affected. As where we say of a man that he fell and injured his leg, we do not mean that his leg was wronged, but that it was hurt.

We mean he fell, and his leg was injuriously (that is to say), hurtfully affected. At the same time I am clearly of opinion that to entitle the parties interested to compensation, the injury or hurt must be such as could not lawfully be inflicted except by the powers of the Act. I have above given my reasons for this. But I will shortly add that the words of the section shew this: The lands must be "injuriously affected by reason of the exercise, as regards such lands, of the powers of the Act."

The Act, therefore, injuriously affecting must be one which would be wrongful but for the statute. But I agree that it need not be one for which an action would lie. It is enough that it would be indictable or might be prevented by injunction. Now clearly this stoppage of the draw-dock would have been indictable, and the defendants might have been compelled to abate the nuisance; besides, it is not to be presumed anyone would break the law. Further, I believe they might have been prevented by injunction from doing, and compelled to undo, if they did, the Act which has caused the loss. If so, then we have a thing done under the powers of the statute, which could not have been lawfully done but for those powers, which, if done, might have been compelled to be undone, which directly causes loss to the plaintiff in respect of his interest in these premises. Why is this not within the section? It says—"shall make to the owners, &c., of lands injuriously affected by the construction of the works full compensation for all damage sustained by such owners, &c., by reason of the exercise as regards such lands of the powers of the Act." I admit, of course, that the loss must be to the person in respect of his interest in the thing. That the thing, the premises, must be lessened in value, not merely that the person suffers in common with the rest of the public or on account of something peculiar to him personally. I admit, for instance, that if a market gardener had usually landed his goods at this dock and taken them to Farringdon Market, he would have no claim; because no premises of his would be injuriously affected. It might be an inconvenience

and even loss to him to get his goods to market in some other way; but his premises would not be injuriously affected. He would suffer as one of the public, more perhaps than any one else, but still as one of the public only, and it may well be, that though his loss is special, yet he must bear it as one of the public, for the public gain, and on account of the difficulty of compensating in such cases. *He* would be injuriously affected, but not his *premises*. His case would be like that of a medical man injured by sanitary improvements under statutory powers which by diminishing sickness diminished his practice. Nor is such an affecting one by the exercise of the powers of the Act. No power of the Act is directly applied to cause it; it is an indirect consequence only. Here the premises are injuriously affected, and for actual and potential purposes they are of less value. If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place ten miles off, if there were no other within twenty miles of the premises affected. The line is to be drawn by ascertaining whether the *premises* are actually or potentially affected for present or other purposes, or the man whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were 1,000 claims for 1,000*l.* each. If they are well-founded, 1,000,000*l.* of property is destroyed, and why is not that part of the cost of the improvement, and if taken into account as such, why should not the losers of it receive it? On these principles I think the present case within the statute, and give my entire concurrence in Lord Westbury's reasoning, from which the foregoing is borrowed. Of course if there is any binding authority on the subject reasoning is useless. But I think the cases are in such a condition that there is none on which we can act, and that the matter must be set right in the House of Lords or by legislation. That being so, one may reasonably enquire how this case ought to be decided. *Rickett v. The Metropolitan Railway Company* (4)

would govern us did we know the *ratio decidendi*. Now there is a *ratio decidendi* expressed by Lord Cranworth, which would entitle these defendants to judgment. He appears to think that there must be some damage to structure or easement to constitute injurious affecting. Now it does seem strange that the Act and its results being the same the premises are injuriously affected or not according as the right hurt or injured, is public or private, as by grant or prescription. But further Lord Cranworth says "or making it inaccessible by lowering or raising the ground immediately in front of it." I suppose the important word there is "immediately," making the thing peculiar to the house. But what in principle is the difference between "immediately" and five yards' distance, what is the difference in principle between total inaccessibility and total loss and partial inaccessibility and partial loss? With great respect to his Lordship's opinion, and that of my brother Cleasby, they seem to give up their position in this. For lowering the ground in front would be no cause for compensation unless it was a highway, and if it is a highway the claimant has no right in relation to it except as one of the public. His premises being close to the road do not alter his case in principle but in degree only.

But Lord Cranworth's was not the *ratio decidendi* of Lord Chelmsford. Further I agree in the remark of my brother Blackburn that the Judges and (for aught we can see) the Lords in *Rickett v. The Metropolitan Railway Company* (4) did not mean to overrule *Chamberlain v. The London and Crystal Palace Railway Company* (3), and I agree with him in thinking that if that case is law, it is an authority for the plaintiff, and that the distinction between the two cases is unreal. Then, in order to reverse this judgment, we ought to be able to say that it is wrong on principle or authority. I cannot say it is on either.

KELLY, C.B.—It is necessary in the first place to have a clear apprehension of the facts of this case. The plaintiff is the owner of a house and premises in which he carried on the business of a carman,

and the defendants, in order to construct an embankment, possessed themselves under the powers of their Acts of Parliament of a water-way, or public highway called a draw-dock, leading from a portion of a highway lying between the plaintiff's premises and the draw-dock to the river Thames. The plaintiff therefore had a public way from his house and premises across a space of twenty-one feet to the draw-dock, and thence by the draw-dock of the length of 352 feet to its outlet on the Thames, and the defendants by taking the draw-dock and constructing an embankment upon its site, have permanently destroyed and extinguished the public highway from a spot twenty-one feet from the plaintiff's premises to the river Thames. By this means the communication between the plaintiff's premises and the Thames has been taken away, and his premises have become less valuable, either to sell or to occupy, to the amount of 1,900*l*. The question is whether the plaintiff is entitled to compensation under the Lands Clauses Act, 1845, which is incorporated with the defendants' Acts of Parliament. A great many decisions, some of them seeming to conflict with each other, are to be found upon this question, and it may be well to consider at the outset in what state of things claimants, or plaintiffs, whose property as alleged has been prejudicially affected within the Lands Clauses Act, have been held not entitled to compensation. And, first, it has been determined that loss of profits in trade is not within the Act. Why this should be so,—why a man should be deprived of the profits which he is acquiring in his trade by means of a public highway in the immediate neighbourhood of his premises being taken by a joint-stock company or other public body, and applied to their own use, and in many cases used for *their own* profit, and the injured trader should be entitled to no compensation, I have never yet been able to discover; but such is the law as laid down by the House of Lords, and this Court is bound by their decision. So it has been decided that no compensation can be recovered where no action could be maintained, if the wrong had been done not under the authority of an

Act of Parliament. And further, that it does not follow that even if an action might be maintained a claimant could necessarily obtain compensation within the Lands Clauses Act. Finally it has been held that the temporary obstruction as in *Rickett's Case* (4), or the occasional obstruction as in *Ogilvy's Case* (6), of a public highway is not the subject of compensation; and that the permanent extinction of a highway, but so distant from the premises of the claimant that he only sustains injury in common with the public at large, is also not an injury within the meaning of the Act. And Lord Cranworth has laid it down that to entitle a claimant to compensation, "there must be actual injury to the land itself, as by loosening the foundation of the buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration." On the other hand it has never yet been determined that the permanent extinction of a public highway, so near to the claimant's premises as directly to diminish their value to sell or to let, or to be enjoyed by the claimant himself, is not the subject of compensation within the Act. And it will be found, upon a careful consideration of the authorities bearing upon this question, that such an injury has been held to entitle the party injured to compensation, and the decision to that effect has been affirmed in a Court of Error, and approved in the House of Lords. In *Chamberlain v. The London and Crystal Palace Railway Company* (3) it was decided in the Queen's Bench, and afterwards in the Exchequer Chamber, that the destruction or extinction of a highway at a distance of seventy yards from the nearest of the plaintiff's houses alleged to have been injuriously affected, was an injury within the Lands Clauses Act, 1845, which entitled the plaintiff to compensation. In that case the highway at the point of extinction was not only not in contact with the plaintiff's premises, but, as observed, at a distance of seventy yards; nor were the premises directly injured in any of the modes pointed out by Lord Cranworth in *Rickett's Case* (4), or otherwise than

that by reason of the proximity to the plaintiff's premises of that portion of the highway, which had been taken for the purposes of the railway, the access to them by a substituted road was less convenient, and the premises had thereby become less adapted to the carrying on of a trade and of less pecuniary value. All these requisites concur in the case now before the Court, and it remains to be considered whether *Chamberlain's Case* (3) must be taken to have been overruled by *Rickett v. The Metropolitan Railway Company* (4) in the House of Lords.

Having carefully considered the facts and the language of the opinions delivered in this case of *Rickett* (4), it appears to me that it in nowise conflicts with the decision in *Chamberlain's Case* (3), and that it is clearly and plainly distinguishable from the case now before this Court. First, the good and substantial ground of the decision in *Chamberlain's Case* (3) and in this case, is that the portion of a highway the taking of which by the defendants was complained of, had been permanently and absolutely extinguished and the plaintiffs in both cases had been for ever deprived of the use of it for themselves and all others resorting to their premises, whereas in *Rickett's Case* (4), the highway was not taken at all, and the access to it had been for a time only and partially obstructed, another temporary way to the plaintiff's premises had been substituted and the highway itself ultimately restored to its former condition. It is true that the obstruction was continued for the long period of twenty months, and it may be that, as in *Wilks v. The Hungerford Market Company* (16), an action might have been maintainable for the continuance of the obstruction for an unreasonable time, but there is a marked and manifest distinction between a mere temporary obstruction which must occasionally take place in a highway under a great variety of circumstances, as during the repairs of the way itself or of the sewers, or of the gas pipes or water pipes underneath it, and the permanent destruction of a way by which property

(16) 2 Bing. N.C. 281; s. c. 5 Law J. Rep. (N.S.) C.P. 23.

in its neighbourhood may be permanently and irreparably injured. But further, the only damage found by the jury, or complained of by the plaintiff, was a loss of profit in his trade estimated by the jury at 100*l.*, a loss which, as already observed, the House of Lords had decided not to be within the Act of Parliament. Here, on the other hand, as in *Chamberlain's Case* (3), it is expressly found that the premises of the plaintiff with reference to the uses to which they might have been applied by any owner or occupier, have been permanently damaged and diminished in value. The decision therefore in *Rickett's Case* (4), upon the facts there found, is clearly distinguishable from *Chamberlain's Case* (3), and this case, and is in express terms distinguished from *Chamberlain's Case* (3) by Lord Chelmsford, one of the majority by whom that decision was pronounced. We are, however, bound not merely to consider the judgment itself of the House of Lords, but to collect as far as we are able to do so, the *rationes decidendi*, from the language in which it was delivered, and it certainly appears, from some expressions that fell from Lord Cranworth, to have been his opinion, that to constitute an injury within the Act, it must have been caused by something in contact with or directly and physically operating upon the land itself. But if such was really the meaning of his Lordship, it is not only opposed to some of the authorities recognised by the decision to which he was a party, but inaccurately illustrates the proposition intended to be laid down. For "the raising or lowering of a highway in front of a claimant's premises," had not the effect in the case referred to of rendering the premises inaccessible, though it diminished the possibility of access, and [the destruction of a portion of a highway by the construction of an embankment upon it at the distance of some fifteen feet from the claimant's house, is no more "an actual injury to the land itself," than the construction of a railway at the distance of seventy yards or an embankment at the distance of twenty-one feet.

Passing by, then, these remarks of Lord Cranworth, which would confine all
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claims to compensation within narrower limits than either the authorities or the provisions of the Act of Parliament have prescribed, and without calling in aid the able and elaborate opinion of Lord Westbury in support of the claim to compensation, I think we are warranted in holding that the true *rationes decidendi* in this case of *Rickett* (4) were that the pecuniary injury complained of was confined to the loss of profits in trade, that there was no finding of any diminution in the value of the property and that the highway in question had not been permanently extinguished or taken away but only temporarily obstructed; all which reasons for the decision are inapplicable to either *Chamberlain's Case* (3), or the case before us.

The Caledonian Railway Company v. Ogilvy (6) is equally distinguishable from the present case. There the plaintiff complained not of the permanent extinction of a highway, but only of an occasional and temporary obstruction by the shutting of the gates on either side of a railway for a few minutes or seconds at a time, during the passing or expected passing of a railway train. There is, therefore, no decision to be found in any Court of Appeal, that where a highway is not merely obstructed but permanently destroyed so near to the premises alleged to be injuriously affected, as to render them of less pecuniary value by preventing an easy and convenient access to them by the occupiers and the public, the owner of the premises is not entitled to compensation. Upon these grounds, therefore, supported by the many authorities referred to, consistent with the decisions of the House of Lords, and in accordance with the strict principles of justice, I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

Attorneys—A. S. Edmunds, for plaintiff; W. W. Smith, for defendants.

1873. { COOKE AND OTHERS v. GILL
Jan. 21. { AND ANOTHER.
THE UNION BANK OF LONDON,
Garnishees.

Prohibition—Inferior Court—Jurisdiction—Mayor's Court of London—Cause of Action.

The Mayor's Court of London being an inferior Court, the whole cause of action must arise within its jurisdiction, and therefore, where a material fact necessary to be proved in order to sustain the plaintiffs' case occurs out of the jurisdiction of such Court, the garnishees against whom process of foreign attachment has been issued to attach moneys owing by him to the defendant, is entitled to a prohibition against such Court proceeding with the suit.

This was a rule calling on the plaintiffs to shew cause why a writ of prohibition should not issue to prohibit the Mayor's Court of London from proceeding further against the garnishees on a foreign attachment out of that Court, on the ground that the cause of action did not arise within the jurisdiction of such Court; and why the plaintiffs should not pay the costs of this application.

The material facts as disclosed by the affidavits used upon the argument of the rule, were these—The proceedings in the Mayor's Court of London were on four bills of exchange, amounting in the aggregate to 12,112*l.*, which had been respectively drawn by the defendants in Philadelphia, in the United States of America (where they resided and carried on business), upon the Union Bank of London, addressed to such bank at its place of business, in Princes Street, Mansion House, London. The plaintiffs, who sued as indorsees of such bills, carried on business in partnership at Lombard Street, in the City, and the bills were indorsed to them by the defendants in Philadelphia, as follows, viz., two of the bills were specially indorsed to the plaintiffs, and two to Messrs. J. Cooke & Co., the plaintiffs' correspondents in America, and the four bills came to the plaintiffs' firm in London, about the end of October, 1872; and were duly presented at the Union

Bank of London, for acceptance and payment, when they were dishonoured, the bank refusing either to accept or pay.

The plaintiffs attached by process of foreign attachment in the Mayor's Court the moneys of the defendants in the Union Bank, who being thus proceeded against as garnishees, applied for and obtained the present rule; against which

Gates now shewed cause.—The indorsement of the bills was not completed until the bills reached the plaintiffs in the City of London, and therefore the indorsement was within the jurisdiction of the Mayor's Court. At all events the refusal by the Union Bank to pay or accept took place within such jurisdiction, and therefore a material part of the cause of action arose within the jurisdiction, and that is sufficient, and it is immaterial that the bills were drawn in America, since it is not necessary, to give the Mayor's Court jurisdiction, that the whole cause of action should arise within its jurisdiction. The recent case of *Jackson v. Spittall* (1), shews that to entitle a plaintiff to proceed in any of the Superior Courts under the Common Law Procedure Act, 1852, section 18, against a defendant residing out of the jurisdiction, it is not necessary that the whole cause of action should arise within the jurisdiction; and in that case the Court of Common Pleas commented on and dissented from the case of *Sichel v. Borch* (2), in which the Court of Exchequer had decided otherwise.

[BRETT, J.—*Sichel v. Borch* (2) was followed by the Court of Queen's Bench in *Allhusen v. Malgarejo* (3), and in the late case of *Cherry v. Thompson* (4) that Court has adhered to its former decision and declined to concur with the opinion of this Court in *Jackson v. Spittall* (1).]

It is true, as is stated in 1 Wms. Saund.

(1) 39 Law J. Rep. (N.S.) C.P. 321; s. c. Law Rep. 5 C.P. 542.

(2) 2 Hurl. & C. 954; s. c. 33 Law J. Rep. (N.S.) Exch. 179.

(3) 37 Law J. Rep. (N.S.) Q.B. 169; s. c. Law Rep. 3 Q.B. 340.

(4) 41 Law J. Rep. (N.S.) Q.B. 243; s. c. Law Rep. 7 Q.B. 573.

99, note 3 (ed. 1871), that "in actions in inferior Courts it is necessary that every part of that which is the gist and substance of the action should appear to be within their jurisdiction; therefore the consideration of the promise must be laid in the declaration within the jurisdiction." But by section 12 of the Mayor's Court of Procedure Act, 1857 (20 & 21 Vict. c. clviii.), where the debt does not exceed 50*l.*, no plea to the jurisdiction is allowed if the cause of action "wholly or in part" arose within the City, and by section 15 of that Act, no defendant is to object to the jurisdiction of the Court in or by any proceeding whatsoever, except by plea. The form of such plea requires the defendant to allege that each part of the cause of action accrued out of the jurisdiction of the Mayor's Court. If then that Court has jurisdiction against the defendant in a case where part of the cause of action accrued within the City, it must equally have jurisdiction in such a case against the garnishee.

[BOVILL, C.J.—That does not follow. The Act gives the Court jurisdiction against a defendant by default.]

[BRETT, J.—In *Cox v. The Lord Mayor of London* (5), the House of Lords considered that, as regards the garnishee, the case was just as if these sections of the Mayor's Court of London Procedure Act never existed.]

[KEATING, J.—In the copy of the report of *Cox v. The Lord Mayor of London* (5), belonging to this Court, I find my late brother Willes has added this note—"the cause of action must arise and the garnishee reside within the City, in order to give the Lord Mayor's Court jurisdiction."]

Cause of action does not mean the whole cause of action. In *Huxham v. Smith* (6), the order for the goods was given abroad but being acted on in the City, it was held by Lord Ellenborough to be sufficient to give jurisdiction to the Mayor's Court.

[BOVILL, C.J.—No, in that case, as I read it, both the order and delivery were in the City.]

If a cause of action arises within the City it is sufficient, although part of the facts necessary to maintain it occur out of the City.

Douglas Walker, in support of the rule. —Not any part of the cause of action in the present case arose within the City of London.

[BRETT, J.—Is not the presentation for acceptance, and refusal, a material part of the cause of action?]

The contract is between the drawers of the bills and the present holders, the indorsees, and that is only that the drawers will pay if the acceptors do not. However, in order to give jurisdiction to the Mayor's Court, every material part of the cause of action must occur within the jurisdiction, as appears from what was said by some of the Judges in *Banque de Credit Commercial v. De Gas* (7). Here the drawing of the bills was material to sustain the plaintiffs' cause of action, and that took place in America, and therefore the Mayor's Court of London had no jurisdiction.

BOVILL, C.J.—There is no doubt that the practice in the Lord Mayor's Court has been for many years to frame the proceedings in that Court without alleging that the cause of action arose within its jurisdiction, and no statement of the material facts having taken place within its jurisdiction has been made in any of its proceedings. The point was raised more than fifty years ago in *Banks v. Self* (8), where this Court of Common Pleas supported a plea of foreign attachment to an action brought by the defendant in a suit in the Mayor's Court against the garnishee, although such plea did not aver that the defendant was indebted to the plaintiffs in the Mayor's Court within the jurisdiction of that Court, on the ground "that the uniform course of pleading had been so ever since

(6) 36 Law J. Rep. (N.S.) Exch. 226; s. c. Law Rep. 2 E. & I. Ap. 239.

(6) 2 Campb. 21.

(7) Law Rep. 6 C.P. 142.

(8) 5 Taunt. 234.

the time of the year books, Edward the Fourth's time, and it was too much to ask them to overthrow so uniform a practice without citing so much as a single applicable case in favour of that request." Therefore, so far as the form of pleading is concerned, it is not the practice to state that any of the facts occurred within the jurisdiction of the Mayor's Court. On that ground an argument has been raised as to whether it is necessary, in point of fact, that the cause of action should have arisen within the jurisdiction of that Court, and the matter has been very much considered by the Court of Queen's Bench in *De Haber v. The Queen of Portugal* (9), and there Lord Campbell in the course of his judgment said—"The circumstance that the cause of action, if there were any, arose out of the jurisdiction of the Lord Mayor's Court, need not be relied on. Nevertheless, after the strong assertions at the Bar that this is material where the defendant does not appear, we think it right to say that having examined the authorities, we entertain no doubt that the process of foreign attachment can only be duly resorted to where the cause of action arose within the jurisdiction of the Court from which it issues."

I was counsel in that case and I believe that it has been considered law up to the present time. The question was again raised in *Westoby v. Day* (10), where Lord Campbell in delivering judgment approved of what had been so stated by the Court in *De Haber v. The Queen of Portugal* (9), and added, "the objection that the cause of action did not arise within the jurisdiction of the Court, if properly taken, must prevail." In the present case the objection has been properly taken by the garnishees. Now if the cause of action must have arisen within the jurisdiction of the Mayor's Court, it follows that the Mayor's Court being an inferior Court, must come within the general rule applic-

able to those Courts, except so far as it has been altered by general usage or Act of Parliament. The general rule as to inferior Courts is stated in 1 *Chitty on Pleading*, 7th ed. p. 287, to make it still "necessary in addition to the statement of the county as a venue, to aver that every material fact took place within the jurisdiction of the Court, as in *assumpsit*, as well that the promise or contract was made as that the goods were sold or the money had and received, &c., within the jurisdiction of the Court, and if the allegation be omitted the declaration will be insufficient even after verdict." Numerous instances of this are to be found in *Comyn's Digest*, Title "Courts," P. 9, and the same rule in substance is contained in note 3 to 1 *Wms. Saund.* 99. In the Mayor's Court, by long usage, independently of any Act of Parliament, a general form of pleading has been allowed, but still it has been necessary to prove that the material facts occurred within the jurisdiction, otherwise the Court had no jurisdiction. Then has this been affected by the Mayor's Court of London Procedure Act, 1857? The 15th section enacts that "no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever except by plea." That in terms is confined to the case of a defendant, and does not preclude any other person from so objecting, and it was settled in *De Haber v. The Queen of Portugal* (9) that a stranger may apply for a writ of prohibition suggesting that the Inferior Court is exceeding its jurisdiction. The 12th section is to the same effect, as it only contains a further limitation to the rights of a defendant. I am at a loss, therefore, to see how that Act of Parliament can be said to extend the jurisdiction of the Mayor's Court. Parties to the action may be precluded from raising the question except by pleading, but that is very different from saying that such Court shall have jurisdiction. Here material facts necessary to constitute the cause of action occurred elsewhere than in the City. Therefore the writ of prohibition must go, and the rule will be made absolute with costs.

(9) 17 Q.B. Rep. 171; s. c. 20 Law J. Rep. (n.s.) Q.B. 488.

(10) 2 E. & B. 605; s. c. 22 Law J. Rep. (n.s.) Q.B. 418.

KEATING, J.—I am of the same opinion. Mr. Gates contends that because the 12th section of the Mayor's Court of London Procedure Act, 1857, has altered the law by requiring the defendant to plead to the jurisdiction, therefore this Court is to be governed by the same rule in granting a prohibition as is applicable to a defendant in so pleading. That I apprehend is not so. I need not repeat the authorities which have been cited by the Chief Justice to shew that whatever may have been the practice of pleading in the Mayor's Court, proof must have been given that everything necessary for a cause of action had occurred within the jurisdiction of that Court as in the case of any other inferior Court. The question is whether this has been altered by the Mayor's Court of London Procedure Act, 1857. The 12th section applies only to cases under 50*l.*, and I see no reason for going beyond its terms which are confined to the case of a defendant. The process of foreign attachment is for the purpose of forcing the defendant to appear, but this is an application by the garnishees, and therefore we are bound to decide as if the Act had not been passed. That I think is the result of *Cox v. The Mayor of London* (5), and it certainly was the opinion of Willes, J., as expressed by him in several cases in this Court, that the provisions of the Act do not extend to a garnishee when applying for a prohibition. In that I entirely concur, and I think, therefore, this rule should be absolute.

BRETT, J.—In this case the claim of the plaintiffs is for a much larger sum than 50*l.* It would be necessary, if the plaintiffs were put to the proof in order to maintain their action, to prove that the defendants drew and indorsed the bills, and that they were presented for acceptance and dishonoured. The bills were drawn in America. It has been suggested that they were not indorsed there. I incline, however, to think that they were, but they had to be presented in the City of London for acceptance, and therefore some of the facts necessary to be proved occurred in the City of London. The question is whether, under these cir-

cumstances, the case was within the jurisdiction of the Mayor's Court of London, so that the moneys in the hands of the garnishees there could be attached. The opinion of the late Willes, J., as shewn by the note he has written on the head note to *Cox v. The Mayor of London* (5), was that "the cause of action" must arise within the City to give the Mayor's Court jurisdiction. The question is what is the meaning of that term "cause of action." That the Mayor's Court is an inferior Court is now beyond dispute. It was so held by the Court of Queen's Bench in *The Queen v. The Mayor of London* (11), as was pointed out by Willes, J., in *Cox v. The Mayor of London* (5). That being so, then independently of the Mayor's Court of London Procedure Act, 1857, the rule is that the cause of action must arise within the jurisdiction. Now what is the meaning of "cause of action" within that rule? It seems to me that it means that every material fact which is necessary for the plaintiffs to prove in order to succeed in their action, that is, every fact which a defendant might traverse, must arise within the jurisdiction of the Court. If so, has the Mayor's Court of London Procedure Act, 1857, made any difference? The objection that the Court has no jurisdiction is one which may be taken before any pleading at all, and as I understand *Cox v. The Mayor of London* (5), it was decided that although if the defendant appear he can only plead to the jurisdiction in a particular way, yet that prohibition may be applied for by the garnishee or a stranger before any pleading, and the question as to granting it is to be determined on common law principles and independently of pleading, and that the Courts will grant the prohibition if the cause of action did not arise within the City of London. I should suppose that the cause of action within the meaning of that rule meant the whole cause of action, that is, every fact which the defendant would be entitled to traverse. That is the proposition which was endeavoured to be stated by

(11) 13 Q.B. Rep. 1; s. c. 16 Law J. Rep. (N.S.) Q.B. 185.

Montague Smith, J., and myself in *Banque de Credit Commercial v. De Gas* (7), and when Willes, J., used the phrase "cause of action" in his note to *Cox v. The Mayor of London* (5), I think he used it in the sense of "the whole cause of action." The result, therefore, is that where the application for the prohibition is not made by the defendant but by the garnishee or a stranger, the jurisdiction of the Lord Mayor's Court does not exist unless the whole cause of action arose within the city.

Rule absolute.

Attorneys—Janson, Cobb & Pearson, for plaintiffs; Lyne & Holman, for defendants.

1873. }
Jan. 30. } BURSLEM v. ATTENBOROUGH.

Pawnbroker—Loss of Ticket—39 & 40 Geo. 3. c. 99. ss. 15, 16.

A person who had pledged goods, having unknowingly given the ticket amongst other matters to a third person, obtained under the (now repealed) statute, 39 & 40 Geo. 3. c. 99. ss. 15, 16, the form of affidavit, &c., therein mentioned, went immediately with it to a magistrate as therein provided, and shewed it afterwards to the pawnbroker:—Held, that under that statute the pawnbroker was not justified in afterwards delivering the goods to the ticket-holder, as the ticket was "lost or mislaid," and it was not necessary to deliver the affidavit and redeem the goods.

This was an action of trover for three rings. The defendant pleaded not guilty, not guilty by statute, a denial of the property, and leave and license.

At the trial the following facts appeared. The plaintiff pledged various articles, and amongst them the three rings, with the defendant, a pawnbroker; and afterwards handed a bundle of pawn tickets to one Brathwaite, who was indebted to him, on

the understanding that he was to pay the interest due on them. Among them were the tickets for the three rings, which the plaintiff did not intend to part with, and did not know were in the bundle. Brathwaite absconded. The plaintiff went to one Oliver, the defendant's manager, told him the circumstances, obtained from him, as provided by 39 & 40 Geo. 3. c. 99. ss. 15, 16 (then in force), copies of the tickets and forms of affidavits of his having lost, mislaid, or destroyed them, went immediately to a magistrate as provided, and immediately returned and shewed the affidavits to Oliver. The defendant afterwards parted with the rings to a person who presented the tickets. A verdict was found for the plaintiff, with leave to the defendant to move to enter a nonsuit or a verdict for himself on the ground that on the true construction of 39 & 40 Geo. 3. c. 99. ss. 15, 16, the plaintiff was not entitled to recover on the facts proved, and a rule nisi having been granted pursuant to such leave,

*F. Williams and Reid shewed cause.—*The tickets were clearly lost or mislaid, the plaintiff was therefore entitled to obtain the forms from the defendant, and having done so, and having gone immediately to the magistrate, and shewn the defendant he had done so (even if that be necessary) the defendant had no right to part with the property.

Giffard and Turner, in support of the rule.—First. The tickets were not lost or mislaid, inasmuch as they were given to Brathwaite under circumstances which would entitle him to conclude that they were lawfully in his possession, and that he was entitled to deal with them. Secondly. The plaintiff, after going to the magistrate, should have immediately, or within a reasonable time, delivered the documents to the defendant and redeemed the property. It was decided in *Vaughan v. Watt* (1) that the statute saying "thereupon" the person is to go to the magistrate, he must go immediately or within a reasonable time, and similarly

(1) 6 Mee. & W. 492; s. c. 9 Law J. Rep. (N.S.) Exch. 272.

where it says "whereupon" he shall be suffered to redeem on leaving the documents, he must similarly leave the documents and redeem. If this were not so the pawnbroker might be put into a great difficulty, and not know to whom he was to deliver the property.

BOVILL, C.J.—The provisions in 39 & 40 Geo. 3. c. 99, to which our attention has been drawn, are for the protection of pawnbrokers, and to relieve them from responsibility in cases where more than one person claims the goods. The ticket is made in a certain sense negotiable, *i.e.* the person presenting it is, by section 15, entitled to have the goods, and the pawnbroker is indemnified against loss, except in certain specific cases. One case is where the pawnbroker has "previous notice from the real owner or owners thereof not to deliver the same to the person or persons producing such note," and what took place here amounted to such notice, and the statute goes on (after an alternative claim), "and unless the real owner or owners thereof proceeds or proceed in manner hereinafter provided and directed for the redeeming of goods and chattels pledged where such note has been lost, mislaid, destroyed, or fraudulently obtained from the owners or owner thereof." The statute does not say if actually redeemed, but in the manner provided for redeeming, so that what is contemplated by section 15 is that the owner is to proceed so as to be able to redeem, not that he is actually to redeem. Are then the requirements of section 16 fulfilled? [His Lordship read the section.] It has been argued that though notice was given, the ticket was not "lost or mislaid," but on the facts it appears that it was so in every sense. Consequently there being notice, and the ticket being lost and mislaid, he was entitled to apply to the pawnbroker for a copy of the ticket and form of affidavit; that he did, and these being delivered to him he went to the magistrate "thereupon," for this was done immediately, and it may be that then the pawnbroker was in the position of a holder of property claimed by more than one person. Th

section then goes on to say, "whereupon" the pawnbroker shall suffer such person, on leaving the copy and affidavit, to redeem the goods. The word "whereupon" is to be construed by the duty or right which is conferred on the party, which is to be allowed to redeem, "on leaving" them, and there is nothing to shew it was intended to abridge the time (by the next section a year is given) for redeeming. Ample notice is given to the pawnbroker originally when the ticket is lost, by the declaration that the person is owner, and then he is only to give the goods to the person making the declaration, and is protected on delivery to him on leaving the copy, ticket, and declaration. As respects the future, there being now an express provision in 35 & 36 Vict. c. 93 to meet this case, the point will not arise again. The affidavit being immediately sworn, and the owner coming back to the pawnbroker, the latter was not justified in delivering to Brathwaite.

KEATING, J.—I am of the same opinion. The clause is certainly ambiguous, but some things in it are not. The ticket must be "lost or mislaid," and I agree that here it was. The owner then having obtained the copy ticket and form of affidavit, is "thereupon" to go to a magistrate as provided, and I should be quite prepared to hold that this should be done promptly, even apart from *Vaughan v. Watt* (1), where it was so held. The Legislature has now got rid of this difficulty, but even under this statute if the owner does not go to the magistrate or pawnbroker, and leaves the latter in ignorance, I should be quite prepared to hold that the statute was not fulfilled, for it was not intended to put the pawnbroker in this difficulty, but here everything has been done to bring the case even within the last Act, for the owner went promptly to the magistrate and shewed the declaration to the pawnbroker, who though now entitled to the documents under the recent Act, was not so under the repealed Act, 39 & 40 Geo. 3. c. 99, and consequently the pawnbroker was not justified after what took place in giving the goods to Brathwaite.

GROVE, J.—I am of the same opinion. As to the first point, the ticket was lost and mislaid, though unknowingly put into a person's hand instead of a drawer. As to the second point, I do not see what more could be done. The owner, suspecting Brathwaite, goes to Oliver and gets the documents, then goes to a magistrate, and then shews them to the defendant. The question as to the power of selling does not arise, but it is said that the owner must leave the documents and redeem. There is nothing, however, in the statute to shew that, and it says that the pawnbroker shall *suffer* him, on leaving them, to redeem; *i.e.*, he is to *have a title* to redeem on leaving them. Suppose the ticket to be lost in a week, on such a construction he would have still to redeem directly. What would be the result if there were unnecessary delay, and the owner left the pawnbroker without notice, it is not necessary to decide. The recent statute will prevent any such point arising in future.

HONYMAN, J.—I am of the same opinion, but have had some doubt because of the hardship which it seemed might arise, if after getting the copy ticket and declaration the owner had gone away and not gone before the magistrate.

Rule discharged.

Attorneys—T. S. Ashwin, for plaintiff;
A. Neate, for defendant.

1873. }
Jan. 25. } *In re BALL, an attorney.*

Attorney and Solicitor — Attachment against—Rule for Payment of Money—1 & 2 Vict. c. 110. s. 18.

The Court will refuse to grant an attachment against an attorney for disobeying a rule of Court ordering him to pay money, unless special circumstances be shewn, as the remedy for such disobedience is by execution under 1 & 2 Vict. c. 110. s. 18.

Kemp moved for an attachment against George E. Ball, an attorney, for not complying with a rule of Court ordering him to pay a sum of money, which had been received by him as an attorney.—The rule is moved for on only the ordinary affidavits of service of the rule and demand of the money, and in *Re Robinson* (1), where a similar application to the present was made to the Court of Queen's Bench, that Court refused the attachment, stating that where an order for the payment of money is made and disobeyed, the party is deemed to have elected to take his remedy by a civil proceeding, and must proceed by way of execution as on a judgment, according to the power given him by 1 & 2 Vict. c. 110. s. 18. If that is adopted by the Court in the present case there will be no chance of getting the money, for an execution against the goods will probably be fruitless, and since the Debtors Act, 1869 (32 & 33 Vict. c. 62), there is now no remedy against the person, as arrest is abolished for non-payment of a sum of money.

BOVILL, C.J.—We (2) shall abide by the decision of the Court of Queen's Bench in *Re Robinson* (1), and, therefore, this application for an attachment is refused. We do not, however, say that we would not grant an attachment if special circumstances for inducing us to do so were shewn.

Application refused (3).

Attorney—T. Angell, for the applicant.

(1) 10 B. & S. 75.
(2) Bovill, C.J.; Keating, J.; Brett, J.; and Grove, J.

(3) See *In re Rush* (Law Rep. 9 Eq. 147), where the Master of the Rolls allowed an attachment to issue against a solicitor for not paying money ordered to be paid by him, such being expressly excepted out of the Debtors Act, 1869, by sec. 4 sub-sec. 4 of that Act.—*Reporter.*

1872. }
 Nov. 10. }
 1873. } HARVEY v. WALTERS.
 Feb. 24. }

Easement—Eaves dropping—Alteration of Dominant Tenement—Trespass.

The plaintiff, who had a right to project the eaves of his house over the land of the defendant, raised the eaves about thirteen or fifteen inches without changing the extent of their projection over the defendant's land:—Held, in an action for interfering with such right, that the easement was not destroyed by such raising of the eaves, in the absence of evidence that any additional burthen had been cast upon the defendant's land.

Semble, that the fresh projection over the land of the defendant which was made when the eaves were raised, was not a new trespass, but only a mere user of the space taken possession of by the trespass occasioned by the original projection.

Action for obstructing certain windows in the plaintiff's premises, and also for interfering with the plaintiff's right to have his eaves project over the defendant's land.

The only part necessary to refer to for the purpose of this report is that relating to the latter cause of action.

As to this, the third count of the declaration stated that the plaintiff was possessed of a messuage, to wit a brewery, and a messuage, to wit a stable, and was entitled to have the rain water that did and might, from time to time, naturally fall upon certain roofs, part of the said brewery and stable, and to have the said eaves project over the said land, and the defendant wrongfully removed the said eaves, and by building on the said land close to and higher than the said roofs prevented the said roofs from having such eaves as aforesaid projecting over the said land, and prevented such rain water as aforesaid from dropping from the said eaves upon the said land, and penned back the same upon the said roofs, whereby the plaintiff's said brewery was rendered wet and unhealthy, and was permanently injured and lessened in value.

The defendant pleaded not guilty, and
 NEW SERIES, 42.—C.P.

inter alia she traversed that the plaintiff was entitled as alleged in the said third count.

The cause was tried before Quain, J., at the Nottingham Spring Assizes for 1872, when the facts as to the eaves were as follows—The plaintiff and defendant were the occupiers of adjoining houses at Arnold, in the county of Nottingham. The wall of an outhouse of the plaintiff, which separated it from the defendant's premises and was about seven feet high, had a spouting into which the water from the roof of the outhouse ran. This spouting, as well as the tiles on the roof of the outhouse, projected over the defendant's property and had so existed for more than twenty years before 1867. In that year the plaintiff made certain alterations, by which, for the purpose of converting the outhouse into a brewhouse, he raised the boundary wall of it three or four courses of bricks, that is to say about thirteen or fifteen inches, and with it the tiles and spouting, but these did not project more than they had done before the alteration. The defendant afterwards, for the purpose of building a wall on that part of her property which adjoined the plaintiff's, caused the plaintiff's spouting and tiles to be removed and put back so that they no longer projected and the water no longer fell down there as it had done previously on to the defendant's land and so into the drain. The jury found that the eaves of this outhouse had projected over the defendant's land for more than twenty years before 1867, and consequently that they had a right to so project, and a verdict was thereupon entered for the plaintiff for 40s., but leave was reserved to the defendant to move to enter a verdict for her on the issues relating to the eaves, if the Court should be of opinion that the easement as to these was gone by the alteration which the plaintiff had made.

A rule *nisi* to that effect having been obtained, cause was shewn against the rule in last Michaelmas Term by

Field for the plaintiff.—The right to project the eaves on to the defendant's land was proved to have existed for more than twenty years up to 1867, and that ease-

P

ment was not destroyed by the alteration which the plaintiff then made. There was no evidence that the alteration had increased the burthen of the servient tenement. The water was not shewn to drop further or with greater force than it had previously done. The difference of the height was trifling, and there was no evidence on which a verdict could be entered for the defendant. According to the civil law, referred to in *Gale on Easements*, 4th ed. p. 559, "where a man had a right of way and used it in a mode not warranted by the grant, although he committed a trespass on his neighbour, the right of way was not lost. But a roof could not be lowered so as to make the *servitus stillicidii* more burthensome." Passages from the Civil Law, viz., L. 20. sects. 4 & 5, are given in support of this in note i. The case of *Thomas v. Thomas* (1) is expressly in point. It was there held that where a party has a right to have the droppings of rain fall from his wall upon the premises of another such right is not destroyed by his raising the height of the wall. Indeed that case is a good deal stronger than the present, for there the eaves after the alteration was made projected some inches further than they had done before.

[GROVE, J., referred to *Hall v. Swift* (2)].

That case clearly shews that a trifling alteration in the mode of enjoying the right does not destroy the right. To the same effect is the decision in *Hale v. Oldroyd* (3).

[GROVE, J.—The alteration there did not alter the burthen of the servient tenement. Does a proof that there has been an alteration shift the *onus* of proof as to whether the burthen of the servient is or not thereby increased?]

No. The alteration proves nothing.

Cave in support of the rule.—With regard to *Thomas v. Thomas* (1) this point was, as is stated in *Gale on Easements*, 4th ed. p. 554, "very slightly urged and consequently but little considered by the

Court," and at page 555 he states that "it is admitted by the Court of King's Bench in *Garritt v. Sharp* (4), that the mode of enjoying an easement might be so changed as to defeat the right altogether, and it would seem on principle that this consequence would ensue, at all events to the above extent, wherever a material injury is caused to the owner of the servient tenement by the alteration, and the original and usurped enjoyments are so mixed together as to be incapable of being separately opposed." In this case the defendant is deprived of her power of building. At all events the making a projection of the eaves is a fresh trespass, as appears from the opinion expressed by Maule, J., in the case of *Fay v. Prentice* (5), and though the defendant might be content to allow a trespass at one spot, that is no reason why she should allow it at another spot.

[*Field* objected that this point was not open to the defendant on this rule, and that the leave to enter the verdict was only reserved for the purpose of considering the effect of the case of *Thomas v. Thomas* (1).]

By committing a new trespass a different burthen is cast on the servient tenement. Where what has been done by the owner of the dominant tenement has been only for the purpose of repairing or rebuilding the property, the easement is not lost, but where, as here, a roof is raised intentionally, the character and enjoyment of the dominant tenement is altered, and more is being thereby got out of the servient tenement. If the alteration does not do so, the *onus probandi* lies on the party making the alteration to shew that he is only keeping the easement he had at first. In *Gale on Easements*, at p. 557 (4th ed.), it is said that—"as all easements are restrictions upon the natural rights of property, in every case of conflict between the interests of the owners of the dominant and servient tenements, the liberty of the latter is more favourably regarded by the law than the attempts of the former to limit it."

Field, on the point as to there being a

(1) 2 Cr. M. & R. 34; s. c. 4 Law J. Rep. (n.s.) Exch. 179.

(2) 4 Bing. N.C. 381; s. c. 7 Law J. Rep. (n.s.) C.P. 209.

(3) 14 Mee. & W. 789; s. c. 15 Law J. Rep. (n.s.) Exch. 14.

(4) 3 Ad. & E. 325.

(5) 1 Com. B. Rep. 828; s. c. 14 Law J. Rep. (n.s.) C.P. 298.

trespass by projecting the eaves, cited *Pickering v. Rudd* (6).

Our. adv. vult (7).

GROVE, J. (on February 24), delivered the judgment of the Court (8).—This action was tried before my Brother Quain, at the Nottingham Spring Assizes for 1872, when a verdict was found for the plaintiff, subject to a point reserved upon the third count of the declaration, which was for an interference with a right of eaves dropping from a roof of the plaintiff upon the defendant's premises. A rule was subsequently obtained by Mr. Cave on the part of the defendant to enter the verdict for him upon the issues on this point, on the ground that the plaintiff by raising his roof had lost the right to project his eaves and gutter over the defendant's land, and that is the only point which is open to the defendant upon the present rule. The question was reserved at the trial in order to enable the defendant to take the opinion of the Court upon the point raised in *Thomas v. Thomas* (1). But for the alteration the right to the easement was established by the evidence and the verdict of the jury. In 1867, the plaintiff made some alteration in his building by which the eaves were raised higher by three or four courses of bricks, but the extent of projection of the eaves remained as before the alteration. Things being in this state the defendant shortly before the time of the action removed some spouting and put back the eaves to make room for some buildings which she erected, and thereby damaged the plaintiff by causing the water which flowed off to percolate into crevices and obliging him to construct a new gutter along the roof. It was contended by Mr. Cave, on behalf of the defendant, that by the change in the position of the eaves in 1867, the mode of enjoyment was changed and the easement destroyed. Mr. Field, on the other hand, contended, on the authority of

Thomas v. Thomas (1), that there being no substantial variance in the enjoyment the right to the easement was not affected. In that case, which was very similar to the present and not distinguishable in principle from it, it was held that the raising a wall about three feet from which water dropped on the servient tenement and also slightly increasing the projection by substituting thatch for pantiles, did not destroy the easement. It was, however, urged by Mr. Cave that on the principle of *cujus est solum ejus est usque ad cælum*, there was a trespass in this case which the person trespassed on had a right to abate. Mr. Field, *contra*, contended that the point did not arise upon the rule, and that in the case of *Pickering v. Rudd* (6), Lord Ellenborough held that for nailing a board so as to overhang the plaintiff's close the proper remedy was case and not trespass. And assuming the point as to trespass to be open to the defendant upon this rule (which was granted only on the point reserved at the trial), the original projection would seem to be the real trespass, and the projection above it a mere user of the space taken possession of by such trespass.

The real and indeed the only point reserved, however, was whether the easement was destroyed by the alteration. It is difficult to see how the mere raising of the eaves, which would, if anything, cause the water falling from them to become more dispersed, could affect injuriously the defendant's property. No real difference was pointed out to us in the effect of the slight raising of the height of the eaves; it did not appear that any greater burthen was thereby cast upon the servient tenement, and in the civil law it was considered that the raising of the eaves diminished instead of increased the burthen of the *servitus* in the passage cited by Mr. Field. It appears to us that to hold that any, even the slightest variation in the enjoyment of an easement, would destroy the easement, would virtually do away with all easements, as by the effect of natural causes some change must take place, thus water percolating or flowing would produce some wear and tear and alter the height or width of the conduit, so would weather alterations of

(6) 4 Campb. 219.

(7) The Court delayed giving judgment in order that there might be a settlement on terms proposed by the Court, but the parties were unable to agree to any terms.

(8) Bovill, C.J., Grove, J., and Denman, J.

heat and cold, &c. In the case of ancient lights changes in the transparency of glass, wear and tear of frames, growth of shrubs, &c., would produce effects which would vary the character of the enjoyment. In the user of a footpath, the footsteps would never be in the same line or confined accurately to the same width of tread.

We are of opinion that the question here, as in *Hall v. Swift* (2) and other cases, is whether there has been a substantial variance in the mode or extent of user or enjoyment of the easement so as to throw a greater burthen on the servient tenement. In the language of Sir Richard Kindersley, which was adopted by the Master of the Rolls in the late case of *Heath v. Bucknall* (9), there must be an additional or different servitude, and the change must be material either in the nature or in the quantum of the servitude imposed. It was not suggested nor was there any evidence that any such additional burthen had been cast upon the defendant's premises by the alteration in this case, and therefore we are of opinion that the defendant is not entitled to have the verdict entered in her favour upon the issues in question, and that the present rule must be discharged.

Rule discharged.

Attorneys—Field, Roscoe & Co., for plaintiff;
Purkis & Perry, agents for W. Williams, jun.,
Nottingham, for defendant.

1873. { LISHMAN AND OTHERS v.
Feb. 7, 8. { THE NORTHERN MAR-
TIME INSURANCE COM-
PANY (LIMITED).

Marine Insurance—Slip and Policy—Additional Terms—Concealment of Material Fact—30 & 31 Vict. c. 23. s. 8—Continuing Policy.

The defendants, on March 11, agreed to insure freight by the plaintiff's vessel on a certain voyage, and a slip containing the terms of the insurance was then drawn up by the defendants, who on that day accepted

(9) 38 Law J. Rep. (N.S.) Chanc. 372; s. c. Law Rep. 8 Eq. 1.

the risk. No question was then asked as to the insurance on the hull of the vessel, but on March 17, when the stamped policy was issued, the defendants required to know the insurance on the hull, and upon learning it issued the policy, with a warranty inserted therein that the hull was not insured beyond that amount:—Held, that the addition of such warranty did not prevent the policy from being drawn up in respect of the risk accepted on March 11, and therefore it was not necessary for the plaintiffs to have communicated to the defendants the loss of the vessel, which had occurred on March 16, as the plaintiffs knew, before the stamped policy was issued.

A policy of insurance was made on a vessel for a year, by an insurance association, by the rules of which the insurance was to be from year to year, unless notice to the contrary be given, and the managers, unless they received ten days' notice to the contrary, were to renew the policy on its expiration:—Held, that according to the terms of such rules, and 30 & 31 Vict. c. 23. s. 8 (which makes null a policy exceeding twelve months), the policy was not a continuing one, but expired at the end of the year.

This was an action on a marine policy of insurance dated March 15, 1871, by which, in consideration of the premium of 65s. per cent., the defendants insured 400l. on freight by the plaintiff's vessel, the *Mayflower*, on a voyage from Tyre to Argasteria. The policy contained the following warranty: "Hull warranted not insured for more than 2,700l. after March 20, 1871."

The pleas relied on at the trial (which took place before Brett, J., at the last Liverpool summer assizes) were a plea that at the time of making the said policy the plaintiffs concealed from the defendants a fact then known to the plaintiffs and unknown to the defendants, and material to the risk of the said policy, namely, that the ship and goods were then lost; and a plea, which, with leave of the Judge, was added at the trial, alleging a breach of the above warranty.

The following are the facts (1).—

(1) The statement of the facts is taken from the judgment of Keating, J.

It appeared that the plaintiffs, ship-owners, being desirous of insuring the freight in question, on March 11, 1871, sent to the defendants, who were underwriters at Newcastle-upon-Tyne, to inquire the terms of insurance, and ultimately an agreement was made at 65s. per cent., and a slip or proposal drawn up and accepted by the defendants at that rate. This slip contained all the necessary terms for a complete insurance at the above rate, and was drawn up without any question whatever being asked as to the amount of insurance upon the hull of the vessel.

On March 16 the ship was lost, and the plaintiffs knew of the loss on the 17th. They sent on that day to the defendants for a stamped policy in pursuance of the terms of the slip; and then for the first time the defendants required to know in what amount the hull of the ship had been insured. The plaintiffs had in fact effected insurances upon the ship amounting to 2,700*l.*, and a further policy for 500*l.* with the Teignmouth Mutual Shipping Insurance Association, of which they were members, by which the insurance was to be for a year from March 20 preceding, with renewal from year to year unless determined at the end of a year by notice from either party (2). Upon the requirement of the defendant's clerk, the plaintiff's clerk gave the amount insured on ship at 2,700*l.*, when the defendants inserted that amount as a warranty in what they stated to be a copy of the policy. The plaintiffs, however, sent it back in consequence of its not including the amount insured by the policy for 500*l.* on ship; and the words "after March 20" were added, and a stamped policy with that warranty given out.

(2) By rule 1 of the rules of this association it was stipulated "that the members," &c., "insure each other's ships or shares of ships from noon of March 20, 18 , or from the date of entry of each vessel respectively, until noon of March 20 then next, and from that time until noon of March 20 in the next succeeding year, and so from year to year unless notice to the contrary be given as hereinafter mentioned," &c. This notice is provided for by rule 25, which states "that the managers, unless they receive ten days' notice to the contrary, shall renew each policy on its expiration except in cases where it may be deemed expedient not to renew the same, when the managers shall cause notice to be given to the owner."

No communication was made by the plaintiffs to the defendants of the loss of the ship before or at the time of the delivery of the policy.

Upon this policy the plaintiffs sued, and at the conclusion of the plaintiff's case, the defendants objected that the warranty was not complied with, because the policy for the 500*l.* was a continuing policy beyond March 20 unless notice to terminate it at that time were proved, and there was no evidence of such notice. They also objected, that, inasmuch as the real and only legal contract between the parties was the stamped policy of March 17 declared on, and the loss having occurred on the 16th, and being known to the plaintiffs on the 17th, the omission to communicate it on that day constituted the concealment of a material fact, and avoided the policy.

The learned judge asked the jury whether the warranty was complied with, and they found it was; and, in answer to other questions, they found that the risk was accepted by the defendants on the 11th of March, and that it was not material to make known the loss to the defendants upon the 17th. The verdict therefore passed for the plaintiffs, with leave to the defendants to move to enter a verdict for them, if the judge ought to have directed the jury as matter of law that the warranty was not complied with, and that the omission to communicate the loss on the 17th was a concealment of a material fact which avoided the policy. A rule *nisi* was obtained upon that ground, with the alternative of a new trial on the ground of misdirection on the part of the learned Judge in not so directing the jury, and also that the verdict was against the weight of the evidence.

Holker and G. Bruce shewed cause.—The warranty as to the hull of the vessel not being insured for more than 2,700*l.* after 20th March, 1871, was complied with; for the policy for 500*l.* with the Teignmouth Mutual Shipping Insurance Association expired on that day, and it is admitted by the defendants, that if that be so, the hull would not then have been insured for more than 2,700*l.* There was sufficient evidence of notice to the man-

agers of the association not to renew this 500*l.* policy; but independently of such notice, the policy would by the rules of the association expire on the 20th March, unless renewed. By the 30 & 31 Vict. c. 23. s. 8, no policy is to be made for any time exceeding twelve months, or it will be null and void. Taking, therefore, this enactment with the rules of the association, the result is, that the policy would expire on the 20th of March, and that at most there would be a contract only to renew it; therefore, if the defendants rely on the existence of such policy after the 20th of March, it is for them to shew that it has been renewed. The main point, however, is as to the concealment of the loss of the vessel on the 17th of March, when the policy was delivered. The risk, as found by the jury, was accepted by the defendants on the 11th of March, and they were bound in honour after that to have issued the policy, and the fact of the loss of the vessel between the time of such acceptance of the risk and issuing of the policy was immaterial. The case is governed by that of *Cory v. Patton* (3), which decides that the assured need not disclose to the underwriter anything between the slip and the issuing of the stamped policy. The adding the warranty at the request of the defendants was no such material alteration as to make it a fresh contract when the policy was given. Notwithstanding that the 30 & 31 Vict. c. 23. s. 7, enacts that no contract for an insurance "shall be valid, unless the same is expressed in a policy," the slip may be looked at to see when the risk attached—*Ionides v. The Pacific Insurance Company* (4).

Herschell and Crompton, in support of the rule.—The warranty was not complied with, because there was an insurance with the Teignmouth Mutual Shipping Insurance Association for 500*l.* existing after the 20th of March, 1871. The insurance with that association, as appears by its rules, continues from year to year, until notice to the contrary be given.

(3) 41 Law J. Rep. (N.S.) Q.B. 195 n.; s. c. Law Rep. 7 Q.B. 304.

(4) 41 Law J. Rep. (N.S.) Q.B. 190; s. c. Law Rep. 7 Q.B. 517.

[BRETT, J.—Is not that contrary to 30 & 31 Vict. c. 33. s. 8 ?]

It is not necessary to treat the policy as a policy for more than a year. It is a contract to insure and resembles the slip, and to that extent the defendants may pray in aid the decision in *Cory v. Patton* (3). Then if it continues until notice, there was no evidence that any notice was given, for the evidence relied on by the plaintiffs was not admissible for that purpose. Next as to the concealment. When was the contract of insurance made on which the action is brought? Not on the 11th of March, but on the 17th of March. It may be that on the 11th of March a risk was accepted, but it was not the risk, for the slip was no undertaking by the defendants to insure on the terms ultimately agreed to when the policy was issued. The parties were in fact treating about an insurance from the 11th to the 17th of March, and it was not until the latter day that the contract of insurance was actually made. That distinguishes this case from that of *Cory v. Patton* (3). It is not disputed, that when the insurance has been agreed on, the disclosure of any fact which may happen afterwards cannot be material. *Morrison v. The Universal Marine Insurance Company* (5), only shews that when the stamped policy is in accordance with the slip that it is immaterial what happens between the policy and the slip. Cleasby, B., there puts the decision in *Cory v. Patton* (3), on the ground that the obligation was fixed at the time of the slip.

KEATING, J.—[After stating the facts of the case in the words above given, his Lordship proceeded as follows] — Mr. Herschell, for the defendants, argued, first, that the policy for the 500*l.* was a policy to continue beyond the 20th of March unless notice was given, and, secondly, that there was no proof of notice. But it seems to me that, according to the terms of the Teignmouth Mutual Shipping Insurance Association's rules and the words of the statute, 30 & 31 Vict. c. 23, the policy was not a continuing policy, and that in this case

(5) 42 Law J. Rep. (N.S.) Exch. 17; s. c. Law Rep. 8 Exch. 40.

no new effective policy could have been made on the 20th of March, the ship having been lost before that day.

This renders it unnecessary to consider whether the evidence to prove the notice was sufficient, if such notice had been necessary.

The great question, however, argued was whether there was a concealment of a material fact, so as to avoid the policy; and I am of opinion that there was not.

It was admitted by Mr. Herschell, in accordance with the decision of the Court of Queen's Bench in *Cory v. Patton* (3), referring to *Ionides v. The Pacific Insurance Company* (4) in the Exchequer Chamber, that, notwithstanding the provisions of 30 & 31 Vict. c. 23. ss. 7 and 9, the real bargain between the assured and the underwriters takes place when the slip containing the terms of the intended policy is accepted; and that, although such slip does not constitute a contract enforceable at law, yet it may be looked at for the purpose of discovering at what time the risk was really undertaken by the underwriters; and that a material fact coming to the knowledge of the assured between the date of the slip and that of the policy need not be communicated. Admitting this, however, Mr. Herschell contended with considerable force that, in this case, the slip on the 11th of March could not shew the terms of the bargain, as a negotiation between the parties was going on up to the 17th, when the policy containing the added warranty was issued, which contained the only complete contract of insurance between the parties, and therefore the case

was distinguishable from *Ionides v. The Pacific Insurance Company* (4) and *Cory v. Patton* (3).

In my opinion, however, the jury having found as a fact, that the risk was accepted by the underwriters on the 11th of March, it cannot be said that the addition of a term for the benefit of the underwriters, and not affecting the risk, prevented the policy from being one drawn up in respect of the risk accepted on the 11th; the case therefore is the same in principle with those referred to, and the occurrence of the loss subsequently to the 11th, though before the issue of the stamped policy, did not render it incumbent on the plaintiffs to communicate it, inasmuch as it could not affect the risk already accepted or the premium already agreed to and paid.

I think, therefore, there was no misdirection on the part of the learned Judge, that the evidence justified the verdict of the jury, and their answers to the questions put to them, and that the rule must be discharged.

GROVE, J., concurred.

BRETT, J.—I only wish to add, that when the plea alleging the breach of the warranty was allowed by me to be added at the trial, it was on the terms that the question whether it had been complied with should be left to the jury on the evidence as it then stood.

Rule discharged.

Attorney—Mercer & Mercer, agents for Oliver & Botterell, Sunderland, for plaintiff; Williamson, Hill & Co., agents for R. P. & H. Philipson, Newcastle-upon-Tyne, for defendants.

NOTE.—*Seymour v. The London and Provincial Marine Insurance Company* (reported 41 Law J. Rep. (N.S.) C.P. 193), came on for argument on appeal in the Court of Exchequer Chamber on the 8th and 10th of February, 1873, and the judgment was affirmed on the facts, without any question of law being involved, the Court thinking that the special facts of the particular case clearly shew, first, that the artillery harness was destined to a belligerent state for belligerent purposes, and so, as was admitted, in such case contraband; and secondly, a concealment of a material fact. The decision thus depending on conclusions of fact and involving no dispute as to the law, no further notice of it is required.

END OF HILARY TERM, 1873.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND IN THE

Exchequer Chamber and House of Lords,

ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

EASTER TERM, 36 VICTORIÆ.

1873. } SIMPSON AND WIFE v. THE LONDON
April 25. } GENERAL OMNIBUS COMPANY.

Injury to Passenger in Omnibus—Evidence for Jury.

In an action against an omnibus proprietor for injury to a passenger, it was proved, on behalf of the latter, that he was sitting inside the omnibus and was injured by one of the horses kicking the front panel constituting the back of his seat, and that on a subsequent examination marks of other kicks were seen:—Held, that there was evidence of negligence of the defendants to go to the jury.

This was an action against the owners of an omnibus for injuries sustained by a passenger. No question was raised as to the form of the pleadings which therefore need not be set out. The evidence on behalf of the plaintiffs was that the female plaintiff was inside the omnibus and was injured by one of the horses kicking the front panel constituting the back of the seat on which she was sitting; and that on examination on a future day the marks of two or three kicks were seen. The learned Judge left it to the jury to say whether there had been negligence on the part of the defendants in using a kicking horse, or not providing against such an accident. The jury found

for the plaintiffs, and a rule *nisi* having been obtained for a new trial on the ground that there was no evidence to go to the jury—

Bompas shewed cause, and contended that this was a case where the fact of the accident was evidence of negligence, calling for explanation on the part of the defendants, in the absence of which the jury might assume that the defendants negligently used a vicious horse, or abstained from taking proper means to prevent the consequences of a possible accident; citing *Redhead v. The Midland Railway Company* (1), *Stokes v. The Eastern Counties Railway Company* (2), *Byrne v. Boadle* (3), *Christie v. Griggs* (4), *Bridges v. The North London Railway Company* (5), *Scott v. The London Dock Company* (6), *Sharp v. Grey* (7), *Stokes v. Saltentall* (8), *Skinner v. The London, Brighton and South Coast Railway Company* (9)

(1) 9 B. & S. 519; s. c. 38 Law J. Rep. (n.s.) Q.B. 169.

(2) 2 Fos. & Fin. 691.

(3) 2 Hurl. & C. 722; s. c. 33 Law J. Rep. (n.s.) Exch. 13.

(4) 2 Campb. 79.

(5) 40 Law J. Rep. (n.s.) Q.B. 188.

(6) 3 Hurl. & C. 596; s. c. 34 Law J. Rep. (n.s.) Exch. 220.

(7) 9 Bing. 457; s. c. 2 Law J. Rep. (n.s.) C.P. 45.

(8) 13 Peters 181.

(9) 5 Exch. Rep. 787.

and *Cockle v. The London and South Eastern Railway Company* (10).

[*GROVE, J.*, referred to *Daniel v. The Metropolitan Railway Company* (11) and *Burns v. The Cork and Bandon Railway Company* (12).]

Day, in support of the rule, contended that the accident was not *prima facie* evidence of negligence, as an accident caused by a horse which has a will of its own, and has a tendency to kick, was not analogous to one caused by the falling of a barrel, or such like matter, and that it was not to be assumed that the horse was vicious, or that, not being so, the defendants ought to take precautions not adopted by other prudent persons.

BOVILL, C.J.—It is quite true that the defendants did not absolutely warrant the plaintiff's safety or the sufficiency of the carriage and horses, and that they were only bound to use due and reasonable care for the safety of passengers, and it is true that the mere fact of an accident is not generally *prima facie* evidence of negligence; but if the cause of the accident be shewn this may or may not be *prima facie* evidence according to its nature. In the case of a public carriage, the owner is bound to use due and reasonable care that there are proper horses which are not dangerous to the passengers, and as respects his liability it is not necessary to shew that he was aware that they were improper or dangerous. In the present case, without apparent cause, a horse kicked and injured the plaintiff, a passenger, and this being so it seems to me that the case is one which required explanation on the part of the defendants. It has been said that it is the nature of a horse to kick, but it ought not to kick, and if it does this is *prima facie* evidence of its being a kicker. The burthen of shewing that it is not is on the defendants, and the reasonable rule is that the defendants should be called on to prove the circumstances, explain the accident, and shew the horse was a proper one, so

as to absolve themselves from the consequences of the *prima facie* evidence. So that if here there were the mere fact of the kicking, I think there would be *prima facie* evidence for the jury. But here there is the further evidence as to other marks, which it is impossible to reject and keep from the jury, and therefore the defendants were called on to explain this. And further, when it is said that all horses kick and may be irritated without any fault, the answer is, if so, it becomes a question for the jury whether the defendants ought not to provide means against this; and as to what has been said as to persons driving themselves and families without such precautions, the answer is, that they generally take care that the horse is quiet; and if a person put a horse into his carriage without care, and it kicked, he would think it was a kicker, and not use it. I am, therefore, of opinion that this rule should be discharged.

GROVE, J.—I am of the same opinion, though I have not been free from doubt. If proving a horse to have kicked twice proves him a kicker, does not proving he has kicked once afford evidence of it; is it not a mere question of degree, and is it not rather to be assumed he is? I think the balance is in favour of that; and further, there was here proof of additional kick-marks to necessitate explanation.

DENMAN, J.—The only question is, whether there was evidence for the jury, and I think there was.

Rule discharged.

Attorneys—S. M. Benson, for plaintiff; Stevens, Wilkinson & Harries, for defendants.

(10) 39 Law J. Rep. (N.S.) C.P. 226; s. c. Law Rep. 5 C.P. 457.

(11) 40 Law J. Rep. (N.S.) C.P. 121.

(12) 13 Ir. C.L. Rep. 546.

NEW SERIES, 42.—C.P.

1873. }
 April 28. } MORDUE v. THE DEAN AND
 CHAPTER OF DURHAM.

*Mines, Reservation of—Compensation for
 Damage from Workings.*

The lessees of lands, subject to clauses reserving to the lessor the minerals with power to work them, making compensation, bought the reversion subject to similar clauses, which reserved the minerals with working powers of an extensive character, and provided for compensation for damage or spoil to the ground thereby:—Held, that the true construction of the particular deed was that the compensation was to be made, not merely as to future workings, &c., but also for subsequent damage accruing from the future use of existing workings, &c., and that such compensation was to be assessed with reference to the marketable value of the land, taken or damaged, for all purposes to which it was reasonably applicable, without regard to the powers of working, &c., to which it was subject, and that there was no restriction on increasing the weight in the mines.

This was a SPECIAL CASE stated by an arbitrator for the opinion of the Court.

1. By indenture of lease, dated the 21st day of July, in the year of our Lord 1856, the Dean and Chapter of Durham demised to the Rev. William Marriott, Smith Marriott, Thomas Greenwood, John William Anderson Chandless, and William Chater, certain lands and premises at Wallsend, to hold the same, except as thereafter mentioned, for the term of twenty-one years.

2. In this lease are the following reservations—"Save and except and always reserved unto the said lessors the woods, underwoods and trees then being upon the said hereditaments and premises, and the mines, pits and quarries then being and to be, and all seams and beds of coal, stone, clay and other minerals whatsoever within the said demised premises; and also, save and except and always reserved as aforesaid, all such rights of way and other rights and easements, and so much of the said demised lands or grounds and premises, as should be necessary or proper for having access to, and getting and carrying away, and if desired, of converting, manufacturing, or otherwise disposing

of the said woods, minerals and premises thereinbefore excepted, and any other woods, minerals and substances whatsoever, and particularly sufficient land or ground for agents' and workmen's houses, pit and heap room, furnaces, engine-houses and other like conveniences. And also save and except and always reserved as aforesaid, full and exclusive power for the said lessors, their grantees and assigns, to make and exclusively have and use any road or way, roads or ways, through, within, under, over or across the said demised premises for the purpose of general traffic, or any other purpose whatsoever, and in order to form any road or way, to make any cutting, embankment, bridge, tunnel or other works, and to lay down iron rails or other materials, and for the purpose of using any road or way, to erect and have any engine-houses, station-houses, or other erections, or any depôts or yards or other conveniences, and to travel on any such road or way with any engine, and in any manner whatsoever, whether of present use or future invention; and also generally save and except and always reserved as aforesaid, full power for the said lessors, their grantees and assigns, to do any act for the purposes of the foregoing exceptions, or any of them, upon, over or with respect to the said demised premises, that they could have done had no lease been granted of the said premises. Provided that the said lessors, their grantees or assigns, did pay annually reasonable compensation for spoil of ground to be occasioned by the exercise of the powers thereby reserved, or any of them, such annual compensation, if the parties could not agree, to be determined by the adjudication of two indifferent persons, one to be chosen by each party, or by the umpire of such two indifferent persons."

3. By another indenture, dated the 16th day of July, in the year of our Lord 1859, these hereditaments and premises were assigned to the plaintiff Joseph Mordue for the residue of the said term.

4. And by another indenture, dated the 10th day of September, in the year of our Lord 1859, the reversion of the said hereditaments and premises was granted to the said Joseph Mordue, his heirs and assigns.

5. In this last-mentioned indenture are contained the following exceptions and reservations from the grant thereby made, that is to say—"Save and except and always reserved out of these presents and the grant and confirmation hereby made, or intended so to be, to the said Dean and Chapter, their successors and assigns, all mines, pits, quarries, seams and beds of coal, stone, clay, lead and other minerals and substances whatsoever, whether opened or unopened, in, within or under the said hereditaments and premises. And also full and free liberty of access, ingress, egress and regress to and for the said Dean and Chapter of Durham, their successors, assigns and lessees, and all and every other person or persons by their appointment or permission, from time to time, and at all times hereafter, with or without horses, carts, machines and carriages, to enter into, upon, through or over all or any of the said lands and hereditaments, the reversion whereof is thereby granted and confirmed, or intended so to be, and using and occupying so much of the said lands or grounds and premises as shall be necessary or proper for having access, and winning and getting, and carrying away, and if desired, of converting, manufacturing or otherwise disposing of the said mines, minerals and substances hereinbefore reserved, and also all or any other minerals or substances whatsoever, of or belonging to the said Dean and Chapter, their successors, grantees, lessees or assigns, or of or belonging to any other corporation, or any other person or persons, whether arising or produced from or under the lands, the reversion whereof is hereby granted and confirmed, or intended so to be, or any other lands or grounds whatsoever; and particularly full and free liberty, power and authority to have, take and occupy sufficient land or ground for agents' or workmen's houses, pit and heap room, furnaces, engines and engine-houses, and other like conveniences. And also except and reserved to the said Dean and Chapter, their successors and assigns, full and exclusive power for them, and such other person or persons as they shall at any time hereafter authorize or appoint, to make and use aircourses, drains and watercourses through, within, under, over or across the

said lands and grounds for the purposes thereinbefore mentioned, or any of them. And also to form any road or way, roads or ways, to make or use any cutting, embankment, bridge, tunnel or other work, and from time to time to repair, reconstruct, alter and vary any such, or to make any other new, additional or substituted aircourses, drains, watercourses, roads, ways, cuttings, embankments, bridges, tunnels or other works, and to lay down iron rails and other materials for the purpose of using any road or way, to erect and have any engine-houses, station-houses or other erections, or any depôts, or yards or other conveniences, and to travel and carry goods, coals and other minerals and substances, on any such roads or ways, with any engine and in any manner whatsoever, whether of present use or future invention, or to make use of such roads or ways in any other manner whatsoever. And also generally, save and except and always reserved as aforesaid, full power for the said Dean and Chapter and their successors, and such other person or persons only as they may hereafter appoint, to make and exclusively have and use any road or way, roads or ways through, within, under, over or across the said hereditaments and premises thereby granted and confirmed, or intended so to be, for the purpose of general traffic or any other purpose whatsoever. And also, save and except full power for the said Dean and Chapter, and their successors and assigns, and such other person or persons as aforesaid, to do any and every act for the purpose of the foregoing exceptions, or any of them, in, upon, over, under, or with respect to the said lands and grounds that they could have done had they been and continued the sole and absolute owners of the fee simple in possession thereof, and such way, leave and rights so reserved to the said Dean and Chapter and their successors, and such other person or persons as aforesaid, shall not be liable to be defeated or destroyed by effluxion of time or non-user of the same. And all and singular the rights, liberties, matters and things hereinbefore agreed to be excepted and reserved, or re-granted to the said Dean and Chapter and their successors, or such other person or persons as aforesaid, shall be taken and

considered as commencing, and to be had, used and exercised as and from the day before the date of these presents, and shall be taken and adjudged to be the absolute and entire exclusion of the said Joseph Mordue, his heirs and assigns, and all persons claiming by, from, through or under him or them, from the right of using or exercising, or of granting or permitting any other person or persons whomsoever to use or exercise any of the same, or the like rights, liberties, easements, privileges, matters or things as are hereinbefore excepted or reserved, in, upon, over, across, through, under or in respect of the said lands and hereditaments, the reversion of which is thereby conveyed; and it shall not be lawful for the said Joseph Mordue, his heirs or assigns, or any person or persons claiming or to claim by, from, through or under him or them, to make, do or commit, or suffer to be done or committed any act, matter or thing whatsoever, whereby or in consequence whereof, the said Dean and Chapter, their successors, assigns or lessees, shall or may be in any way prevented from, or interrupted, hindered, obstructed or injured in the free and undisturbed use, exercise and enjoyment of the same, or any of them. Provided always that the said Dean and Chapter, their successors and assigns, and such other person or persons as aforesaid, shall pay to the said Joseph Mordue, his heirs and assigns, annually reasonable compensation for damage or spoil of ground to be occasioned by the exercise of all or any of the powers, liberties and privileges expressed and reserved, such annual compensation, as often as any cause for the same shall have arisen, if the parties cannot agree, to be determined by the adjudication of two indifferent persons, to be chosen from time to time, one by each party, or by an umpire to be chosen by such two indifferent persons. Provided always that nothing herein contained shall be construed so as to give to the said Dean and Chapter of Durham or their successors, as against any succeeding Dean and Chapter, or as against the Crown or any other person or persons than the said Joseph Mordue, his heirs and assigns, any other rights or powers of opening or working mines than they would by law or custom have, or would

have been entitled to in case these presents had not been executed."

6. Mr. Joseph Anderson, as lessee under the said Dean and Chapter, and under the provisions and authorities granted or demised to him under and by virtue of an indenture of lease dated the 25th day of May, in the year of our Lord 1864, or otherwise by the license, authority and permission of the said Dean and Chapter, has exercised over divers parts of the said lands comprised in the said firstly recited lease and the said deed of the 10th of September, 1859, the rights, easements and authorities, or some of them, reserved by the said last-mentioned deed.

7. The extent at the time of this question arising of the land over which these powers have been exercised is shewn on the map hereto annexed and coloured red.

8. The parties are to be at liberty to refer to the said deed of the 10th of September, 1859, and to any of the leases mentioned in it, as if they formed part of this case. And it is to be taken as proved that at the time of the said deed of September, 1859, there were buildings for the purpose of carrying on manufactures on portions of the land comprised in that deed, but none on that portion in respect of which the present claim arises.

9. There was also on the part coloured C.C. on the said plan an old pitshaft and some old buildings, which had been abandoned in 1856, the buildings being taken down. This plot was occupied by former lessees of the Dean and Chapter, owners of what was Wallsend Colliery, under the reservations in the then lease.

10. It was agreed that the said deed of the 10th of September, 1859, conveyed this last-mentioned plot of land to Mr. Mordue.

11. Clay is found on portions of the land comprised in the said last-mentioned deed within a foot of the surface.

12. The leases of the Dean and Chapter are granted for twenty-one years, which leases are by long usage renewable every seven years, the lessee surrendering the existing lease and receiving a new lease for twenty-one years, on payment of a fine calculated on from $1\frac{1}{2}$ to $1\frac{1}{2}$ years' improved value of the property; and for the purpose of calculating such renewal fine any improved value given to the leased pro-

erty, by new buildings erected on the property during the currency of the lease, are not taken into consideration in the first renewal, so as to give the lessee making such erections the benefit of his improvements for that period, without additional payment by way of fine.

13. Under the above circumstances it was contended before me on behalf of Mr. Mordue that, so far as regards the land used and occupied under the reservations in the deeds, the compensation to which Mr. Mordue was entitled was the marketable annual value of the lands for any purpose for which the lands were applicable, and that as regards other parts of Mr. Mordue's land not used or occupied, but which were damaged by severance or otherwise by the use and occupation of the parts used and occupied, Mr. Mordue was entitled to the amount by which their marketable annual value was diminished.

13a. It was contended before me on behalf of the Dean and Chapter, that Mr. Mordue was not entitled to have the compensation assessed on the above principles, and further, that he was not entitled to compensation as to some parts of the land in respect of which he claims compensation.

14. I have therefore, at the request of the parties, stated the foregoing Case, and submit to the Court the following questions thereon—

I. Whether the compensation for damage or spoil of ground is to be inclusive or exclusive of ground occupied by pits which were open and existing at the time of the execution of the deed of conveyance of the 10th September, 1859.

II. If, exclusive of ground occupied by such pits, whether such ground is to be inclusive or exclusive of ground used or occupied at the time of the execution of the said deed, with and for the necessary purposes of such pits.

III. Whether the compensation for damage or spoil of ground is to be inclusive or exclusive of ground which at the time of the execution of the deed was used or occupied for having access to, or getting or carrying away or converting, manufacturing or otherwise disposing of the excepted minerals and premises, or any other minerals or substances, or for agents' or work-

men's houses, or for pit or heap-room, or for furnaces or engine houses, or other like conveniences.

IV. Whether the compensation for damage or spoil of ground is to be inclusive or exclusive of ground which at any time after the execution of the said deed might be used or occupied for the purposes mentioned in the preceding questions, or any of them.

V. Whether the compensation for damage or spoil of ground (to whatever it is applicable) is to be estimated with reference to the value of the ground if usable only for the purposes for which it was used at the time of the execution of the said deed, or with reference to its value if usable for building or any other purposes to which it is applicable, or with reference to its value as subject to any restrictions necessarily imposed upon its use by the provisions of the said deed, or on what other principle.

VI. Whether Mr. Mordue is restricted by the provisions of the said deed from using the land for any purpose which would substantially add to the surface weight to be supported from below.

VII. Whether Mr. Mordue is restricted by the provisions of the said deed from using the land for any purpose for which it could not be used without interfering with the minerals or other substances excepted and reserved by the said deed, or with the powers thereby excepted and reserved for working or getting the said minerals or substances.

VIII. Whether the restrictions referred to in the two last preceding questions, or either of them, or any other restriction necessarily imposed upon the use of the land by the provisions of the said deed, ought to be taken into consideration in estimating the compensation for damage or spoil of ground, and how and upon what principle.

Herschel (G. W. Hill with him) argued for the plaintiff, and cited *Wakefield v. Duke of Buccleuch* (1).

Kemplay (Haselfoot with him) argued for the defendants, and cited *Bell v. Wilson* (2), *Heat v. Gell* (3), *Roubotham v. Wil-*

(1) 39 Law J. Rep. (N.S.) Chanc. 441.

(2) 34 Law J. Rep. (N.S.) Chanc. 572; s. c. on appeal, 35 Law J. Rep. (N.S.) Chanc. 337.

(3) 41 Law J. Rep. (N.S.) Chanc. 293, 761.

son (4), *The North Eastern Railway Company v. Elliott* (5), *Fletcher v. The Great Western Railway Company* (6), *The Caledonian Railway Company v. Sprot* (7), *Shafto v. Johnson* (8), *Smith v. Darby* (9), *Eaton v. Jeffcock* (10), and *Smith v. Thackeray* (11).

BOVILL, C.J.—No doubt it is difficult to construe these several provisions, but the general object of the deed is, that the surface should pass to the plaintiff and the minerals remain vested in the defendants. The deed conveys the soil and buildings to the plaintiff in the condition they *then were*, and under it the plaintiff acquires all the rights of a freeholder, subject to the rights expressly reserved or re-granted; these are the right to the minerals, with full powers to work and carry them away, and to erect buildings and make roads, &c., necessary for the above purposes. These powers are given not only as to future mines, but they are also given as to those then opened, and the plaintiff is expressly excluded from using the powers vested in the defendants, and also a clause in general terms prevents him from interfering with the use of the rights of the defendants, by which, giving the widest interpretation, there is hardly any act which would not be an interference; but a reasonable interpretation must be given to it, and it means interfering in point of fact, when the defendants desire to use them, and is not to prevent the use of the land as freeholder. An annual compensation is however to be made for "damage or spoil of ground to be occasioned by the exercise of the powers, &c., expressed and reserved," and under this deed it seems to me that the plaintiff, the purchaser of the reversion, may use the land as he thinks fit and build on it, and that

the powers of the defendants do not restrict him; but if they be exercised he is to have compensation. It is agreed that no compensation is due for the mere existence of the old pit, which is not used, but if it were used and buildings erected, the clause would then apply. An argument has been raised as to the liability for buildings already erected at the shaft, but there are none. The plaintiff takes a conveyance of the property as it then was, and therefore has no claim as to the old pit, but is entitled to compensation for its use, and as respects the measure of compensation, he is entitled to the marketable annual value of the land, for the purposes for which it is reasonably applicable, and he is entitled to compensation not only for the land actually taken, but also for damage to the parts not taken, even if only damaged by severance. Now applying this to the precise questions, the answers are these—As to the first and second, the plaintiff is not entitled to compensation as to the old pit shaft for damage existing at the date of the deed; but for the future use of the shaft, &c., he is entitled; he is also similarly entitled to compensation as respects land which may have been undermined at the date of the deed, and I am also of opinion, that he is entitled to compensation for land used hereafter for the necessary purposes of the pit, though not so used at the date of the deed. As to the third, I am of opinion that he is entitled to compensation as to land used or occupied for access, &c., at the date of the deed, provided it be used and damage accrue since the deed, but if executed at the date of the deed and no future damage accrues, he is entitled to none. As respects the fourth, it is conceded it must be answered affirmatively. As to the fifth, I think compensation should be made with reference to the value of the land for any purpose to which it may be reasonably applied without reference to the restrictions imposed by the deed, for the powers of the deed do not restrict the enjoyment, and compensation is to be made without reference thereto. As to the sixth, there is no restriction on the land, though the surface weight be substantially added to, a position which is supported by *Wakefield v. Buccleuch* (1). As to the seventh, I am

(4) 8 H. of L. Cas. 348; s. c. 30 Law J. Rep. (n.s.) Q.B. 49.

(5) 1 Jo. & H. 145; s. c. 29 Law J. Rep. (n.s.) Chanc. 808.

(6) 28 Law J. Rep. (n.s.) Exch. 147; s. c. (Ex. Ch.) 29 Law J. Rep. (n.s.) Exch. 253.

(7) 2 Macq. S. App. 449.

(8) 8 B. & S. 252 note.

(9) Law Rep. Q.B. 716.

(10) 42 Law J. Rep. (n.s.) Exch. 36; s. c. Law Rep. 7 Exch. 379.

(11) 35 Law J. Rep. (n.s.) C.P. 276.

of opinion that the plaintiff equally is not restricted as stated, except that he cannot touch the minerals themselves, and therefore no compensation is due for them; but he is entitled to everything short of this. And as to the eighth, the provisions for the defendants' benefit are not to be considered to diminish the plaintiff's rights, except as to the non-touching of the minerals.

GROVE, J.—I am of the same opinion, and should answer the questions in the same way as my Lord. But as to one point discussed by him I give no opinion; that is, as to whether when there are any existing mining operations effected at the time of the deed, there is to be compensation for damage accruing from them after, a point which is not raised. If the defendants continued working them there would be compensation, but if they were abandoned, I doubt whether there would be compensation for subsequent damage. As to the other questions, it is difficult to answer them as matter of law, they are more questions of fact for the arbitrator, who should not assess the damages as if for a mansion and park, but should not consider the actual prospect of what might be done and should not deteriorate the value thereby, for putting out of the question amenities, the result would be exactly the same. For anything existing at the time of the deed and not continued there is no compensation, but if re-opened there is compensation.

DENMAN, J.—It is sufficient to say that I agree with my Lord as to the answers to be given to these questions.

Judgment accordingly.

Attorneys—J. G. Watson, agent for R. Peele, Durham, for plaintiff; Williamson, Hill & Co., agents for Kidd & Kewney, North Shields, for defendants.

1873. }
May 8. }

BAYLIS v. LINTOTT.

Costs—Action founded on Contract or Tort—30 & 31 Vict. c. 142. s. 5.

A declaration alleged that the defendant at the time of the promise and negligence therein alleged, was the owner of a hackney cab at the time of the promise conducted by his servant; that the plaintiff at his request hired it of him, and the defendant promised to convey the plaintiff's luggage safely, but not regarding his duty or promise negligently lost the same:—Held, that the action was founded on contract, and that as a sum not exceeding 20l. was recovered, the plaintiff was deprived of costs under 30 & 31 Vict. c. 142. s. 5.

The declaration in this action alleged that at the time of the making of the promise and committing of the negligence thereafter mentioned, the defendant was the proprietor of a hackney carriage, which at the time of the making of the promise thereafter mentioned was under the control of the defendant's servant, and plying for hire within the metropolitan police district, and thereupon and after the Act of the 7th year of her Majesty for regulating hackney and stage carriages, the plaintiff, at the defendant's request, hired the defendant's hackney carriage to carry the plaintiff and her luggage within the said district, and in consideration thereof and certain reward to be paid to the defendant as and being such proprietor promised to convey the plaintiff and her luggage safely, but not regarding his duty as such proprietor or his said promise did not convey the same safely, but being such proprietor so carelessly and negligently conducted himself by his servant, that, through the mere careless, negligent and improper conduct of the defendant by his servant, the said luggage was lost.

The sum of 15l. was paid into Court, and an additional 5l. was recovered by verdict. The Master refused to tax the plaintiff's costs, on the ground that the action was founded on contract.

Kydd now moved for a rule calling on the Master to tax the plaintiff's costs,

contending that the action was founded on tort, and citing *Tattan v. The Great Western Railway Company* (1), *Bourne v. Galliffe* (2), *Legge v. Tucker* (3), *Brooke v. Pickwick* (4) and *Bullen and Leake on Pleading*, 121 note.

BOVILL, C.J.—The statute 30 & 31 Vict. c. 142. s. 5 deprives the plaintiff of costs, where a sum not exceeding 20*l.* is recovered in an action founded on contract. In the present case 15*l.* was paid into Court, and 5*l.* recovered in addition, so that what was recovered did not exceed 20*l.*, and the question is whether the action is founded on contract or tort; and looking to the allegations in the declaration it seems to me that it is founded on contract. In *Tattan v. The Great Western Railway Company* (1), an action against a carrier, the Court of Queen's Bench no doubt held that the action was founded in tort, but Cockburn, C.J., regretted the anomalous state of the law on this subject, and it is sufficient to say that no promise was there alleged, but the action was founded on a breach of duty, whereas this action is founded on a promise, and is therefore distinguishable from *Tattan v. The Great Western Railway Company* (1), and precisely within the County Court Act. Again, it is to be observed that in *Legge v. Tucker* (3), an action against a stable-keeper decided before *Tattan v. The Great Western Railway Company* (1), the Court of Exchequer held that the action was founded on contract; and that since then, in *Morgan v. Ravey* (5), an action against an innkeeper, where it became necessary to consider whether the defendant was chargeable on contract or for neglect of duty, the Court of Exchequer held that the action was founded on contract, and therefore the executor liable. And in Messrs. Bullen and Leake's work on pleading the question is said

to be one of substance. The law as to this matter is laid down in *Morgan v. Ravey* (5) by Pollock, C.B., who says, "The cases have established that where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of a reward to be given by the other, the law will imply or the Court may infer a promise by such party to do that which is to be done by him. If so, the objection that such an action would not lie against executors because it is brought on such a promise does not arise." And looking to the cases, if it were open to, or necessary for, us to decide as to conflicting authorities, I should be inclined to agree with the Court of Exchequer; but it is not here necessary to say more than that this case is distinguishable from *Tattan v. The Great Western Railway Company* (1), and founded both in substance and form on contract.

KEATING, J.—I am of the same opinion. As to *Tattan v. The Great Western Railway Company* (1), I will say nothing; that case is distinguishable from the present, which proceeds on an express promise made by the carrier, and is founded on contract and within the words of the statute.

HONYMAN, J.—I am of the same opinion. There are many actions where the declaration may be framed either in assumpsit or case, and the rule is thus laid down by Tindal, C.J., in *Boorman v. Brown* (6)—"That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either assumpsit or case upon tort is not disputed. Such are actions against attorneys, surgeons and other professional men for want of competent skill or proper care in the service they undertake to render; actions against common carriers, against ship-owners on bills of lading, against bailees of different descriptions, and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff." The cases are not easily

- (1) 29 Law J. Rep. (N.S.) Q.B. 184.
- (2) 11 Cl. & F. 45.
- (3) 1 Hurl. & N. 500; s. c. 26 Law J. Rep. (N.S.) Exch. 71.
- (4) 4 Bing. 218.
- (5) 6 Hurl. & N. 265; s. c. 30 Law J. Rep. (N.S.) Exch. 131.

- (6) 3 Q.B. Rep. 525; s. c. 11 Law J. Rep. (N.S.) Exch. 439.

reconcilable as to the suing in case or assumpsit so as to affect the position of the defendant, but here the plaintiff being able to sue in either, chose to bring his action in a form which is clearly assumpsit, no duty being alleged, and it would be unreasonable to allow the plaintiff, though he has the advantages conferred by so proceeding, to say he will claim costs on the ground of his action being founded on tort. As respects *Tattan v. The Great Western Railway Company* (1) and *Legge v. Tucker* (3), I will merely say that in the former the declaration was on the case.

Rule refused.

Attorneys—J. Craven, for plaintiff; W. H. Orchard, for defendant.

1873. }
April 25. } GOURLEY v. PLIMSOLL.

Libel—General Plea of Justification.

In actions of libel, the general practice of the Court now is, to allow pleas of justification in a general form with a liberal allowance of particulars.

This was an application to vary an order of Cleasby, B., allowing two pleas. The declaration was founded on an alleged libellous pamphlet imputing to the plaintiff that he sent out vessels in a state dangerous to the lives of their crews, and the two pleas were general pleas of justification that the allegations were true in substance and in fact.

Philbrick, for the plaintiff.—The defendant is entitled, where such an imputation as the present is made in general terms, to have a specific justification on the record. In *Behrens v. Allen* (1), where the general plea was allowed, Willes, J., agreed on the ground that the charges were specific, and during the argument stated that at Chambers he allowed this course only when the justification was not an indictable matter. In *Jones v.*

Bewicke (2), where the imputation was one of perjury, no such point was taken; but on the application for particulars, Keating, J., doubted whether the plea should be allowed at all. And both the note to *P'Anson v. Stuart*, in *Smith's Leading Cases*, and the note on this subject in the work of Messrs. Bullen and Leake on Pleading, are directly against the allowance of these pleas. Statements placed on the record will be more carefully restricted to what the defendant can prove, than statements put into particulars.

BOVILL, C.J.—I am of opinion that the most convenient course in an action of libel, as a general rule, though there may be exceptions to it, is to allow a plea of justification in the general form. The old system of pleading a special justification led to great inconveniences and difficulties, a verdict sometimes being obtained on one interpretation, whilst the Court put another on the plea, and allegations being sometimes inserted which were unfounded, and though the object of the special plea was to give notice it was an inconvenient mode of doing so, and every object is obtained by a liberal allowance of particulars, so that there may be no surprise, and the verdict of the jury and judgment of the Court be pronounced on the real facts. I am clearly of opinion that the most convenient and satisfactory course is, to allow a general plea and make an order for particulars of such a nature as shall prevent the parties from being misled.

GROVE, J.—I am of the same opinion. The substantial question can be tried on this issue, and if the plea be not specific enough, particulars can be obtained.

DENMAN, J.—I also think this rule should be refused. The question is, whether the general plea is to be allowed where a serious imputation has been made. The fairest course is to allow the general plea, and grant particulars, as to which the Courts are always liberal. As to the expressions used in *Jones v. Bewicke* (2), they were used with reference to the particular case, and the expressed doubt only so applies, for the practice of the Court

(1) 8 Jurist, N.S. 118.

NEW SERIES, 42.—C.P.

(2) Law Rep. 5 C.P. 32.

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is to allow the plea and be liberal as to particulars, though I agree with my Lord, there may be cases where a special plea may be proper.

Rule refused.

Attorneys—Nelson, for plaintiff; Lewis, Munns & Longden, for defendant.

[IN THE HOUSE OF LORDS.]

1873. }
Feb. 27. } GILES AND WIFE v. MELSOM.

Will—Construction—“So specifically Devised.”

A specific devise or bequest is a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie either directly or indirectly.

A testator devised three properties to his three sons respectively for life, with remainder in fee to their respective children, and in case of the death of either of them without issue between the others “in the same manner as the estates devised were limited to them respectively,” subject to the proviso that if either died leaving a widow, but no children, the widow should have an estate for life in the premises “so specifically devised” to her husband:—Held, that the devise to such widow attached, not only to the property originally devised to her husband, but also to property coming to him under the contingent limitations.

This was an appeal from a judgment of the Court of Exchequer Chamber by which that Court had reversed a judgment of the Court of Common Pleas delivered upon a Special Case stated in an action of ejectment.

The question turned upon the construction of the will of George Melsom, the elder, whereby the testator devised three separate freehold estates to his three sons, John, George and Robert respectively—that is to say, he devised one estate to each of his sons. The terms of the

devise to each were similar; thus John's estate was given to him for his life, with remainder to his children in fee, and in the event of his death without leaving issue, to and between George and Robert equally “in the same manner as the estates hereinafter devised are limited to them respectively, subject nevertheless to the proviso hereinafter mentioned, in case my said son, John, should leave a widow.” The devises to George and to Robert were in similar terms *mutatis nominibus*.

The proviso referred to in the devises was as follows—“Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying unto his widow and her assigns for and during the term of her natural life.”

The testator died in the month of June, 1843. Robert, his youngest son, died first, viz., in 1848, a bachelor; then John died, viz., in 1861, leaving a widow but no children; lastly, George died in 1867, also without children, but leaving a widow.

In the events which occurred, there was an intestacy of the ultimate remainder in fee in all the three estates, which accordingly descended to the eldest son, John, and passed under his will to his widow, the defendant in error, who was plaintiff in the Courts below.

The plaintiffs in error, defendants below, were the widow of George Melsom, the younger, the second son of the testator and her husband, she having subsequently intermarried with the co-plaintiff in error, Charles Lovell Fry Giles.

The land to recover which the action was brought was the moiety of the estate which had been devised to Robert, and which upon Robert's death passed under the will of George Melsom, his father, in equal moieties to his brothers, John and George; the plaintiff in error, as widow of George Melsom, the son, claiming to be entitled for her life to the moiety to which her husband had succeeded on Robert's death as well as to the whole estate originally devised to her husband. But the defendant in error contended that the widow of George was only entitled for her life to the estate originally devised to George as being the only estate

which was properly described by the words in the proviso, "specifically devised."

In the Court of Common Pleas Bovill, C.J., and Brett, J., held that George's widow was entitled for her life to the moiety of Robert's estate, as well as to the estates originally devised to George; but Byles, J., dissented, and was of opinion that the moiety of Robert's estate did not fall within the description of an estate "specifically devised" to George.

In the Court of Exchequer Chamber by Bramwell, B., Channell, B., Pigot, B., and Cleasby, B., the judgment of the Court of Common Pleas was reversed; Kelly, C.B., Mellor, J., and Blackburn, J., dissenting, and approving of the judgment of the majority of the Court of Common Pleas. The case in the Exchequer Chamber, is reported *sub nom. Melsom v. Giles*, 40 Law J. Rep. (N.S.) C.P. 233; and in the Court of Common Pleas, 39 Law J. Rep. (N.S.) C.P. 325.

The case now being brought on error to this House—

Manisty and *Murch*, for the plaintiffs in error, contended that the estates in remainder devised to testator's sons were as specifically devised to them as were the estates originally devised to them, and that the words "so specifically devised" could not properly be construed as if they had been "so originally devised." They cited: 1 *Jarman on Wills*, 3rd ed. 710; 2 *ibid.* 661; *Broom's Maxims*, 599; *Doe dem. Woodhall v. Woodhall* (1); *Ord v. Ord* (2) and the cases there cited, viz., *Ross v. Ross* (3), and *In re Palmer* (4).

Sir John Karlake and *Garth* (*Biron* with them), for the defendant in error, contended that unless the words specifically devised were intended to mean originally devised, they would have no meaning; not to read them so, would be to deprive the word "specifically" of all meaning, but every word ought to be so construed as that it shall have some meaning.

It is easy to understand that the testator intended by inserting the word "specifically" to refer to the estate originally and independently devised by him, in contradistinction to the estates he had devised contingently.

Mainisty replied.

THE LORD CHANCELLOR (LORD SELBORNE), after stating the nature of the case, said—In my opinion this case might well be decided upon the construction of the proviso taken by itself, and without assuming one way or other the effect of the words of reference. Now the words of the proviso are that if either of the testator's sons should die leaving a widow (which has happened as to two of them), then the testator gives the hereditaments and premises so specifically devised to the person so dying to his widow for her life, or their widows if there are two of them. And what are the hereditaments and premises so specifically devised? All the devises precede that clause in the order of the will, all of them are devises of property identified by a particular description; and in the events which have happened, the property which in the first instance had been given to Robert, had by virtue of the gifts in the preceding part of the will come to the two brothers, to be held by them in the same manner as the estates originally given to themselves. Now what does the word "specifically" mean? I own I should have thought that it was one of those words in our language, which had an exact and accurate meaning well known to the law, and so well known that it may almost with propriety be called a technical word of legal language. A specific devise, or a specific bequest (for the word "specific" means exactly the same thing whether it be applied to land, or to chattels, to heritable estate, or to leaseholds) is a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie. Mr. Baron Channell in his judgment—and I cannot name that learned Judge without expressing the feeling of regret which I am sure your Lordships, and all who are acquainted with the administration of the law in recent times, must feel at the loss sustained by his removal from amongst us—Mr. Baron

(1) 3 Com. B. Rep. 349; a. c. 16 Law J. Rep. (N.S.) C.P. 28.

(2) Law Rep. 2 Eq. 393.

(3) 2 Coll. C.C. 259.

(4) 3 Hurl. & N. 26.

Channell adopts that suggestion, and he says it applies with propriety to this gift, because the lands were devised by particular description, and Chief Baron Kelly in two passages of his judgment says with great accuracy, that this is both the natural and legal meaning of the word, because in this case, the legal meaning comes from the natural meaning, and the natural meaning happens to be exact and definite. It is quite clear that this is property defined by specific description, existing at the date of the will, and not less so if it be given directly and in the first instance, or indirectly and in the second instance. The only question that arises is, whether the devise has taken effect upon it, and whether it has taken effect upon it specifically by virtue of that specific description. I said the word was exactly the same in its meaning whether applied to land or to personal estate. It used to be said (and the Chief Baron takes notice of it) that every devise of land is a specific devise. In the old state of the law that was so, because by law no land could pass by a will of which the testator was not seised at the time he made the will, and therefore however general the form of expression, it was applicable to a particular subject identified by the words of description and in existence at the date of the will. I apprehend that that is no longer the case, even as to real estate, in the present condition of the law, which enables a man by general words, to give that which he has not at the time that the will is made. Therefore it is no longer necessary that the will should contain specific words applicable to a particular subject in existence at the date of the will; but it is sufficient if it contains words expressive of the same kind of intention, which is expressed by a residuary gift of personal estate, namely, that whatever he may happen to have which he is capable of disposing of, answering to the description of realty, shall pass under the will. At the same time it is not necessary to dwell upon any nice or technical criticism in that respect, because, assuming that every devise of real estate is specific (unless we deny the proposition which we have just stated as being the universal rule) the words are properly applicable to such devises, and

when applied to such devises they express not an unmeaning thing, but a thing which has a true meaning even if it be universally found with respect to a particular class of gifts.

Now, I cannot but think that it is of very great importance to adhere to the rule that words are to have their natural signification and legal and technical words to have their legal and technical signification, unless there be something in the context of a particular instrument to shew the contrary. What is there in the context of this particular instrument to shew the contrary? It is not very apparent, but dealing with these words they seem to me to speak for themselves, and to involve no difficulty of construction. I am led to follow the argument as to the general scheme of the will. It is, I venture to say, a perilous and hazardous argument in most cases in which it is used. I do not say there are not cases in which it may not be properly used, but certainly it is an argument which seeks to escape from the necessity of grappling with the meaning of particular words upon grammatical principle, and endeavours to get into a region of speculation as to the reasonable and probable intent. There are cases in which the ambiguity of particular expressions is such, that there may be no better mode than that for their construction. But those are not cases one would desire to follow, except where there is an ambiguity of that kind. If I were to attempt to follow the learned counsel in that line of argument, I should say that the general scheme of this will would not lead me to the conclusion that it was intended, with respect to the widow in this particular case, to separate from the property originally given that which the testator had added to it by words, saying that it was to be held in the same manner as the estates previously devised, and on looking through the will, I can see no context which at all requires or justifies a departure from the proper sense, as I understand it, of the words, "so specifically devised," which, coming where they do, include everything which had previously been given.

Two arguments were relied upon. First of all, it is said that this clause being in the shape of a proviso, ought

really to be split into three clauses, and read in that form into earlier parts of the will, with the effect of making the words, "so specifically devised," receive from the context a more limited application than that which they would receive in the place where they occur. That is a singular mode certainly of dealing with the construction, to transpose without necessity words from the place where they occur, in order to make the words of reference that are found with them, that is to say, the words, "so specifically devised," apply to a different subject than that to which they would naturally apply where they were found. Of course, if you put in the words, "so specifically devised," immediately after the first gift of the estates to John, the word "devise" could only apply there to those estates. But you do not find it there. You must deal with those words according to the place where you find them, which is after all the devises, and so dealing with them, it seems to me that the words, "so specifically devised," mean the same as if they had been "hereinbefore specifically devised," and, reading them so, I am obliged to enquire whether any reason can be suggested why the testator put the clause in that place, instead of distributing it it over other places in the way that has been pointed out, and it appears to me that he may have done so to avoid any question as to the way in which the property was to be included, and as to its covering everything. I do not want to dwell upon the effect of the words, "in the same manner as the estates hereindevise are limited to them respectively." I cannot, however, help saying upon that, that it seems to have been all but conceded in the arguments on the part of the respondents, and all but decided—certainly assumed in the opinions of the learned Judges who were in the respondent's favour—that these words of reference would have the effect of making the sons tenants for life with remainders to their children of what they took over under these words; and if so, it is wholly impossible that they should not also have the effect of carrying the estate given over through all the limitations which had been declared of the estates which were originally given, and I must confess my total inability to

follow the argument, that the limitation is less a limitation, because it is introduced by the word "provided," and occurs in a different part of the will from the other limitations, in connection with which it is to be read ultimately, according to its legal effect. The whole argument (if I may say so respectfully) seems to me to lose sight of the cardinal rules of construction, which are, that where you have words that are sensible and intelligible in their proper and natural meaning, and especially if they are words of law and words of art, they are not by any uncertain conjecture to be wrested or diverted from their meaning. You must have clear interpretative words in some other parts of the will which make it necessary to put upon them another than their proper sense. As to its being necessary to do that in order to make them officious in the sense which the argument for the respondent requires, I must demur wholly to the principle. If the words, "so specifically devised," were not according to their true meaning applicable to the particular estates, then we must search for some other meaning for the word "specifically" which would succeed in making them applicable. But, being applicable, it is no argument to say, if the word "specifically" had been left out we should still have known from the rest of the will that these were specific devises. You might just as well say, that the words, "without leaving any lawful issue," were to receive some other definite construction, because, if the word "lawful" had been left out, they would have meant the same thing. Nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning, only because those words are superfluous. Here the words have a meaning. It is an accurate meaning, a well-known meaning and a legal meaning, a meaning which can receive effect without the slightest difficulty in the present case. I totally disagree with the opinion, that you are to depart from the real meaning and search for some other meaning, merely because the sense would have been practically the same if the words had been left out.

I must, therefore, advise your Lordships in this case to reverse the judgment of

the Court below, and to give judgment in the appellant's favour.

LORD CHELMSFORD and LORD COLONSAY concurred.

Judgment appealed from reversed, and judgment given for the plaintiffs in error, with a direction that they be restored to all things which they had lost by reason of the judgment of the Court of Exchequer Chamber.

Attorneys—Young, Maples, Teasdale, Nelson & Co., for plaintiffs in error; Meredith, Roberts & Mills, agent for Cowdry, Bath, for the defendant in error.

1873. }
April 23. }

BROOKE v. AVRILLON.

Action founded on Malice—Evidence of Malice from Pleadings.

Where in an action for maliciously giving the plaintiff into custody and for slander, the defendant pleaded to the latter cause of action a plea in justification, which would have been no answer to the former, and at the trial the plaintiff failed to prove the slander,—Held, that the jury ought to disregard this plea in considering the former cause of action.

The first count of the declaration in this action was for assaulting the plaintiff, and giving him in charge on a false charge of felony; and the second, third and fourth for slander, in calling the plaintiff a thief, saying he had robbed the defendant of 3*l.*, and had been guilty of other misconduct, and was unfit to be employed. The defendant pleaded not guilty to all four counts, and also as to so much of the third and fourth counts as imputed other misconduct and unfitness for employment, a plea of justification, setting out charges of drunkenness and disorderly conduct, and alleging that the plaintiff, "without lawful cause or excuse, wrongfully and fraudulently spent and converted to his own use" 3*l.*, given to him as servant by the defendant for the defendant's use, to give change to the defendant's customers, and account for it.

At the trial before Denman, J., the plaintiff failed to prove the slanders, and on

counsel proceeding to press on the jury the plea of justification as evidence of malice in aggravation of damages under the first count, the learned judge ruled that this could not be done, and that the jury ought to disregard the plea, and a verdict for 10*l.* being found,

Murphy, for the plaintiff, now moved for a new trial, on the ground of misdirection, contending that the plea might be used in the proposed manner, and that there was malicious ingenuity in pleading it only to the counts in slander, and not to the first count, and citing *Warwick v. Foulkes* (1), *Pearson v. Le Maître* (2), and 1st *Taylor on Evidence*, 353 (last edit.)

BOVILL, C.J.—I agree that it is a general principle that in an action founded on malice it is open to prove the circumstances occurring before and after the alleged cause of complaint; and in a libel case it is the practice to refer to what has occurred after action and during the course of the trial, whether proving the justification or falling short of it. In this case, if there had been a plea of justification to the first count alleging a felony, the plea could not have been withdrawn from the consideration of the jury, especially if there were an attempt to prove it which failed. But the case as it stands is distinguishable from this, for there is no plea of justification to the first count, but only to the alleged slanders. It has been contended that the plea might have been pleaded to the first count, but this is not so, for it falls short, indeed carefully short, of a charge of larceny or embezzlement, and it would have been idle to plead it to the first count, and therefore we cannot say that any advantage has been taken, and the facts seem to me to shew this. The slanders were not proved, and the defendant being entitled to a verdict thereon, it was idle to go into the question raised by the plea of justification; and on the facts I think my brother Denman was quite right, and took the only course to be adopted.

(1) 12 Mee. & W. 507; s. c. 13 Law J. Rep. (N.S.) Exch. 109.

(2) 5 Mac. & G. 700; s. c. 6 Sa. N.R. 607; s. c. 12 Law J. Rep. (N.S.) C.P. 253.

GROVE, J.—I do not say that there may not be a case where a plea pleaded to one count may not be used as here proposed in respect of another; but here the plea was no answer to the first count, and as the charges of slander failed, it became unnecessary to go into evidence to shew whether the plea was true or false.

DENMAN, J.—I am of the same opinion. I told the jury to disregard the plea. The principle is that a *false* plea is an aggravation, but here we cannot say that it is false, as it was unnecessary to go into the question of whether the plea was proved.

Rule refused.

Attorneys—E. D. Lewis, for plaintiff.

1878. }
April 26. }

RUDGE v. RICHENS.

Mortgage—Right of Mortgagee to Sue for Debt after Sale of Mortgaged Property—Equitable Plea—Practice—Striking out Plea.

To a declaration on the mortgagor's covenant to pay the debt, the action being brought to recover the balance due to the mortgagee, after giving credit for the money realised on the sale of the mortgaged property, the defendant pleaded, by way of equitable defence, a plea which shewed that the plaintiff had taken possession of the mortgaged property, and had sold the same under the power of sale contained in the mortgage, and had thereby, as the plea alleged, deprived the defendant of his right to have such property reconveyed to him upon payment of the money and interest due on the mortgage. This plea was pleaded under a master's order, which gave the plaintiff liberty to reply and demur thereto. Instead of demurring the plaintiff applied for and obtained an order from a Judge to strike the plea out:—Held, that such Judge's order was rightly made as the plea was clearly bad, since it did not shew that sufficient had been realised by the sale to satisfy the debt.

This was an action by a mortgagee to recover 336l. 5s. 11d., the balance of principal and interest due from the mort-

gagor, after giving credit for the proceeds of the sale of the mortgaged property, which had been sold under the power of sale contained in the mortgage. The first count in the declaration was for breach of the defendant's covenant in the mortgage deed, by which he covenanted to pay the plaintiff on the 3rd of July, 1870, 1,500l., with interest at 5l. per cent.

The defendant pleaded to this count, *inter alia*, thirdly, an equitable plea which began by repeating the following averments in the second plea, viz., that at the time of making the said deed, the defendant was in possession of certain leaseholds, which by the said deed were conveyed to the plaintiff by way of mortgage for securing the moneys in the first count, which consisted of 1,500l. lent by the plaintiff on the security of the said mortgage, and that it was covenanted and agreed by and between the plaintiff and defendant, that if default should be made in payment of the said 1,500l. or the interest thereon at the time mentioned in the said count, then it should be lawful for the plaintiff immediately thereupon, or at any time or times thereafter, without the receipt of any further consent or concurrence by or on the part of the defendant, to sell and absolutely dispose of the said leaseholds so conveyed as aforesaid. The third plea then stated that upon the defendant's making default in the payment of the said 1,500l. and the said interest due thereon, the plaintiff, pursuant to the said covenants in the said deed, entered into and took possession of the said leaseholds so mortgaged as aforesaid and sold the same, and thereby deprived the defendant of his right to have the said property so mortgaged to the plaintiff as aforesaid reconveyed to him, the defendant, upon payment of the money and interest due upon the mortgage, whereby the plaintiff has realised, received and now holds the proceeds of the said sale, to pay and satisfy herself, all principal, moneys and interest, and all other moneys due to her under and by virtue of the said deed, and was in equity satisfied before the suit by the sale of the said leaseholds as aforesaid.

This third plea was pleaded with the other pleas, pursuant to the order of Master Gordon, giving the defendant leave

to plead several matters, with liberty to the plaintiff to reply and demur.

The plaintiff afterwards applied by summons to strike out this third plea, but Master Kaye, before whom the summons was heard, refused the application.

The plaintiff then appealed to Bramwell, B., and that learned judge ordered the third plea to be struck out.

Oppenheim now moved for a rule to shew cause why this order of Bramwell, B., should not be set aside.—The plaintiff should have appealed from the order of Master Gordon if she was dissatisfied therewith, or else she should have demurred to the plea, but the plea having been regularly pleaded there was no ground for striking it out. It is believed that the learned Judge said that the plea was a dishonest one, and therefore he made the order, but the defendant has a right to plead any equitable defence he may have. There is authority in equity for this defence. The mortgagor is entitled to a reconveyance of the mortgaged property upon payment of the money due upon the mortgage, as stated by Turner, L.J., in *Walker v. Jones* (1), and, therefore, after the mortgagee has sold the mortgaged property, he cannot sue the mortgagor on his covenant to pay the debt, and a Court of Equity will restrain him from doing so—*Palmer v. Hendrie* (2).

KEATING, J.—This is an application to rescind an order of my brother Bramwell which directed the third plea to be struck out. It appears that when the case came before Master Gordon, he gave leave to plead this plea, with liberty to the plaintiff to reply and demur to it, and that Master Kaye afterwards took the same view; the summons which came before him was not to set aside the order of Master Gordon, and Master Kaye thought that it was better to allow the plea to remain, with liberty to the plaintiff to demur. The plaintiff then brought the case before my brother Bramwell, and that learned Judge ordered the plea to be struck out. Now what is the plea in question? The mortgage deed gave the

mortgagee a power of sale, which he exercised on the default of the mortgagor to pay the mortgage debt according to the covenant, and about 1,240*l.* was realised by the sale. There is no impeachment of such sale, nor is it denied that it did not realise enough to satisfy the whole of the mortgage debt, but it is said that a Court of Equity would restrain this action for the balance of the debt, on the ground that the 1,240*l.* which had been received from the sale was a satisfaction of the debt. The authorities which have been cited do not appear to make out any such proposition, but only this, that after the debt has been satisfied, either by the money received from the sale or by foreclosure of the mortgaged property, the Court of Equity has said that the mortgagee shall not sue on the covenant to pay the debt. We would not set aside a Judge's order unless we were satisfied that the Judge was wrong in making the order, but in the present case, so far from thinking that the learned Judge was wrong, I think he was perfectly right, and that the plea is clearly bad.

GROVE, J.—I am of the same opinion. The second plea (3) raises a fair equitable defence which would be supported by the cases which have been cited; but the third plea does not say that sufficient was realised by the sale of the property to satisfy the money due on the mortgage, and I do not see how in any sense it can be an answer to the action.

DENMAN, J.—I think that it is the duty of a Judge to set aside a plea if it be clearly bad, and still more so if it be a dishonest one. I think that this third plea is a bad plea, and that the cases which have been cited go to the extent of shewing this. When the learned Judge said, as he is reported to have done, that this was a dishonest plea, I think very probably it was in reply to a statement that the plea was a good equitable plea.

Rule refused.

Attorneys—F. & E. Chester, for plaintiff.

(1) 35 Law J. Rep. (N.S.) P.C. 30; s. c. Law Rep. 1 P.C. App. 50.

(2) 27 Beav. 349; s. c. 28 Beav. 341.

(3) The second plea, which was also pleaded by way of equitable defence, alleged that more was realised by the sale of the mortgaged property than was sufficient to satisfy the debt.

(In the Second Division of the Court.)
1873. }
April 28. } WEEKS v. PROPERT.

Railway Company—Issue of Debentures—Ultra Vires—Personal Liability of Directors—8 & 9 Vict. c. 16. ss. 38, 39—30 & 31 Vict. c. 127. s. 26—Money borrowed to pay off Debentures.

The directors of a railway company which had exhausted its statutable powers of borrowing money on debentures, published an advertisement in which they stated they were prepared to receive proposals for loans on debentures of the company "to replace loans falling due," the intention of the directors being to apply the money so raised in discharge of an equal amount of the then existing debentures. In consequence of such advertisement W. offered to lend 500*l.* on the debentures of the company. The directors accepted such offer and promised to issue a debenture to him when he was prepared with the money. On the faith of this W. paid the 500*l.* and the directors gave the money to H. who had held debentures of the company and directed him to transfer a debenture for 500*l.* to W., but H. kept the money without transferring any debenture, upon which the directors issued a new debenture of the company in favour of W., but which was not binding on the company as it was in excess of its borrowing powers:—Held, that on these facts the directors were to be deemed to have given W. a warranty that they had power to issue a debenture to him which was binding on the company, and that they were therefore personally liable for the breach of such warranty.

The plaintiff sued as the executor of Walter Weeks, deceased, and the action was brought to recover with interest the sum of 500*l.*, which had been paid by the said testator, Walter Weeks, for a debenture issued to him under the circumstances hereinafter stated. The cause came on to be tried before Bovill, C.J., at the sittings in London after Hilary Term, when a verdict was by the direction of the Judge found for the plaintiff for 1,000*l.*, the amount of damages in the declaration, subject to the opinion of the Court upon a

NEW SERIES, 42.—C.P.

Special Case stated without pleadings, and containing *inter alia* the following facts.

CASE.

1. The defendant was, from the year 1860 to the year 1867, one of the directors of the Carmarthen and Cardigan Railway Company, which is a company incorporated by a local and private Act, passed in the 17th and 18th years of Her Majesty's reign, chapter 218.

2. By the said Act the said railway company were authorised to construct and maintain a railway from the South Wales Railway, at or near the borough of Carmarthen to the town of Newcastle Emlyn, with a view of being thereafter extended to the town and harbour of Cardigan, and were empowered to raise for that purpose a capital of 300,000*l.* by shares, and of 80,000*l.* by bond or mortgage.

3. By a local and private Act of Parliament passed in the 19th and 20th years of Her Majesty's reign, chapter 68, to enable the said railway company to make a deviation of a portion of their line of railway, and to abandon parts thereof, and to grant further powers to the said railway company, and for other purposes, it was enacted as follows—

"And whereas there will be a saving to the company by the substitution of the works by this Act authorised for the works originally authorised, and the present capital of the company may therefore be reduced: Be it enacted, that the capital of the company shall be 200,000*l.* instead of 300,000*l.* as prescribed by the said firstly recited Act and the powers of borrowing given to the company by that Act shall be reduced from 80,000*l.* to 60,000*l.*, and shall be exerciseable as soon as the said sum of 200,000*l.* has been subscribed and one half thereof has been paid up."

4. Early in August, 1864, a resolution was passed by the board of directors of the said railway company, that the following advertisement should be inserted in the *Times* and other daily newspapers, and the same was accordingly inserted.

"Loans on Mortgage Debentures.

"Five per cent. interest. The directors of the Carmarthen and Cardigan Railway Company are prepared to re-

ceive proposals for loans on mortgage debentures for three, five or seven years, in sums of 100*l.* and upwards, bearing interest at the rate of 5 per cent. per annum, payable half-yearly, to replace loans falling due.

"By order,
Owen Bowen,
Secretary.

"Secretary's Offices,
"4 Chatham Place,
"Blackfriars."

The said Owen Bowen in the said advertisement named, was then the secretary of the said railway company. At the time the said advertisement was published as aforesaid, the said railway company had issued debentures to the amount of 60,000*l.*, being the full amount which they were by their Act of Parliament authorised to issue, and the whole of the said 60,000*l.* worth of debentures were then outstanding against the said railway company; the money proposed to be raised by the loans so advertised for was intended to be applied by the directors in discharge of an equal amount due on the debentures originally issued to raise the 60,000*l.*

5. On the 10th of August, 1864, the said testator, Walter Weeks, having seen the aforesaid advertisement in one of the newspapers in which it appeared, wrote and sent to the said railway company a letter, which is lost, and the contents of which cannot be ascertained, except so far as they are to be inferred from the answer to the same, which was as follows.

"11th August, 1864.

"Sir,—In the absence of our secretary who is in Wales, I beg to accept your offer for loan of 500*l.* on the mortgage debentures of this company on the terms contained in your letter, and on hearing from you the mortgage will be proposed at the next meeting of the directors.

"Any information you may require I shall be happy to afford you.

"I am, Sir,

"Mr. Walter Weeks, Yours obediently,
"Roborough, Fred. Edwards,
"near Plymouth. Acct."

The said Frederick Edwards was, at the date of the said letter, the accountant of the said railway company.

6. On August 16th, 1864, a meeting of the directors of the said railway company

was held, and the following is an extract from the minute book of the said railway company. The said J. L. Probert, Esq., in the said extract mentioned, is the defendant in this suit, and among the applications there mentioned to have been laid by the secretary on the table, was that from the said Walter Weeks.

"At a meeting of the directors of the Carmarthen and Cardigan Railway Company, held at the offices of the company, No. 4, Chatham Place, Blackfriars, London, on Tuesday, August 16th, 1864.

"Present: John Probert, Esq., in the
"Chair;
"J. L. Probert, Esq.;
"Saml. Crosse, Esq.

"The secretary reported that he had inserted advertisements in all the leading London and railway papers, for the purpose of obtaining loans on mortgage debentures to replace bonds now falling due, and the secretary laid upon the table the applications he had received in reply to them."

7. On the day it bears date, Owen Bowen, the secretary of the said railway company, with the authority and by the directions of the directors, wrote and sent to the said Walter Weeks, the following letter:

"27th August, 1864.

"Sir,—In reply to your application to lend 500*l.* on the debentures of this company, I beg to inform you that your proposal has been accepted, and when you are prepared with the money the debenture will be issued to you.

"I am, Sir, your obedient servant,
"Mr. Walter Weeks, Owen Bowen,
"Roborough, . Secretary.
"nr. Plymouth."

8. After the receipt of such letter, the said Walter Weeks, on August 29th, 1864, sent by post to the directors of the said railway company, his cheque for 500*l.*, a copy of which was set out in the Case.

9. After the receipt of the said cheque a meeting of the directors of the said railway company was held, and the following is an extract from the minute book of the said railway company. The said J. L. Probert, Esq., in the said extract mentioned, is the defendant in this suit.

"At a meeting of the directors of the

Carmarthen and Cardigan Railway Company, held at the offices of the company, No. 4, Chatham Place, Blackfriars, London, on Tuesday, August 30th, 1864.

"Present: John Propert, Esq., in the
"chair;

"Samuel Crosse, Esq.;

"J. L. Propert, Esq.

"The secretary laid upon the table the letters that have been received in answer to the advertisements in the papers, and a cheque for 500*l.* received from Mr. Walter Weeks, for which he requests a debenture to be issued to him."

"Proposed by Mr. Crosse,

"Seconded by Mr. J. L. Propert,

"Resolved, that Mr. Holden be requested to transfer a debenture bond for 500*l.* to Mr. Walter Weeks in due course, and that the cheque for 500*l.* be paid to Mr. Holden, and that on the 1st of October such bond be exchanged for a new one for the like amount, having seven years to run."

The said cheque was in pursuance of such resolution paid to the said Mr. Holden, and passed by him through his bankers, and was paid by the bankers of the said Walter Weeks on the 2nd of September, 1864.

10. The said Mr. Holden in the last preceding paragraph mentioned was the contractor for the making of the said railway. Previously to and on the 10th day of March, 1863, he held seven original debentures of the said railway company for 500*l.* each, numbered 40, 41, 42, 43, 44, 45 and 46, which had been issued by the company to him. On that day he deposited these debentures and three Lloyd's bonds of the same company for 1,000*l.* each with the Royal Naval and Military Assurance Society as security for the sum of 5,000*l.* lent to him by that society. These debentures were, at or shortly after that time, and before August, 1864, duly transferred by the said Mr. Holden to the said society or their trustees, and at the date of the resolution in the last preceding paragraph mentioned, the said seven debentures were registered in the names of such transferees. The said Mr. Holden, in August, 1864, and thenceforward, was not the registered holder of any debenture bond of the said company which had been

issued by them within the powers conferred on them by their Acts of Parliament. He was, as mentioned in paragraph 9, requested to transfer a debenture of the said railway company for 500*l.* to the said Walter Weeks, in order that the said Walter Weeks might hold the same until a new debenture for 500*l.* was issued by the said company and delivered to him. The said Mr. Holden did not, although he retained the cheque and applied the same to his own purposes, transfer a debenture to the said Walter Weeks or to the plaintiff, his executor.

11. Between the 30th of August and the 27th of September, 1864, the said Walter Weeks had written to the directors of the said railway company a letter which is lost, and the exact contents of which cannot be ascertained, and on or about the 27th of September, 1864, the accountant of the said railway company wrote and sent to his address the following letter in answer:

"September 27th, 1864.

"Sir,—In reply to your letter of the 26th instant, the reason you have not received the debenture is that we have had no board meeting since, but it shall be forwarded as soon as possible.

"I am, Sir, your obedient servant,

"P. p. Owen Bowen,

"Alex. Young.

"Walter Weeks, Esq.,

"Roborough, near Plymouth."

12. On the 5th of October, 1864, a board meeting of the directors of the said railway company was held, and the following is an extract from the minute book of the said railway company. The said J. L. Propert, Esq., in the said extract mentioned, is the defendant in this suit.

"At a meeting of the Directors of the Carmarthen and Cardigan Railway Company, held at the offices of the company, No. 4, Chatham Place, Blackfriars, London, on Wednesday, October 5th, 1864.

"Present, John Propert, Esq., in the
"chair;

"J. L. Propert, Esq.;

"Samuel Crosse, Esq.;

"Proposed by Mr. J. L. Propert,

"Seconded by Mr. Crosse,

"Resolved, that there be now issued and sealed with the company's seal a de-

benture bond for 500*l.* in favour of Mr. Walter Weeks, of Roborough, such bond bearing date from the 1st of October instant, and payable in seven years."

13. The case set out a copy of the debenture bond dated the 5th of October, 1864, which was sealed with the seal of the company and issued to the said Walter Weeks, pursuant to the said resolution in the said 12th paragraph; and the case stated that neither the said Walter Weeks in his lifetime, nor the plaintiff after his decease, had any notice or knowledge in fact of any of the circumstances attending the issue or origin of the said debenture bond, other than as expressly appeared in the case.

A suit was instituted against the said railway company in October, 1864, by one Fountaine, by the decree in which, dated the 14th of February, 1868, the said debenture, dated the 5th of October, 1864, was declared void, as being for a sum in excess of the borrowing powers of the railway company, which had at the time the same was issued been fully exercised.

The question for the opinion of the Court was, whether the plaintiff was, as executor as aforesaid, entitled to recover against the defendant the said sum of 500*l.* and interest thereon, or either of the said sums.

No question of non-joinder was to be raised.

Kingdon (*Philbrick* with him), for the plaintiff.—The defendant was present as director at all the meetings of the company. The issuing the advertisement and taking the money of Weeks, the testator, under the circumstances mentioned in the case, amounted to a warranty by the defendant that the company had power to borrow the money which the plaintiff's testator lent, and that they could give him a valid debenture. The company had in fact no power to borrow, and the debenture which was issued to the plaintiff's testator was therefore invalid, and the defendant became personally liable for the breach of warranty. *Richardson v. Williamson* (1) is in point. There the

plaintiff lent money to a building society, established under 6 & 7 Will. 4. c. 32, and received a certificate signed by the defendants, who were directors of the society, stating that the plaintiff had deposited the money with the society for a certain period, upon which interest would be allowed, and that was held to be a representation that the society had authority to borrow money, and it turning out that the rules of the society did not give it any such power, the defendants were held personally liable for the misrepresentation, although they had acted *bona fide*. That case only followed a previous decision of the same Court in *Collen v. Wright* (2), which likewise shews that an action lies against a person who represents he has an authority which in fact he has not.

The Court called on

Manisty (*R. E. Turner* with him), for the defendant.—It is true that the company had no power to borrow, but they had power to take money in order to pay off an existing debt. The transaction here, to which the directors were parties, was to purchase with the money which the plaintiff's testator advanced one of the debentures held by Holden, and to give that or a new one in lieu of it to Weeks, so that the amount of the money borrowed would not be increased. The directors acted *bona fide*, and they were entitled to receive such money from Weeks for the purpose of paying off a debenture debt. The advertisement gave notice that the money wanted was for that purpose, for it expressly stated that it was "to replace loans falling due," so Weeks must have known the nature of the transaction in which the directors were so engaged. Then the 8 & 9 Vict. c. 16. s. 100 declares that directors are not to be personally liable for being parties to "any contract on behalf of the company," or for otherwise lawfully executing any of the powers given to the directors," and consequently the defendant cannot be personally liable in this action, as he was acting within his autho-

(1) 40 *Law J. Rep.* (N.S.) Q.B. 145; s. c. *Law Rep.* 6 Q.B. 276.

(2) 7 E. & B. 361; s. c. 26 *Law J. Rep.* (N.S.) Q.B. 147; (Ex. Ch.) 8 E. & B. 647; s. c. 27 *Law J. Rep.* (N.S.) Q.B. 215.

rity as director when he received the money from Weeks. The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 26, shews that a company may get money to pay off existing debts, for it enacts that "money borrowed by a company for the purpose of paying off, and duly applied in paying off bonds or mortgages of the company given or made under the statutory powers of the company, shall, so far as the same is so applied, be deemed money borrowed within and not in excess of such statutory powers."

[*Kingdon*.—That statute was passed after the transaction between the directors and Weeks in this case.]

It is merely declaratory of the intention of the Legislature in the 8 & 9 Vict. c. 16. s. 39, which likewise gives a power of re-borrowing in order to pay off existing mortgages.

As the company might get money to pay off existing debts, though they had exhausted their borrowing powers, then, if by accident they were prevented from paying off such debts, and of making the money they had so received properly money borrowed, they would be bound to return it to the plaintiff, and consequently if they did not do so, would be liable to him for its amount as money had and received. Therefore the plaintiff has sustained no damage by the act of the defendant, and as the defendant acted *bona fide*, he ought not to be made personally liable. *Richardson v. Williamson* (1) is explained by Lord Justice Mellish in the recent case of *Beattie v. Lord Ebury* (3), which last case shews that unless there has been a misrepresentation in point of fact of the authority of the directors, or some fraud on their part, they would not be personally liable.

Kingdon replied.

KEATING, J.—In this case the question is, whether the directors (for although the action is against only one, it is agreed that it shall be the same as if all were sued) can be made personally liable for the 500*l.* paid by Mr. Weeks, the plaintiff's testator, on an advertisement issued under

the authority of the directors. The advertisement is in these terms [The learned Judge here read the advertisement as it appears in paragraph 4 of the Special Case.] Now, Mr. Manisty has pressed upon us, that this advertisement was one which gave sufficient notice that the loans were required under such circumstances as would authorise the directors to receive and apply them, and to give securities for them which would bind the company. I confess that I cannot so read it. The advertisement is not for those persons only who from being conversant with such matters, might draw the inference which Mr. Manisty seeks to draw from the words "to replace loans falling due." It is an advertisement to all the world, and there is no reason to suppose that Mr. Weeks considered from reading it, that he was lending his money to a company who had already exhausted their borrowing powers. He writes, making the offer of a loan of 500*l.*, on the footing of that advertisement, and he receives this letter in answer, telling him that his offer has been accepted: [The learned Judge here read the letter of 27th August, 1846, set out in paragraph 7 of the Case.] That letter was written upon a resolution of the directors, one of them being the present defendant, and it appears to me to be clearly a statement made with the authority of the directors, that if you, Mr. Weeks, will lend 500*l.*, we will issue to you a binding debenture of the company, and to amount to a warranty that the directors had power to do so. Now it is clear, that at that time they had not power to issue any such debenture, although they expected to have that power by means of the transaction with Holden. On the faith, however, that the directors had power to issue such debenture, the money was paid. It is said that the directors were acting *intra vires* in this matter, but it appears to me, that they could not have authority to bind the company by such a transaction as this. The defendant sends the cheque given by Mr. Weeks to one Holden, who is said to have been a contractor of the company, and was formerly the owner of debentures of the company, but he had parted with these debentures twelve months before,

(3) 41 Law J. Rep. (N.S.) Chanc. 804; s. c. Law Rep. 7 Chanc. App. 777.

and the transfers were registered in the books of the company. Having, therefore, sent this cheque to Holden without ascertaining if Holden then had a debenture, the defendant directs him to send a debenture to Mr. Weeks, the plaintiff's testator. Holden has no debenture to send, and not having any which he can send, he puts the money in his pocket. Afterwards the directors issued a debenture to Mr. Weeks, which purported to bind the company and to be issued under the powers of their Act. It was, however, a piece of waste paper, so far as binding the company; the directors had no power to issue it, and the document itself was held by the Court of Chancery to be absolutely void. Under these circumstances the question is, whether the plaintiff can look to the directors personally upon the warranty which, as I have already said they must be deemed to have given, that they had authority to issue a valid debenture. Mr. Manisty has contended, that admitting the debenture to be void, yet, that the money being received for the company and the company being liable to refund it, the plaintiff has not sustained any damage. Now, that involves the question, how far the directors had authority to do what they did, and it appears to me, that they had no such authority. It is said that they had power to borrow money to replace debentures becoming due. I think that they may obtain money for that purpose, and so far as it is so applied it would be within the terms of section 26 of the Railway Companies Act, 1867, and even before that enactment it would be considered to be not in excess of the statutory borrowing powers of the company. But that is not what the directors did in this case. They held themselves out to the plaintiff as having power to issue to him a binding debenture bond of the company, and at the time when they contracted the loan with him they warranted that they had such power. That warranty was broken, and they are, I think, personally liable for the breach.

HONYMAN, J.—I am of the same opinion. There can, I think, be no doubt that the defendant is guilty of a breach of warranty that the company had power to

issue the debenture bond to Mr. Weeks. Several cases have been cited, and amongst others *Collen v. Wright* (2), where Willes, J., in delivering the judgment of the majority of the Court of Exchequer Chamber, said, "I am of opinion that a person who induces others to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent is answerable to the person who so contracts for any damages he sustains by means of the assertion of the authority being untrue," and he further says, "the obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorised, that the authority he professes to have does in point of fact exist." That was followed by the case of *Richardson v. Williamson* (1), and I do not see that that rule is interfered with by the judgment of the Lords Justices in *Beattie v. Lord Ebury* (3). There are no doubt passages in the judgment of Mellish, L.J., which might seem to infer that the rule only applies where there has been a misrepresentation amounting to fraud, but having read the judgment carefully, I think he does not mean to say that there is no such warranty in these cases to which I have referred, but that he means to say that if the representation is not a representation of a fact, but only of the law, the warranty does not arise. For instance he means: if you say, I am authorised by a power of attorney to act in a certain way for A B, and he shews the instrument, and it turns out that it does not in point of law confer the power required, there you would not be liable for a breach of warranty, for the other person would have had an opportunity of seeing and judging for himself, and there would have been no representation of a fact. That this is his meaning appears clear, when he refers to and comments on the cases of *Collen v. Wright* (2), *Richardson v. Williamson* (1), and *Cherry v. The Colonial Bank of Australasia* (4), in each of which, as he points

(4) Law Rep. 3 P.C. 24.

out, there was a misrepresentation of a fact. So in the present case, as I understand it, when the directors advertised for a loan, they represented in point of fact that their borrowing powers had not been exhausted, just as in *Richardson v. Williamson* (1), the directors in the opinion of Mellish, L.J., were to be taken as representing that they had a right to borrow money and that the borrowing was within the right. Reference is made by the Lord Justice to *Rashdall v. Ford* (5), and after stating the facts and decision of that case, the Lord Justice adds, "Now in that case, as regards their being a representation by the directors that they had power to bind the company, there was as direct a representation as could possibly be conceived. The plaintiff offered to lend money to the company and the company said, we will give you a Lloyd's bond as security, and they gave him a Lloyd's bond as security. According to the authorities that was a representation that they had power to bind the company by a Lloyd's bond, but because, as a matter of law, a Lloyd's bond is not a good instrument binding upon the company when it is given for money borrowed, and as it was as much the business of the plaintiff as of the directors to know what the law was, it was held that no suit could be maintained." Now I fully agree to that, because there it was a representation that the company would give a Lloyd's bond, and the plaintiff was bound to know as a matter of law, that the company could not give a Lloyd's bond which was binding on them. But here the plaintiff had no right to know that the company had exhausted their borrowing powers, and therefore he was entitled to assume that the directors had authority to issue the debenture. Then it is not necessary that the agent should know that he has no power to do that which he professes to be authorised to do. It is quite clear, then, that this action can be maintained, for it is not disputed that there was a want of authority in the directors to issue the debenture. Mr. Manisty is therefore driven to contend that the plaintiff can only recover nominal

(5) 35 Law J. Rep. (N.S.) Chanc. 769; s. c. Law Rep. 2 Eq. 760.

damages, and he puts his case thus, if the company are insolvent then of course there can be no damages notwithstanding the instrument be a binding one, and if the company are solvent, still he says the plaintiff sustains no damage, because he may go to the company and compel them to pay him the money he lent. I should think it lies on the defendant, who has broken his contract, to shew that there is any such right against the company, and I must say that he has failed to satisfy me that the plaintiff could have any claim against the company.

The borrowing powers are given by the 17 & 18 Vict. cap. cxxviii., a local and personal Act, and by the fourth section of that Act the company are authorised to raise a capital of 800,000*l.* The 9th section empowers the company to borrow on mortgage or bond 80,000*l.*, and that is afterwards reduced by a subsequent Act of Parliament to 60,000*l.* Debentures to the extent of 60,000*l.* being outstanding Mr. Manisty is driven to contend this—Admitting the company cannot borrow any more money on mortgage, he says they may receive money on deposit on the terms that they may therewith pay off some of the existing debentures, and afterwards re-issue such or fresh debentures in their place, or if they fail to do so, pay back the money they have so received on deposit. Now the Companies Clauses Act (8 & 9 Vict. c. 16), which is incorporated with the special Act of the company, says in section 38, "If the company be authorised by the special Act to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special Act, to borrow on mortgage or bond such sums of money as shall from time to time by an order of a general meeting of the company be authorised to be borrowed, not exceeding in the whole the sum prescribed by the special Act, and for securing the repayment of the money so borrowed, with interest, to mortgage," &c., "or to give bonds," &c. It is clear, therefore, taking the general Act with the special one, that this company cannot borrow more than 60,000*l.* at a time. Then the 39th section of the general Act says, "If after having borrowed any part

of the money so authorised to be borrowed on mortgage or bond, the company pay off the same, it shall be lawful for them again to borrow the amount so paid off, and so from time to time; but such power of re-borrowing shall not be exercised without the authority of a general meeting of the company, unless the money be so re-borrowed in order to pay off any existing mortgage or bond." At first sight that might appear to give some sanction to there being a power to borrow money for the purpose of paying off an existing mortgage or bond, and so no doubt there is such power where the whole amount authorised has not been borrowed. But the 39th section does not say, "after having borrowed the whole of the money authorised to be borrowed," it shall be lawful for the company to borrow again with a proviso that they are not to do so without the consent of a general meeting unless to pay off an existing mortgage. It seems to me that that section is satisfied by saying that having borrowed part, they may borrow to pay that part off, and that the section does not extend to authorise the borrowing even to pay off, previous mortgages, when by doing so the limit of the borrowing power given by the special Act will be exceeded. The 30 & 31 Vict. c. 127. s. 26, seems to confirm the view we have taken. As, however, it was passed after the transaction in the case now before us, it can only be useful as shewing the intention of the Legislature. It was probably thought that there was a hardship if, where the money had been borrowed in a case like the present, and it had afterwards been applied in paying off existing debentures (and it had never been intended that the company should have really any more than the money they were authorised to borrow, so that in fact it was only a re-transfer of an existing mortgage), yet because there had been a time at which for the moment the company had exceeded the limit of their borrowing power, there had been an offence against the words, though not against the spirit of the Act. Therefore the twenty-sixth section declares that if the company has borrowed money for the purpose of paying off mortgages and has

duly applied it in paying them off, the money so applied shall be deemed money borrowed within and not in excess of the statutory power of the company. That amounts in my opinion to a legislative declaration that if the money be so borrowed for the purpose of paying off mortgages of the company, and the money be not so applied, the company are not liable for it, when it is in excess of their statutory powers. I therefore think that Mr. Manisty has failed to shew that the company are liable for the money, and consequently there is no ground for cutting down the damages, and the plaintiff is entitled to retain his verdict.

Kingdon applied for interest by way of damages.

KEATING, J.—The judgment will be for the plaintiff for 500*l.* and interest.

Judgment for the plaintiff.

Attorneys—R. W. Childs & Batten, agents for Woolcombe & Venning, Devonport, for plaintiff; F. C. V. Pike, for defendant.

(In the Second Division of the Court.)

1873. { CORNELL v. TORRENS;
April 25. { THE SAME v. HAY, BART.;
THE SAME v. MASSEY.

Company — Prospectus — Omission of Statement of Contract to Qualify Directors — 30 & 31 Vict. c. 131. s. 38—Action on Statute — Bondholder — Pleading Embarrassing — Common Law Procedure Act, 1852, s. 52.

The 38th section of the *Companies Act, 1867* (30 & 31 Vict. c. 131), enacts that "every prospectus of a company" "shall specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors or trustees thereof, before the issue of such prospectus;" "and any prospectus" "not specifying the same shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith

of such prospectus, unless he shall have had notice of such contract." A declaration, after alleging the defendant to have been director of a certain corporation, and that before the issue of the prospectus the promoters of the said corporation had entered into a contract with the defendant, by which, in consideration of the defendant's name appearing in the prospectus as such director, the promoters were to pay him a certain sum, averred that such contract was not specified upon the prospectus, and that the defendant knew of the said contract, and knowingly issued the prospectus with fraudulent intent to induce the plaintiff to take bonds of the said corporation; and that the plaintiff took such bonds on the faith of the said prospectus, without having had notice of the said contract; and by reason of the aforesaid fraud of the defendant the plaintiff lost the value of the said bonds:—Held, that the declaration was bad as a declaration on the 38th section, since that section does not apply to the case of a bondholder, and that the declaration, if treated as a declaration at common law for a fraudulent representation, was embarrassing, and likely to delay the fair trial of the action, within the meaning of section 52 of the Common Law Procedure Act, 1852.

Quære, if section 38 of 30 & 31 Vict. c. 131, gives a cause of action where a prospectus is issued contrary to that section.

The alleged cause of action was the same in all these actions. In the action against Torrens, and also in the action against Sir J. Hay, the first count of the declaration stated that the defendant was a director of the Canadian Oil Works Corporation (Limited), and before the issue of the prospectus hereinafter mentioned, the promoters of the said corporation had entered into a contract or contracts with the defendant and certain other persons that, in consideration of the defendant and the said persons consenting to allow their names to appear in the prospectus of the said corporation and otherwise, as directors of the said corporation, the promoters would pay to the defendant and the said persons a large sum each in cash or fully paid-up shares of the said corporation. Averment, that the said contract or contracts were not

specified upon the prospectus of the said corporation, nor in any way mentioned therein, and that the defendant knew of the said contract or contracts, and knowingly issued the said prospectus, with the fraudulent intent to induce the plaintiff and others to take bonds of the said corporation; and that the plaintiff took divers such bonds on the faith of the said prospectus, without having had notice of the said contract or contracts; and by reason of the aforesaid fraud of the defendant the plaintiff lost the value of the said bonds, and had been otherwise damaged.

In the action against Massey, the first count only differed from that in the other actions, in stating the defendant to be a trustee instead of a director of the said Canadian Oil Works Corporation.

In each action there was a demurrer to the said first count. There were also pleas which the plaintiff demurred to; but the same point was raised on the demurrers to the pleas as was raised on the demurrer to the first count in each action, viz., the construction of section 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131).

Reid (the Attorney General with him) for the plaintiff.—The first count of the declaration is on sec. 38 of 30 & 31 Vict. c. 131. That section is as follows—
 "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors of the company or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." If the count comes within that section it is good, without averring or shewing that the prospectus was issued with any intent whatever.

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The objection to its being within that section is that the plaintiff is a bondholder and not a shareholder; but the section is properly divisible. The first part imposes the duty of specifying all contracts whether made by the company, or its promoters, directors or trustees, in the prospectus of the company; and the second part declares that a prospectus which does not specify such contracts shall be deemed fraudulent, as between the promoters, directors, and officers of the company on the one side, and the shareholders on the other side. If, however, a neglect of the duty imposed by the first part of this section is shewn, that is sufficient to enable a person to maintain an action who has suffered by such neglect, although such person does not answer to the description of person mentioned in the second part of the section, as regards whom the prospectus is to be deemed fraudulent. If the count be not good under the statute, it is, at all events, good as shewing a cause of action at common law, for it avers that the defendant knowingly issued the prospectus with the fraudulent intent to induce the plaintiff to take bonds.

Roland V. Williams (Lanyon with him), for the defendant, Torrens.

Sir John Karlake (Holl with him), for the defendant, Sir John Hay.

Henry James (R. E. Turner with him), for the defendant Massey.

In the first place, the contract alleged to have been made is not one which is required by section 38 of 30 & 31 Vict. c. 131 to be specified in the prospectus; it is a contract by the promoters personally, and on their own behalf, whereas that section is intended to refer only to contracts by the company, or to contracts by promoters or others on behalf of the company. Next, no statutable cause of action is shewn in this count. The plaintiff is a bondholder and not a shareholder, and the statute makes the prospectus fraudulent only as against shareholders. The legislature might intend to protect shareholders and not creditors of the company; and certainly the same knowledge as to the contracts made by the promoters is not required for a creditor as for a person who takes shares on the faith of the pro-

spectus. Moreover, the statute never intended to give a cause of action. For the purposes of proceedings in Equity with reference to shareholders, the section makes certain omissions in the prospectus fraudulent, so that a person who has been induced by such prospectus to take shares may possibly be able to get his name taken off the list of contributories. That is very different from enabling an action to be brought. The knowledge of the existence of a contract to pay the directors such as is alleged in this count, is immaterial. In *Heyman v. The European Central Railway Company* (1), the Master of the Rolls held that a shareholder was not entitled to relief on the ground of suppression in the prospectus of the fact that paid-up shares were given to the directors to qualify them. With respect to the defendant Massey there is this further objection, that he is only a trustee of the company, and the statute does not make the prospectus fraudulent on his part, unless he comes under the description there given of "officer of the company." A trustee, however, does not come under that description. He is not properly an officer, and it is certainly no part of his business to issue the prospectus. Then is the count sustainable as a count at common law? It is not. It ought to shew facts which make out a fraudulent representation. It does not do so, nor does it disclose facts which would raise any duty to disclose such a contract as is here alleged to have been made to the plaintiff. Certainly it is embarrassing in the way it is framed, and it puts the defendant in a difficulty to know what he will have to meet at the trial.

The Attorney-General in reply.—The contract was one which ought to have been stated in the prospectus. All contracts which have any bearing on the company should be stated, and nothing should be omitted the knowledge of which might influence the judgment of persons contracting with the company—*The New Brunswick and Canada Railway and Land Company v. Muggeridge* (2), and *The Directors, &c., of Central*

(1) Law Rep. 7 Eq. 194.

(2) 10 Q. B. 363; s. c. 30 Law J. Rep. (N.S.) Chan.

Railway Company of Venezuela v. Kisch (3). That was law before the statute, and the statute was passed to enforce this duty. An action will lie, for the neglect of it, at the suit of one who has been injured by such neglect—*Atkinson v. The Newcastle and Gateshead Waterworks Company* (4). Next, there is no reason why the count should not be supported as good at common law. It contains all that is essential to give a cause of action.

KEATING, J.—These three cases have been argued together. Two of them vary somewhat from the third in the statement on the record, but I do not think it necessary to go into the distinctions between them. I am of opinion that the declaration in each is not a good declaration under the 38th section of 30 & 31 Vict. c. 131. That section appears in terms to be applicable to persons taking shares or applying for shares. I can see, perhaps, many reasons why bondholders might come within the mischief contemplated by the legislature. On the other hand, I can see reason for the distinction between bondholders and shareholders as regards the operation of the section. At all events we are bound by the words of the statute, and unless we adopt the ingenious suggestion of the counsel for the plaintiff and split the section into two parts and consider the first as declaring a duty extending to all the world, we could not extend the enactment to persons beyond those alone mentioned, viz., shareholders. In my opinion we cannot do so, and the section does not apply to the case of a bondholder. I do not wish it to be understood that I yield to the argument which has been put forward on behalf of the defendants, that the contract in question was not one which they were bound to state in the prospectus. On the contrary, it seems to me that it was a contract which a person applying for shares had a right to know, and its non-disclosure would come within the mischief which the section contemplated,

but inasmuch as the plaintiff is a bondholder and not a shareholder, she does not, I think, come within the section.

Now, during the argument, there was an intimation by the Court that the count demurred to might be good at common law, and it was so argued. It does not matter from whence the suggestion came, for if I thought the count was good at common law for a fraudulent representation I would endeavour to give effect to it, but I do not think it is such a count for false representation as the defendants can be called upon to go to trial on, but should the defendants apply, as probably they will, under section 52 of the Common Law Procedure Act, 1852, we should deem it our duty to strike the count out, or at least to cause the plaintiff to so amend it as to cure it from being, as it certainly now is, most embarrassing. In the view, therefore, I have taken it becomes unnecessary to go into the argument used on the part of the defendants, as to the general intention of the legislature, as to this 38th section, or to express any opinion whether as suggested by Sir J. Karslake or Mr. Williams, it is to be used only with regard to proceedings in Equity in dealing with contributories. I am of opinion that the section does not apply to the case of a bondholder, and therefore that the count in question is not a good count within the statute; and with regard to its being good at common law I have already stated that it is so embarrassing that the defendants are not bound to go down to trial upon it. I therefore think that our judgment in each action should be for the defendants.

HONYMAN, J.—I am of the same opinion. With respect to the question whether the first count is good as a count on the statute (30 & 31 Vict. c. 131. s. 38) I do not think that the intention of that enactment was to give a cause of action to anyone. I think that as between certain persons, the object of the statute was to make the omission in the prospectus of a company of contracts which had been entered into by the company or the promoters, directors or trustees, such as to render the prospectus liable to be treated as fraudulent. That does not

(3) 36 Law J. Rep. (N.S.) Chanc. 849; s. c. Law Rep. 2 E. & I. App. 99.

(4) Law Rep. 6 Exch. 404.

give a cause of action at law or right to relief in Equity, and if a person wants to go into Equity he must shew such a case as will entitle him to relief there, and if he wants to bring an action at common law he must shew that he has been induced by the prospectus to take shares. I think that the intention of the legislature was the same as under section 3 of the Bill of Lading Act (18 & 19 Vict. c. 111), which as regards a bill of lading in the hands of a *bona fide* holder for value makes the statement therein that goods have been shipped, conclusive evidence of such shipment as against the master or other person signing such bill of lading; so here I consider, as between the directors and other officers who issue a prospectus on the one hand, and the persons taking shares, on the faith of such prospectus, on the other, the statute intends that the prospectus shall be deemed fraudulent if it omits to notice the contracts there referred to.

As to the case of *Atkinson v. The Newcastle and Gateshead Waterworks Company* (4), which the Attorney-General cited, that was a different one from the present, because there was a clear and distinct enactment imposing a duty, and the penalty for the neglect of that duty was given in a different section.

In the view I have taken of the present case, it is unnecessary to say whether, as was argued by Mr. Williams, this 38th section was intended only to apply to contracts made on behalf of the company. I do not adopt that construction of the statute, nor do I adopt what was urged by Sir John Karlake and Mr. James as to its not being important that shareholders should know whether the directors are or not merely the nominees of other persons who provide them with the necessary qualification. The ground on which I think the first count is bad in the action against Sir John Hay, and also in the action against Colonel Torrens, is that the legislature has not said that the prospectus is fraudulent as to all persons, but as to persons taking shares in the company, and persons taking bonds of the company are not mentioned. In Mr. Massey's case the count is bad on the additional ground that he is only a

trustee of the company, and I do not think that a trustee is an "officer" within the meaning of that word in that section.

I also, as at present advised, am inclined to think that the first count is bad as a count at common law, but I am not now prepared to say so, and possibly another tribunal might take a different view of it, but I agree with my brother Keating that if the defendants apply to us under the 52nd section of the Common Law Procedure Act, 1852, to amend or strike the count out as being embarrassing we ought to accede to the application. I cannot imagine anything more likely to embarrass or delay the fair trial of this action than this count as it stands.

[Counsel for the defendants having thereupon applied to strike out or amend the first count, the Court ordered the count to be struck out in each action, unless the plaintiff should amend the same within fourteen days; the costs to be the defendants' in any event.]

Judgment accordingly.

Attorneys—G. Dillon Webb, for plaintiff; A. Gedge, H. W. Vallance & J. & R. Gole, for defendants.

1873. }
May 9. } HORSNAIL AND ANOTHER v. BRUCE.

County Court—Committal Order—The Debtors Act, 1869 (32 & 33 Vict. c. 62), secs. 4 & 5—Several Committals for same Default—County Court Act, 1846 (9 & 10 Vict. c. 95).

A judgment debtor having made default in payment of the judgment debt which had been recovered against him in the County Court, and which he had been ordered to pay forthwith, the County Court Judge made an order for his commitment to prison for forty days. The debtor was arrested thereon, but was subsequently discharged on the ground of his being privileged at the time of such arrest, as a wit-

ness returning from the petty sessions. The debtor was again, and whilst the order for committal was still in force, summoned upon a judgment summons, and a second order for his committal for the same default in not paying the judgment debt was made by the County Court Judge:—Held, that the Judge had no power to make such second order as the first had not been executed.

Held also, by BOVILL, C.J., and BRETT, J., that where a judgment debt is not payable by instalments there is no power under section 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), to commit the debtor more than once for default in not paying such debt.

This was a rule to shew cause why a writ of prohibition should not issue to prohibit any further proceedings being taken on a committal order made by the Judge of the City of London Court on the 27th of March last, on the ground that such order was made without jurisdiction, a former order of committal having been made against the defendant for the same default.

It appeared that on the 2nd of August, 1872, a judgment was obtained by the plaintiffs against the defendant in the City of London Court for the debt of 17l. 7s. 4d., and that the same, with costs amounting altogether to 18l. 18s. 7d., was ordered to be paid forthwith. The defendant not having complied with this order, an order for his committal to prison for forty days was made on the 25th of November, 1872, on the ground that he had the means of paying but had failed to do so. The defendant was arrested on 30th of December on a warrant issued under this order, but he was discharged out of such custody by a Judge's order on the 4th of January, 1873, on the ground of his being privileged from arrest at the time he was arrested, as he was then returning from the petty sessions at Barnet where he had been attending as a witness. The governor of the gaol with whom the warrant had been lodged on the arrest refused to give up the warrant, considering that he ought to keep it for his own protection, and the Judge of the City of London Court having declined to cause a duplicate or second warrant to be

issued for a fresh arrest, the defendant was summoned again upon a judgment summons, and on the 27th of March the said Judge made a fresh order for the defendant's committal for forty days for not paying the debt and costs, and this was the order which it was now sought by the present rule to stay further proceeding with.

F. Turner now shewed cause.—The power of a County Court Judge to commit is not limited to one commitment, and in this particular case and under the special circumstances of it he was at all events justified in making the second order of committal. The question turns on the Debtors Act, 1869 (32 & 33 Vict. c. 62). The 4th section abolishes imprisonment for debt with certain exceptions, amongst these exceptions is sub-section 6, "default in payment of sums in respect of the payment of which orders are in this Act authorised to be made," and the 4th section provides that "no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year." The 5th section which relates to both the Superior and County Courts states that "any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court," and towards the end of this 5th section it is further stated that "this section, so far as it relates to any County Court, shall be deemed to be substituted for sections 98 and 99 of the County Court Act, 1846, and that Act and the Acts amending the same shall be construed accordingly." "No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand, or cause of action, or deprive any person of any right to take out execution against the lands, goods or chattels of the person imprisoned in the same manner as if such imprisonment had not taken place." The 98th and 99th sections of the County Court Act, 1846 (9 & 10 Vict. c. 95), for which this 5th section is substituted, gave the County Court Judges power to

commit in certain cases of unsatisfied judgments, but contained no reference to the 103rd section of that Act of 1846, and though by the Bankruptcy Repeal and Insolvent Court Act, 1869 (32 & 33 Vict. c. 83), sections 98 to 101 both inclusive of the 9 & 10 Vict. c. 95 are expressly repealed, this 103rd section is left unrepealed. This 103rd section enacts—
 “that no imprisonment under this Act shall in any wise operate as a satisfaction or extinguishment of the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being anew summoned and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this Act, or deprive the plaintiff of any right to take out execution against the goods and chattels of the defendant in the same manner as if such imprisonment had not taken place.” It is clear as this 103rd section remains in force the County Court Judge has power to commit as often as a new default in nonpayment has been made—*In re Boyce* (1).

[BOVILL, C.J.—Why is not the first order of committal still in force?]

No doubt it is still in force, as the year during which it runs has not yet expired, but the governor of the gaol refused to give up the warrant which had been issued, so that it was impossible to proceed with it, and the Judge having refused to give a fresh one it was necessary to proceed again by a fresh judgment summons.

[BRETT, J.—Supposing there may be committals by successive orders, can there be concurrent orders?]

Rule 20 of the County Court rules which have been made under the Debtors Act, 1869, provides for such. It says—
 “orders of commitment against the same party may be issued concurrently into more than one district.” The case of *Allen v. Worthy* (2), which relates to ordering the vaccination of a child under 30 & 31 Vict. c. 84, shews that where there is a continuing default, the order may be repeated.

(1) 2 E. & B. 521; s. c. 22 Law J. Rep. (N.S.) Q.B. 393.

(2) 39 Law J. Rep. (N.S.) M.C. 36; s. c. Law Rep. 5 Q.B. 163.

Wetherfield, in support of the rule.—
 The 103rd section of the County Court Act, 1846, is repealed because section 5 of the Debtors Act, 1869, is substituted for sections 98 and 99 of the County Court Act, 1846, which are therefore repealed; sections 101, 102 and 103 are only provisos on sections 98 and 99, and when those last sections were repealed, the others necessarily were impliedly repealed. The whole 5th section is substituted for sections 98 and 99 of the County Court Act, and the provision therefore that no imprisonment is to operate as a satisfaction, leaving out any power to recommit, must be read with the County Court Act, and is quite inconsistent with section 103 remaining. At all events the second order cannot be valid since the first order is still in force, and it is quite competent still to arrest the defendant under the first order.

BOVILL, C.J.—I have had great difficulty in putting a construction on this Act, and in determining what was the intention of the Legislature, but after the arguments which have taken place I have come to the following conclusion. The main object of the statute is the abolition of imprisonment for debt, and the 4th section abolishes such imprisonment except in six cases there mentioned, and in those exceptions the case of imprisonment for a judgment debt, which is one of the most ordinary cases of imprisonment, is not mentioned, but amongst those exceptions is, in sub-section 6, the power to imprison for “default in payment of sums in respect of the payment of which orders are in this Act authorised to be made.” Now this does not except imprisonment under orders generally, but only under orders authorised by the Act to be made, and no one has been able to point out the section which directly authorises the making of such orders, and the only section which can be referred to, is the 5th section which indirectly gives that authority. Section 4 also contains a proviso, that no person shall be imprisoned in any case for a longer period than one year. Then section 5, notwithstanding the absolute prohibition to imprison except in the six cases mentioned in sec-

tion 4, empowers a Court to commit to prison for a term not exceeding six weeks in case of non-payment of a debt pursuant to an order of such Court, but such power is only to be exercised where the person making the default, has had the means to pay and has refused or neglected to pay the same. The section, therefore, contemplates a default, and in case of such default there is a power to imprison. It might possibly have been contended that the imprisonment might be for six weeks or until payment, that is to say, in the alternative, but according to the construction which has in practice been put, and I think properly put, on this section, the debtor is entitled to be relieved on payment of the money ordered, although the six weeks of imprisonment have not elapsed. There is in this 5th section no limitation to the term of imprisonment, except six weeks or payment of the sum due, and therefore in this view the proviso in section 4, that no imprisonment is to be for a longer period than one year, has no application. It is said, however, that although the order be not an order for payment of the debt by instalments, there is still a power to re-commit upon a fresh default. I find no clause in section 5 giving such power. It is said that it is given in effect by reason of section 103 of the County Court Act, 1846 (9 & 10 Vict. c. 95), being considered, as it is said, incorporated with this 5th section of the Debtors Act, 1869. The argument upon this point depends on the last paragraph but two of section 5, which says, "This section, so far as it relates to any County Court, shall be deemed to be substituted for sections 98 and 99 of the County Court Act, 1846, and that Act and the Acts amending the same shall be construed accordingly." Then by the Bankruptcy Repeal and Insolvent Court Act, 1869 (32 & 33 Vict. c. 83), which received the royal assent on the same day as the Debtors Act, 1869, these two sections 98 and 99 are expressly repealed. So that they are not only impliedly repealed by section 5 of the Debtors Act, 1869, but they are by the other Act of 1869 expressly repealed. Now section 103 came by way of proviso on section 99, and as section 99 is repealed, what is then to

become of section 103? It is said that it is to be taken as incorporated into the 5th section of the Debtors Act, 1869, but the objection to that is, that there is in such section a re-enactment of section 103, with the exception of the important part as to a defendant "being anew summoned and imprisoned for any new fraud or other default." The question of fraud is only dealt with by the sections beginning at section 11, and it is altogether omitted from the 5th section, which gives the power of commitment, on which reliance is now placed by the counsel for the plaintiff. Under these circumstances it seems to me, that what is so re-enacted in the 5th section is intended as a substitution for section 103 of the County Court Act, 1846, just as section 5 itself is to be deemed to be substituted for sections 98 and 99 of that Act of 1846, and the effect is that section 104, which is a proviso on section 99, is impliedly repealed. It is to be further observed, that what is enacted in section 5 in substitution for section 103, omits also the words "or other default." If the order for payment of the debt is not for its payment by instalments there is no fresh default. Now the 5th section enacts, that the Court may direct any debt to be paid by instalments, and by the first part of that section power is given to commit any person who makes default in payment of any debt or instalment. Therefore, to my mind, in case of default in payment of any instalment, there is a fresh power of committal, and the words of the 103rd section as to a defendant being anew summoned for "any new fraud or other default," are inapplicable, and are not required.

In the result I have come to the conclusion that where the order does not provide for the payment of the debt by instalments, and where therefore there is only one default, the power to commit can only be exercised once, and cannot extend beyond a committal for six weeks; but that where the order directs the debt to be paid by instalments, there may be a power to commit for a default on each instalment. In the present case, where all was ordered to be paid in one sum, there could only, as it seems to me, be one default and one

order of commitment; and therefore there was no jurisdiction to make the second order of commitment, and the writ of prohibition ought to go. Then, as to the point whether under the particular circumstances of this case there was power to make two orders of committal, it appears to me that the handing over of the order to the gaoler on the occasion of the arrest, and the retaining of such order by the gaoler, gave no authority to the County Court Judge to issue a second order. I am not aware that the gaoler had any right to retain the warrant of arrest after the discharge of the prisoner by the order of one of the Superior Judges, nor that there was any reason why he should do so. No doubt the want of such warrant might lead to some inconvenience, but it would be only as to the evidence, and the warrant, like any other document, if lost, might be proved by secondary evidence. I am therefore of opinion that the County Court Judge had no power to make a fresh order, and that this rule should be absolute.

BRETT, J.—An order of a County Court Judge was made on the defendant on the 2nd of August, 1872, to pay a sum of money forthwith, and on the 27th of March last an order of committal was made for not paying that sum, and it has been objected that such last order was made without jurisdiction, because in November a previous order of committal had been made by such Judge for disobedience of the same order of the 2nd of August, and because such previous order was, as it was said, still in force. I am of opinion that the County Court Judge had no jurisdiction under these circumstances to make such second order of committal. The order was made under section 5 of the Debtors Act, 1869, which enacts that "Any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order" of the Court. In terms this section is only applicable to one order and for one default, but it is said that it applies to two or more orders. Now the 4th section may, I think, be

said to be a destructive section, for it takes away powers of arrest which were then existing. Before that enactment a person might be imprisoned for the making of any of the six defaults mentioned in that 4th section. It takes away the power of arrest, except in the six cases of defaults there mentioned, and the sixth of those cases is thus described: "default in payment of sums in respect of the payment of which orders are in this Act authorised to be made." That, I think, refers to a judgment in respect of which orders for its payment may be made. The 5th section is, I think, a constructive section, and is one which is applicable as a new enactment to the Superior Courts, and by way of substitution for former enactments to the County Courts. It gives a power to commit for a term not exceeding six weeks, and according to the mode it has been universally applied, and which, in my opinion, is its true construction, such power to commit is limited to six weeks, and may be shortened at any time by payment within such six weeks. Then it is applicable to the case of a person "who makes default of any debt or instalment of any debt due from him in pursuance of any order or judgment" of the Court. The jurisdiction is not to be exercised in all cases. It is only to be exercised "where it is proved to the satisfaction of the Court that the person making default" has the means to pay and refuses to pay. It is that which is popularly said to give power to the Court to commit persons who can but will not pay. The section then goes on to say that the Court may direct any debt due in pursuance of any order or judgment to be paid by instalments; but that does not, I think, take away the power to commit for non-payment of any debt due on a judgment, although such was not ordered to be paid by instalments. It is said that the proviso in section 4, "that no person shall be imprisoned" in any of the excepted cases there mentioned "for a longer period than one year," will have no meaning, unless it is applicable to the power of committal for a term not exceeding six weeks given by section 5, so that, therefore, there must be an enlargement of that power to a power to

recommit from time to time for six weeks so long as the whole does not exceed one year. It seems to me that that proviso in section 4 has another meaning, and that it is applicable to the first four subsections of section 4, which are cases in which before the statute a person might have been imprisoned for more than one year, and which are therefore by that proviso limited to one year. Then the 5th section is also said to be enlarged, at least as to the County Courts, by reason of its being read into the County Court Act, 1846, because it is to be substituted for sections 98 and 99 of that Act. But the 5th says "this section" (which means the whole of this 5th section) is, so far as it relates to a County Court, to be so substituted for sections 98 and 99. Consequently that part of the 5th section which says that no imprisonment under it is to operate as a satisfaction of a debt is also substituted for those sections of the County Court Act, 1846, and it is senseless to say that section 103 of that Act remains. Indeed section 5 of the Debtors Act, 1869, is as much substituted for section 103 as it is for sections 98 and 99 of the County Court Act, 1846. Where in such a case of two Acts being so directed to be read together you find important words in one of them omitted, in the other the words so omitted are impliedly repealed. I therefore am of opinion that the statute gives a power of committal only where there is a default in obeying one order. Unless there are different orders, as for payment by instalments (in which case there could be no committal without a fresh summons to shew cause why the person should not pay the instalment due), there is no fresh power to commit. Therefore there can be only one order of commitment for disobedience of one order to pay, and consequently the second order which was made in the present case was made without jurisdiction. The validity of the first order is not, I think, touched by reason of the failure to execute it. The second order may have been made to get rid of some difficulty about giving a duplicate order, but be that as it may, the plaintiff took out a judgment summons for and so obtained a new order of

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committal, to take effect at a different time than the first, and whilst there seems to be nothing to prevent the first order from being also executed. It is, in my opinion, contrary to the terms of this Act of Parliament, that a man can be imprisoned twice for the disobedience of the same order, and the present rule for a prohibition ought therefore to be absolute.

GROVE, J.—I also think that this rule should be made absolute, but I confine my opinion to the case before the Court. I do not wish it to be supposed that I differ from the rest of the members of the Court, but I wish to reserve to myself the power of dealing with the case, when it may arise, of a second order of commitment having been made after a former order has been executed and exhausted. I decide the present case on the ground that there is no power, I think, to issue a second order of commitment whilst the first is existing and is not enforced. There might be a difficulty if there could be no second order after there had been an imprisonment under the first order, as in the case where a debt is ordered to be paid by instalments. A debtor might have paid some of the instalments and yet might be imprisoned for six weeks for not paying perhaps the last instalment, whilst a debtor who had not paid any of the instalments could not be imprisoned more than once, and that only for six weeks. If in such a case there is not another default, the 4th section would, I think, be inapplicable, and therefore it is that I consider it sufficient to confine myself to the facts of this case. Where a first order remains, as it does here, a Judge cannot, in my opinion, issue a second order for the same default. The first order is an existing and valid order, and therefore the second order is invalid, and the Judge had no power to make it.

HONYMAN, J.—It is not necessary to decide how far it is competent to make a second order of commitment after a first order has been executed, for here nothing has been done upon the first order, and it still remains unexecuted. I have some doubts about the present case, but I do

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not wish to differ from the decision of the Court, that the rule should be absolute for a prohibition.

Rule absolute.

Attorneys—J. Popham, for plaintiffs; G. M. Witherfield, for defendant.

(Appeal from the Revising Barrister's Court.)

1872. } WEBSTER (appellant), v. THE
Nov. 19. } OVERSEERS OF ASHTON-UNDER
1873. } LYNE (respondents).
Jan. 29. } HADFIELD'S CASE.
May 2. }

Parliament—County Vote—Rent-charge—Actual Possession—2 Will. 4. c. 45. s. 26—Statute of Uses, 27 Hen. 8. c. 10—Whether Court bound by its own Decisions.

Where the conveyance granting a rent charge operates under the Statute of Uses,

27 Hen. 8. c. 10, the person to whose use the rent charge is granted is, by force of the statute, in the actual possession of such rent charge, within the meaning of section 26 of the Reform Act, 2 Will. 4. c. 45, as soon as the grant is executed, according to the decision in *Heelis v. Blain*, which the Court followed, not being satisfied that it is a wrong decision.

Semble, the Court is not bound by its former decision, though it is a Court of ultimate appeal in registration cases, and its decision in such cases is made final by 6 & 7 Vict. c. 18. s. 66; but the Court will not overrule such former decision unless it be shewn to be clearly wrong.

Appeal from the decision of the Revising Barrister appointed to revise the list of voters for the south-eastern division of the county of Lancaster.

The appellant duly objected to the name of Joseph Hadfield being inserted in the list of voters for the said division of the said county.

The claim of the said Joseph Hadfield was as follows—

Hadfield, Joseph	36, Stockport Road, Ashton-under-Lyne.	One 17th share of rent charge issuing from freehold land and houses	Cotton Street, Bentwich Street, and Moss Street. Hugh Mason, owner.
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The following facts were established by the evidence.

By an indenture made and dated the 29th of January, 1872, and made between Hugh Mason of the first part, the said Joseph Hadfield, Robert Taylor Weild, and others, of the second part, and the said Joseph Hadfield and Robert Taylor Weild of the third part, the said Hugh Mason being seised in fee-simple in possession of certain lands and messuages in Ashton-under-Lyne aforesaid, granted unto the said Joseph Hadfield and Robert Taylor Weild, being parties thereto of the third part, and their heirs, one perpetual yearly rent charge of 35l. 14s., to be payable, clear of all deductions whatsoever (except property or income tax), by equal half-yearly payments on the 29th day of July and the 29th day of

January in each year; and the first payment to be due on the 29th day of July then next, and to be issuing from and out of and charged and chargeable upon the said lands and messuages, to hold the said rent-charge unto the said Joseph Hadfield and Robert Taylor Weild, and their heirs for ever. A copy of the indenture accompanied and was to be taken as part of the case.

In the said deed is contained a declaration that the said rent-charge and the power of distress therein expressed to be granted to Hadfield and Weild, is so granted, and they thereby agreed that they should hold and stand entitled to the same "to the use of the parties thereto of the second part, and their respective heirs and assigns, as tenants in common, and not as joint tenants."

The moiety of the said rent-charge of 35l. 14s. (less property tax) due on the 29th of July, was paid on the 30th of July, 1872, by the said Hugh Mason to Hadfield and Weild, pursuant to the deed, and divided equally by them amongst the said persons (except Alderson Thomas), parties to the said deed of the second part, and John Richardson, who stands in the stead of the said Alderson Thomas.

It was contended by the objector that the said Joseph Hadfield was not in the actual possession of the said rent-charge for six calendar months previous to the 31st of July, 1872, as required by the 2 Will. 4. c. 45. s. 26.

It was contended by the party objected to upon the authority of *Heelis v. Blain* (1) that the Statute of Uses, 27 Hen. 8. c. 10, operated to give to the said party objected to, and the said other persons, parties to the said indenture of the second part, the actual possession of the said rent-charge on the execution of the said indenture.

The Revising Barrister held, upon the authority of that case, that the claim was good.

Herschell, for the appellant, contended that the decision in *Heelis v. Blain* (1) was wrong, and ought to be overruled, inasmuch as the Statute of Uses never gave "the actual possession" which the 26th section of the Reform Act (2 Will. 4. c. 45) contemplated. [He cited *Williams on Real Property*, 8th edition, p. 176, *Gilbert on Uses*, 3rd edition, pp. 185, 228, *Lutwich v. Mitton* (2), *Fonblanque on Equity*, vol. 2, p. 12, and *Comyn's Digest*, Uses (1), where it is said, "By statute 27 Hen. 8. c. 10 *cestui que use* is immediately seised and in actual possession—Cro. Eliz. 46, and therefore shall have assize or trespass against a stranger before entry," and which was relied on by counsel for the appellant in *Heelis v. Blain* (1) and *Comyn's Digest*, Trespass (B. 3), where it is said, "so a bargainee shall not have trespass before entry though the possession is transferred to him by the statute"—*Geary v. Bearcroft*

(1) 18 Com. B. Rep. N.S. 90; s. c. 34 Law J. Rep. (N.S.) C.P. 88.

(2) Cro. Jac. 604.

(3); *Bridgman's Judgments*, 495; *Anelay v. Lewis* (4); *Bacon's Readings on the Statute of Uses*, pp. 26, 38; *Littleton's Tenures*, p. 366; *Mallory's Case* (5); *Green v. Wallwin* (6); and *Roscoe on Real Actions*, p. 652.

Mellor (Kenelm Digby with him), for the respondent, contended, first, that as the Court in registration cases was a Court of ultimate appeal its decisions were binding upon itself in like manner as decisions of the House of Lords are binding on the House itself—*The Attorney General v. The Dean and Canons of Windsor* (7); *Beamish v. Beamish* (8); per Lord Wensleydale in *The Mersey Docks and Harbour Board v. Gibbs* (9); and *Wilt's Claim of Peerage* (10); 6 Vict. c. 18. s. 66. Secondly, that *Heelis v. Blain* (1) was rightly decided—*Gilbert on Rents*, p. 38, *Com. Dig.*, title Seisin (C.); *Murray v. Thorniley* (11); *Hayden v. The Overseers of Twerton* (12); *Barker v. Keats* (13); *Cruise's Dig.*, 386; *Com. Dig.*, Attornment (A.), where it is said, "So if a man grant a rent-charge or a rent-seck over to another, the tertenant who has the freehold must attorn to the grant," and at (B. 1) where it is said, "So if the tenant, &c., deliver a penny, half-penny, &c., to the grantee by way of attornment;" at (L.), "But an attornment is not necessary where the estate passes by way of use, for the statute 27 Hen. 8. c. 10 executes the possession to the use, Co. L. 309 b, R. Dig., 30 a"—*Cook v. Herle* (14); *Gale on Easements*, 3rd edition, p. 323; *Cole on Ejectment*, 67; and *Sanders on Uses*, 5th edition, p. 25.

Herschell replied.

(3) Carter 66.

(4) 17 Com. B. Rep. N.S. 316; s. c. 25 Law J. Rep. (N.S.) C.P. 121.

(5) 5 Rep. 111 b.

(6) Noy 73.

(7) 8 H.L. Cas. 369; s. c. 30 Law J. Rep. (N.S.) Chanc. 529.

(8) 9 H.L. Cas. 274.

(9) 35 Law J. Rep. (N.S.) Exch. 225; s. c. Law Rep. 1 H.L. 125.

(10) Law Rep. 4 H.L. Cas. 147.

(11) 2 Com. B. Rep. 217; s. c. 16 Law J. Rep. (N.S.) C.P. 155.

(12) 4 Com. B. Rep. 1; s. c. 16 Law J. Rep. (N.S.) C.P. 88.

(13) 1 Mod. 263; s. c. 2 Mod. 249.

(14) 2 Mod. 138.

BOVILL, C.J.—In this case the Revising Barrister allowed the claim to vote of Joseph Hadfield, although there had been no actual receipt by him of the rent-charge in respect of which he claimed for six months previously to the 31st of July. The respondents contended that the claimant was entitled to vote notwithstanding he had not been in such receipt of the rent, because by force of the Statute of Uses (27 Henry 8. c. 10) under which the grant of the rent-charge operated, he was in the actual possession of the rent-charge as soon as the grant was made, so that he was thereby brought within the 26th section of the Reform Act (2 Will. 4. c. 45). That section enacts that no person shall be registered “in respect of his estate or interest in any lands or tenements as a freeholder, copyholder, customary tenant or tenant in ancient demesne, unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof, for his own use for six calendar months at least next previous to the last day of July in such year.” The terms of that section are applicable to lands or tenements, and rent-charge is a tenement, and according to the earlier decisions, namely, *Murray v. Thorniley* (11), and *Hayden v. The Overseers of Twerton* (12), there must be an actual possession of it within the meaning of this section in order to entitle the grantee of the rent-charge to be registered. When he takes the rent-charge at common law and not under the Statute of Uses, he must, as was decided by us lately in *Orme's Case* (15), be in the actual receipt of the rent; but when the rent-charge takes effect by virtue of the Statute of Uses, it was decided in *Heelis v. Blain* (1) that such receipt of rent was not necessary. The learned counsel for the appellant has addressed us with a very able argument to shew that the decision in *Heelis v. Blain* (1) is not warranted in point of law. Strong reasons have been given by him for saying that if the matter were new the decision by us should be different from what was decided by this Court in *Heelis v. Blain* (1), and the question which arises is whether we

are now to act according to that decision or whether we are to lay down a different rule.

On behalf of the respondents it was contended that this Court being one of ultimate appeal in registration cases ought not to overrule its previous decisions. The Court, however, is often in a difficulty as to what is the true meaning of an Act of Parliament, which frequently arises from the mode in which Acts are framed, and altered in passing through the Houses of Parliament. There are also cases in which the decisions of this Court have not been uniform. In *Rolleston v. Cope* (16) this Court had to determine between two former decisions which were apparently contradictory. I should therefore be sorry to lay down any rule to prevent this Court from reconsidering its judgment on any point which may come before it and in which it may have been mistaken. I do not consider that this Court is absolutely bound to adhere in every case, as the House of Lords does, to its previous decisions. The House of Lords is the ultimate Court of Appeal, and its decisions are declarations of the law by the whole House of Peers, although in modern days only a selected number of its members takes part in pronouncing them. It seems to be clearly settled that the law so declared by the House of Lords is binding on all and on the House itself. That principle, I think, does not apply to the Courts of law at Westminster in cases where they have a peculiar jurisdiction, such as in appeals to the Queen's Bench from the Quarter Sessions, in cases in the Exchequer relating to the revenue, and in this Court in cases under the Registration Acts, and in matters relating to the management of railways, under the Railway and Canal Traffic Act. It must necessarily involve time before the law is settled in matters under these Acts, and great inconvenience and mischief would result if this Court, in such cases, were to hold itself conclusively bound by its former decisions. I therefore think that I have full liberty to hold myself not conclusively bound by the decision in *Heelis*

(15) *Ante*, C.P. 38.

(16) 40 Law J. Rep. (N.S.) C.P. 160; s. c. Law Rep. 6 C.P. 292.

v. *Blain* (1), but in considering the question whether we are now to act on it, I think we ought to do so unless it be most clearly made out that it cannot be supported in law, and that our adopting it would lead to inconvenience. Now if this case were a matter affecting titles and the practice of conveyancing, it would be very important to take care how we acted, but that is not so as it seems to me, and all we have to do is to ascertain the effect of the operation of the Statute of Uses as regards the franchise. *Heelis v. Blain* (1) was a decision only on that point. The question was whether a person taking a rent charge under a grant which operated by force of the Statute of Uses was in the actual possession of such rent-charge as soon as the grant was executed. This Court in *Heelis v. Blain* (1) was of opinion that he was, and the Court referred to several authorities in support of such opinion, but unfortunately several other authorities which have been brought before us in this case were not present to the mind of the Court on that occasion, and I must say that the argument of Mr. Herschell has shaken my confidence in the decision in *Heelis v. Blain* (1); but in order to prevail the argument must not only raise a doubt, but it must conclusively shew that that decision was wrong. Now does it do so? I think it does not. It has been considered for a length of time that the Statute of Uses gives a possession which for some purposes is treated the same as an actual possession. The more ordinary case of constructive actual possession under the statute is that of a lease and release, which is said by Noy was resorted to in order to evade the Statute of Uses. Mr. Preston at page 219 of the second volume of his work on conveyancing says, "By the common law and till the statute for the amendment of the law (4 Anne, c. 16. s. 9) attornment of the particular tenant was essential to the validity of the grant, and the tenant might in many cases withhold attornment, or the grantor or grantee might die before attornment had taken place. Each of these events would defeat the grant, for unless attornment was obtained in the lifetime of the grantor, and also of the grantee, the grant

became inoperative, and failed in effect. Besides there was a notoriety attending livery or attornment, which must have been distressing in transactions of delicacy which required secrecy; and in giving the history of this assurance, it is said this conveyance was at first only purposely contrived by Serjeant Francis Moore, at the request of Lord Norris, to the end that some of his kindred or near relations should not take notice by any search of public records what conveyance or settlement he should make of his estate." "The inconveniences thus experienced naturally led men of extensive practice to contrive some mode of conveyance by which the estate might be transferred immediately and without any interval from one man to another, although both parties were at a distance from the lands, and without even the necessity of their meeting for the purpose or their giving any written authority to deliver or receive the seisin." In *Noy's Maxims*, 289, Noy, who has always been considered a very high authority, says—"The usual conveyance at common law was by feoffment, to which livery and seisin were necessary, the possession being thereby given to the feoffee; but if there were a tenant in possession, and so livery could not be made, then the reversion was granted, and the particular tenant always attorned to the grantee; and upon the same reason it was that afterwards a lease and release were held a good conveyance to pass an estate; but at that time it was made no question but that the lessee was to be in actual possession by means of an actual entry on the lands before the release was made. Afterwards, when uses became frequent, and settlements to uses very common, to prevent the many inconveniences thereby introduced the statute of 27 Hen. 8. c. 10, was made, by which the use was united to the possession; and after this statute, it became an opinion that if a lease for years were made upon a valuable consideration by the words 'demise, let or grant,' a release might operate upon it without an actual entry of the lessee, because the statute executed the lease and raised a use presently to the lessee." Further, at p. 228, Mr. Preston says—"The bargain

and sale passed an use, and the use was executed by the statute of 27 Hen. 8. for transferring uses into possession, and the use became a term, in other words, an actual estate, and the bargainee was without entry precisely in the same circumstances as a lessee at the common law was after entry or attornment, with the difference only that a bargainee could not maintain trespass for any injury to the possession until he had actually entered; but this was a circumstance which, though it affected the remedy for injuries to the possession, was not of any importance in the consideration of the principles on which the doctrine of releases in enlargement of a vested estate for years depended."

In *Barkerv. Keate* (13) the question arose in 29 Car. 2, as to the operation of the Statute of Uses, and whether it gave sufficient possession to make the lessee under a bargain and sale for a year a good tenant to the præcipe, and it was there held "that the word 'grant' in the lease will make the land pass by way of use; that the reservation of a peppercorn was a good consideration to raise an use to support a common recovery; that this lease being within the Statute of Uses, there was no need of an actual entry to make the lessee capable of the release, for by virtue of the statute he shall be adjudged to be in actual possession, and so a good tenant to the præcipe." The statute, therefore, did for some purposes transfer an actual possession, and in the ordinary forms of conveyance by lease and release since that case, the release has clearly treated and described the bargainee for the year as being in the actual possession. Consequently there were purposes for which during upwards of two centuries the statute has been considered to give the *actual possession*. It has been held in *Geary v. Bearcroft* (3) that the statute did not give a possession which would enable the grantee to maintain trespass; whilst in an *Anonymous case* (17) it was decided that it did give such possession as would enable him to maintain an assize. It would be hopeless to attempt to reconcile the subtleties of this

branch of the law, or to steer between them so as to lay down a consistent rule. I find that for some purposes the Statute of Uses has been considered to give actual possession, and for others not to do so, and under these circumstances are we to say that the Court in *Heelis v. Blain* (1) was clearly wrong in holding that the statute gave possession of a rent charge sufficiently to satisfy the 26th section of the Reform Act, 2 Will. 4. c. 45? There is a difficulty in applying words applicable to lands to an incorporeal tenement. Probably if the matter had been *res nova*, I should have decided differently from what was decided by *Heelis v. Blain* (1), but I cannot find sufficient reasons to say that the authorities on the subject are so clear as that the decision in *Heelis v. Blain* (1) was certainly wrong. That decision was in 1864, and has been acted on ever since, and Parliament has not thought proper to make any alteration of the law there laid down, although it has since legislated upon the subject.

It seems to me, therefore, that there are no sufficient grounds for our so dissenting from the decision in *Heelis v. Blain* (1) as that we ought to overrule it. This appeal must be dismissed, but under the circumstances without costs.

BRETT, J. — The question is, whether within the meaning of the Reform Act, 2 Will. 4. c. 45. s. 26, the claimant can be held to have been in the actual possession of the rent-charge for six months before the 31st of July. It is said that he can because the grant to him of the rent charge took effect under the Statute of Uses, and by that statute he is to be deemed to have been in the actual possession on the execution of the grant, and unless the case of *Heelis v. Blain* (1) is to be overruled that is right. Therefore, it has been urged on the part of the appellant that we ought to overrule that case. On the other hand, it has been argued for the respondents that we cannot do so, first, because this Court is a Court of ultimate appeal in registration cases; and secondly, because of the words of 6 Vict. c. 18. s. 66, viz., "that every decision of the Court shall be final and con-

clusive in the case upon the point of law adjudicated upon, and shall be binding upon every Committee of the House of Commons appointed for the trial of any petition complaining of an undue election or return of any member to serve in Parliament." Cases have been cited to shew that the House of Lords, when acting in a judicial capacity, will not overrule its own decisions. I doubt very much whether if it were shewn clearly to the House that a former decision was wrong, it would not reconsider the same and act accordingly; but be that as it may, I think this Court, sitting to administer the law under the Act, is bound to administer the law which is right according to the best of its judgment. The Court should, I think, as I said in *Orme's Case* (15), adhere loyally to its former decisions, unless clearly shewn to have been wrong, but if a former decision be clearly wrong the Court ought not to follow it; and this Court I am sure has so acted upon more than one occasion. With respect to the words of 6 Vict. c. 18. s. 66, it seems to me that the decision of the Court is to be taken only as final in the case in which it is given.

The question then is, whether this Court should overrule the decision in *Heelis v. Blain* (1). The decision there was that the phrase, "actual possession," in section 26 of the Reform Act, must have the same meaning ascribed to it as the word "possession" in the Statute of Uses. The authorities to which my Lord has referred shew by a continuous and general interpretation of conveyancers and Courts that "the possession" spoken of in the Statute of Uses is to be deemed to be "an actual possession," and that that applies to the case of a rent-charge as well as to the case of land. In the case of land it can be seen if the actual possession has been got rid of the moment it occurs, and there seems to me to be no great difficulty in shewing by some visible act that the *quasi* possession given by the Statute of Uses has been got rid of, and if it has before the six months have taken place required by the 26th section of the Reform Act (2 Will. 4. c. 45), then of course the possession has not continued for such six months. In the case of a

rent-charge it is more difficult to see when the actual possession has been got rid of. It may be done by the assignment of the rent-charge, and so it would be thereby visibly got rid of, and it may be that the mere abstaining from receiving the rent when due would be evidence that it had been got rid of. But it seems to me that the actual possession of the rent-charge being once in the grantee by force of the Statute of Uses, it must, from its nature, be taken to remain in him until some rent be due and be not received, or until he has done some act to divest himself of it. I think that is the substantial ground on which *Heelis v. Blain* (1) was decided, and paying the Judges who decided that case the deference due to their great learning and ability, I am wholly unprepared to say that their decision was wrong. Therefore it seems to me that the clear course for us now to follow is not to overrule *Heelis v. Blain* (1). I admit that this is an anomalous decision with regard to the Franchise Acts, but it must so remain until the legislature interferes.

GROVE, J.—I also am of opinion that the decision of the Revising Barrister should be affirmed; though I must admit that if the matter had come before the Court for the first time, I think, reading the 18th and 26th sections of the Reform Act (2 Will. 4. c. 45) together, I should have held that the 26th section meant that there should be something which should have the effect of preventing a mere paper title, and should enable the public to know the person who was the real owner in possession of that which was to confer the franchise. In *Murray v. Thorniley* (11), which turned upon the meaning of the words "actual possession" in this 26th section, Tindal, C.J., said—“We think those words mean a possession in fact, as contradistinguished from a possession in law; and that as the possession in fact of a rent-charge must be the actual manual receipt of the rent itself, or some part of it, or of something in lieu of it, so there could be no such possession in fact in this case, where the first payment of the rent did not become due until after the expiration of the month of July, and where nothing whatever took

place but the mere execution of the deed." And in another part of the judgment that learned Judge said—"The actual possession of rent being therefore a well-known legal phrase or expression, the legislature cannot be taken to have used it in any other than such well-known sense, that is, as contradistinguished from such possession in law, or right to the rent-charge, as the bare delivery of the deed of grant would confer." It may, therefore, be very doubtful whether "actual possession" may not be used in the Reform Act in a different sense from what the possession given by force of the Statute of Uses has been understood to mean. In *Barker v. Keate* (13) the actual possession given by the Statute of Uses was understood to be where there had been no physical possession, or what would be considered such, as in the case of a rent-charge by the receipt of the rent. All this has arisen from the subtlety of conveyancers, for the words of the Statute of Uses are sufficiently clear. The object of that Act was to make all ownerships apparent, so that the real owner should also be the apparent owner. But we know how that object has been defeated, and how the statute has been made the means of conveying land, and of giving a possession which could only be acquired by having an actual possession. One then gets into a labyrinth of terms, and the question is whether the words "actual possession" in the Reform Act are used in a different sense from such actual possession under the Statute of Uses. I cannot say, therefore, that the decision in *Heelis v. Blain* (1) is wrong; and I agree that except it be clearly wrong this Court ought not to overrule its own decision, particularly as it has remained and been acted on for several years, and been recognised as law when the subject was again dealt with by the legislature. I may add that I do not think the words of section 66 of 6 Vict. c. 18, necessarily make the decision of this Court final and conclusive to all intents and purposes, but still the decision ought to be very clearly wrong before we overrule it.

DENMAN, J.—I am of the same opinion. The great question in this case is what is

the meaning of the words "actual possession" in section 26 of the Reform Act, when applied to a rent-charge given by a deed, which takes effect under the Statute of Uses. I agree that those words mean possession in fact in some sense, and yet there are many cases in which what is called "actual" is really only "constructive." One of the latest instances of this is to be found in *Gladstone v. Padwick* (18), where the expression "actual seizure" was held to mean no more than "seizure," and it was decided that the actual seizure by the sheriff at a mansion house included goods at a farm house, situate nearly a mile distant from the mansion. Then, with respect to a rent-charge, actual possession can hardly mean actual possession in fact, because the subject matter is incorporeal. That being so, we have the decision in *Heelis v. Blain* (1) as an express authority on the point. It was decided before the last Registration Act (31 & 32 Vict. c. 58), and it must be taken that the legislature knew of it, and therefore it ought to be binding upon us, unless it can conclusively be shewn to be wrong. Now, notwithstanding a most able argument which I have heard from Mr. Herschell, I am by no means clear that had the case come before us for the first time, I should not have decided in the same way as was decided by this Court in *Heelis v. Blain* (1). That being so, I do not think that we ought to overrule that case, and consequently the decision of the Revising Barrister, which was given upon the authority of that case, ought to be affirmed.

Decision affirmed.

Attorneys—J. E. Fox, agent for Robert Evans, of Ashton-under-Lyne, for appellant; Rickards & Walker, agents for J. W. Mellor, of Oldham, for respondents.

(18) 40 Law J. Rep. (n.s.) Exch. 154; s. c. Law Rep. 6 Exch. 208.

(In the Second Division of the Court.)

1873. }
May 5. } CORKLING v. MASSEY.*

Charter-Party—Warranty—"Expected to be at A. about the 15th of December."

In a charter-party, dated the 14th of November, 1871, defendant's ship was chartered to the plaintiff as follows—"It is this day mutually agreed between Messrs. M. & S., of the good British steamship *Ceres*, of the measurement, &c., whereof, &c., is master, expected to be at Alexandria about the 15th of December, and the plaintiff," &c., &c. The declaration setting out the charter-party alleged as a breach that the ship was not then expected to be at Alexandria about that day, but was then in such part of the world and under such engagements that the ship could not perform her said engagements and arrive at Alexandria about the same day:—Held, on demurrer, that the statement in the charter-party was a warranty or condition that the ship was then in such a place and under such engagement as that she might reasonably be expected to be at Alexandria about the day mentioned, and that the breach was well assigned.

A plea to the above declaration set out the position in which and certain engagements under which the ship then was, and alleged notice thereof to the plaintiff, and that the charter-party was made subject to the condition that the said vessel should with all convenient speed fulfil her said engagements, and then sail and proceed to Alexandria, and averred performance of the said condition:—Held, that the plea was a good plea upon the authority of *Young v. Austen* (38 Law J. Rep. (N.S.) C.P. 233).

The declaration, which was on a charter-party, dated the 14th of November, 1871, set out the contract verbatim, the material part of which was that it was agreed between the defendants of the good British steamship or vessel called the *Ceres*, of the measurement, &c., whereof, &c., is master, "expected to be at Alexandria about the 15th of December," and the plaintiff, of Manchester, merchant, that the said ship should, with all convenient

speed, sail and proceed to Alexandria, Egypt, or so near thereunto as she may safely get, and there load from the agents of the charterers a full and complete cargo of cotton seed which the said merchant bound himself to ship and send alongside at the port of loading as fast as the steamer could take it in. The breach assigned was that the said ship was not then expected to be at Alexandria about the said 15th day of December, 1871, but was then in such part of the world and under such engagements that the said ship could not perform her said engagements and arrive at Alexandria about the said day.

The third plea was that before and at the time of the making of the alleged agreement, the said vessel *Ceres* in the said charter-party mentioned was on a passage to Revel and Helsingfors, and thence to load from Cronstadt or Riga for a port on the east coast of England, or a port on the continent, and thence to proceed to Alexandria with a cargo from a coal port, of all which the plaintiff had notice, and that the charter-party was made subject to the condition that the said vessel should with all convenient speed fulfil her said engagements and then sail and proceed to Alexandria, and that the said vessel did with all convenient speed fulfil her said engagement, and sail and proceed to Alexandria.

Demurrers to the declaration and the third plea.

Day (Petheram with him), for the plaintiff.—The statement in the charter-party is not too vague to be treated as a warranty—*Behn v. Burness* (1). It is not so vague as "thereabouts," the expression used in *Barker v. Windle* (2), yet even in that case if the question had arisen on demurrer, Martin, B., would have held the statement to amount to a warranty. In *Ollive v. Booker*, referred to in *Behn v. Burness* (1), a statement was held a condition, though it is said in the marginal note to have been, "having sailed three weeks ago or thereabouts."

(1) 3 B. & S. 751; s. c. 32 Law J. Rep. (N.S.) Q.B. 204.

(2) 6 E. & B. 675; s. c. *nom.* *Windle v. Barker* 25 Law J. Rep. (N.S.) Q.B. 349.

* Coram Keating, J.; and Honyman, J.
NEW SERIES, 42.—C.P.

Butt (*Webster* with him), for the defendant.—The statement that the vessel was “expected to be at Alexandria about the 15th of December,” did not amount to a warranty that she was in such a position as to render it probable that she would arrive at Alexandria. It is conceded that a statement that a ship was “now in the port of Amsterdam” amounts to a warranty—*Behn v. Burness* (1), but that is a more positive allegation than that she was expected to be. *Barker v. Windle* (2) is nearer in point. There a statement of the measurement of the ship to be “180 to 200 tons or thereabouts,” was held not to be a warranty but a matter of description only.

Then the third plea is a good one. Since *Young v. Austen* (3) the plea must be construed to mean that the condition was in writing and then it is good.

Day, in reply.

KEATING, J.—With reference to the demurrer to the third plea, we think that plea rests upon the authority of *Young v. Austen* (3), and we do not mean to interfere with that case.

The main question discussed before us has been with reference to the breach in the declaration. The charter-party is stated to be made between the defendant and Sawyer of the good steamship *Ceres*, “expected to be at Alexandria about the 15th December,” &c., and the breach in the declaration has treated that statement as part of the contract or a warranty to that effect, and alleged that the ship was not then expected to be at Alexandria about that day, but was then in such part of the world and under such engagements that she could not perform them and arrive at Alexandria about that day. Whether that is a good breach depends upon whether the words are merely words of description, and not intended to be part of the contract, or were intended as a part of the contract. I think they were part of the contract, and that the breach is well assigned. No doubt the words are somewhat vague, and I have felt some difficulty during the argu-

ment, and I do not say it is absolutely removed, but on the whole I have come to this conclusion. What weighs with me most is the situation of the parties who were about to enter into the charter-party. It is of the utmost importance to the charterer to know when the ship is to be at Alexandria, the port of loading. If it be not a contract that the ship is expected to be there at the time named, or in other words that she is in such a position that she may reasonably be expected to be there, then there is no stipulation to prevent the charterer from being entirely at the mercy of the shipowner as to when the ship would be at Alexandria. I do not think we do any violence to the words of the contract in putting the construction upon it we are now doing. The distinction between a contract or warranty and a collateral representation is well pointed out by the Court of Exchequer Chamber in *Behn v. Burness* (1), in the judgment delivered by Williams, J., and we quite concur with what is there stated. For these reasons I think the plaintiff is entitled to judgment on the demurrer to the declaration.

HONYMAN, J.—I think that *Young v. Austen* (3) is in point as to the 3rd plea. And as to the breach assigned in the declaration, I think the statement in the charter-party is not a matter of description merely, but part of the contract. If the statement had been “now at Alexandria,” it would clearly have been a warranty, but here it is “expected to be at.” I do not think that that variance in the language creates a substantial distinction between the two cases. There is nothing in the charter-party but that statement to inform the charterer when he is to have his cargo ready.

I don't think this case differs much from *Gorriessen v. Perrin* (4), in which case gambier had been bought, “expected to arrive in London,” per certain ships. There is also the case of *Oliver v. Fielden* (5), where the ship mentioned in the charter-party as then on the stocks, was to be launched and

(4) 2 Com. B. Rep. N.S. 681; s. c. 27 Law J. Rep. (N.S.) C.P. 29.

(5) 4 Exch. Rep. 135; s. c. 18 Law J. Rep. (N.S.) Exch. 353.

(3) 38 Law J. Rep. (N.S.) C.P. 233; s. c. Law Rep. 4 O.B. 563.

ready to receive cargo all May, and the readiness to receive cargo all May was held to be a condition, and not a mere matter of description. The distinction between a description and a condition or warranty is pointed out in *Barker v. Windle* (2), and in the Exchequer Chamber in *Behn v. Burness* (1). Therefore there will be judgment for the plaintiff on the demurrer to the declaration, and for the defendant on the demurrer to the 3rd plea.

Judgment accordingly.

Attorneys — Weller & Handson, for plaintiff;
Pritchard & Sons, agents for J. & T. W. Hearfield, Hull, for defendant.

(In the Second Division of the Court.)

1873. } MARSHALL (appellant) v. SMITH
April 29. } (respondent).

Penalty—Local Government Act, 1858
(21 & 22 Vict. c. 98)—*Bye-laws—Structure of Party-walls—Continuing Offence—New Buildings—Public Health Act, 1848*
—11 & 12 Vict. c. 63. s. 115.

A local board of health made a bye-law under the 11 & 12 Vict. c. 63. s. 115, and 21 & 22 Vict. c. 98. s. 34, as to the structure of new buildings, requiring the party-wall of a house of more than one storey to be built of the thickness of nine inches, subject to a penalty, and by another bye-law a penalty was imposed of forty shillings, *de die in diem*, in case of a continuing offence under other bye-laws after written notice by the board to the offender. A person built a house of more than one storey, with a party-wall of a thickness of only $4\frac{1}{2}$ inches, and sold and disposed of the house, and did nothing more to it. Five months afterwards he was fined under the former bye-law. Subsequently, notice having been given to him to make the walls of the requisite thickness, he was fined again in a continuing penalty for seven days of five shillings a day:—Held, that the latter bye-law did not apply to an offence of this description, which was complete before the first conviction, and that the latter conviction was, therefore, bad.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 108.]

1873. }
May 8. }

SMITH v. BAKER.

Trover—Waiver of Tort—Petitioning Court of Bankruptcy and obtaining Proceeds of Goods sold under Bill of Sale.

The defendant sold the goods of D. under a bill of sale. D. became bankrupt, and the plaintiff, his trustee, petitioned the Court of Bankruptcy to set aside the sale as fraudulent or void, and order payment of the proceeds (the amount of which he knew) to him. The Court so ordered and the money was paid. The plaintiff afterwards being dissatisfied with the amount realised, and desiring to obtain the difference between the value of the goods and proceeds of the sale brought trover against the defendant:—Held, that he could not do so as by his acts he had waived the tort.

The plaintiff, as trustee of W. Dale a bankrupt, sued the defendant for converting certain goods, by selling them under an alleged bill of sale.

The defendant pleaded not guilty, not possessed, and a special plea alleging that the conversion was the sale for 179l. 18s. 6d. of goods comprised in a bill of sale, that the plaintiff had petitioned the Court of Bankruptcy to declare the bill of sale fraudulent and void as against the plaintiff, and order payment to him of the proceeds of those goods so sold, and delivery of those unsold, that the Court declared the bill of sale fraudulent and void against the plaintiff and ordered payment of the said sum, that the defendant paid the same, being the gross amount realised by the sale, that no goods remained unsold, and that the plaintiff accepted the said sum in satisfaction of the goods sold and his claim in respect thereof, and thereby before suit waived his claim and cause of action.

At the trial it appeared that the plaintiff had petitioned as alleged (on an affidavit, alleging that the bill of sale was of all Dale's goods for an antecedent debt, voluntarily made when Dale was insolvent and to defraud his creditors, and that the sale realised 179l. and upwards); that the Court ordered as alleged; that the money was paid; and that such money

was the gross proceeds of the sale of all the goods.

A verdict was found for the plaintiff for the damages in the declaration (subject to terms), with leave to the defendant to move to set it aside and enter a nonsuit, or verdict for the defendant, on the ground that the plaintiff was not entitled to recover after obtaining the proceeds of the sale in the Court of Bankruptcy, the Court to draw inferences. And a rule *nisi* having been granted accordingly,

Lopes and *Saunders* shewed cause.—It no doubt must be admitted that if an action for money had and received had been brought, there would have been a conclusive waiver of the tort, as the plaintiff would have thereby elected to affirm the sale and treat the defendant as his agent. But what took place here was not equivalent to such an action, and there was no intention to treat the defendant otherwise than as a wrong doer. This is a question of fact; and that the intention is to be regarded, and that this is not affected by the act of the Court is shewn by *Burn v. Morris* (1); *Hurst v. Gwennap* (2); and *Morris v. Robinson* (3). As respects *Brewer v. Sparrow* (4) it is pointed out in *Valpy v. Sanders* (5) that the accounts were gone into and all the transactions treated as valid. Lastly, there was no proof of the satisfaction and waiver alleged in the special plea.

Cole and *Charles* in support of the rule.—The sale was valid against every one but the trustee who had the choice of affirming it and taking the proceeds, or disaffirming it and claiming the value of the goods; he cannot however do both, and here he demanded the proceeds, and what he did was equivalent to an action of money had and received, which is a conclusive waiver of the tort—*Smith v. Hodson* and notes thereto (6); *Brewer v. Sparrow* (4); *Burn v. Morris* (1); *Lythgoe v. Vernon* (7);

(1) 4 Tyrw. 485.

(2) 2 Stark. 306.

(3) 3 B. & C. 196.

(4) 7 B. & C. 310.

(5) 5 Com. B. Rep. 886; s. c. 17 Law J. Rep. (n.s.) C.P. 249.

(6) 2 Smith's L.C. 119, 6th edit.

(7) 5 Hurl. & N. 180; s. c. 29 Law J. Rep. (n.s.) Exch. 164.

Heilbut v. Nevill (8); *Marks v. Feldman* (9). The facts existing here are exactly those which it is necessary to prove in such an action, namely, a fraudulent or void sale and a ratification of agency; and it may be pointed out that it is clear the plaintiff was aware of the facts, as in his affidavit in applying to the Court of Bankruptcy he states both the sale and amount of the proceeds. And as respects the pleading point, *Valpy v. Sanders* (5) shews that not guilty raises the question.

BOVILL, C.J.—The question here is, whether there has been a waiver or adoption of the wrongful act of the defendant. The defendant took the goods under a bill of sale for an antecedent debt; this was an act of bankruptcy by Dale, was fraudulent under 32 & 33 Vict. c. 71. s. 6, and a fraudulent preference, and the Court of Bankruptcy declared the bill void as against the trustee. As between Dale and the defendant it was valid, and the defendant might sell, except that such sale was subject to become void if Dale became bankrupt. Dale did become bankrupt, and the trustee decided to avoid the sale and went to the Bankruptcy Court. He might have treated the sale as tortious and have claimed the value of the goods and damages, but he did not commence an action on the ground that the sale was fraudulent or void, but resorted to the Bankruptcy Court which declared it fraudulent and void, and he did more, he asked for the proceeds of what had been sold and that the unsold goods should be delivered up to him. The question turns on this act. The law is clear, that if a person whose goods have been taken chooses to waive the tort he is at liberty to do so, and may sue for the price received for them if they have been sold, he may waive the tort and sue in contract. If he bring an action for money had and received, this is a conclusive waiver of the tort, and if he bring trover, that is an election to treat the matter as a tort, as to which there is a clear exposition in

(8) 38 Law J. Rep. C.P. 273; s. c. 39 Law J. Rep. (n.s.) C.P. 245.

(9) 10 B. & S. 371, 378; s. c. 38 Law J. Rep. (n.s.) Q.B. 220; 39 Law J. Rep. (n.s.) Q.B. 101.

Buckland v. Johnson (10). But where, as in some cases the acts may amount to a waiver in law, in other cases they may be doubtful. Here it has been argued that the proceedings in the Court of Bankruptcy were equivalent to an action for money had and received. Section 72 is wide, and gives the Bankruptcy Court power to determine all questions coming within its cognisance, which it may deem expedient to decide for the purpose of doing complete justice. Here there was an application to that Court for the recovery of the proceeds of the goods which had been sold, and payment of such proceeds to the plaintiff. The effect as to what was sold is said to be in law the same as an action for money had and received. If so, there is a conclusive bar; if not, what is the inference to be drawn? In judging of this as matter of fact we ought to be guided by similar decided cases. I conclude as matter of fact that there was an affirmation of the sale by the plaintiff claiming the proceeds, a waiver of the wrongful act and an election to take the proceeds.

KEATING, J.—I am entirely of the same opinion. The question is a short one. It is admitted that if an action for money had and received had been brought this would have been a conclusive affirmation of the sale. The proceedings here taken were tantamount to this. The plaintiff claimed by judicial proceedings to have the proceeds awarded to him; this was ordered, he put the order in force, and he received them. It seems to me that this is tantamount to an action for money had and received, which is not the only mode of affirming a sale, as is shewn by the cases, and if it be not technically so, I should agree that on the facts there was a clear affirmation. The cases cited shew that it is only necessary there should be a claim for the proceeds and a receipt of them, and I agree with my Lord, and also think the rule should be made absolute.

HONYMAN, J.—I am of the same opinion. About the law there is no dispute. A man cannot both say a sale is valid and

void, and it is admitted an action for money had and received is a waiver of the tort, because this treats the tortfeasor as an agent. The only question is whether what took place here is tantamount to this. The plaintiff, instead of taking proceedings to make the sale void, or to make it void and get paid the value of the goods, elects to ask for the proceeds of the sale and gets them, and as a juryman I infer he elected to affirm the sale.

Rule absolute.

Attorneys—Merediths, Roberts & Mills, agents for J. W. S. Dix, Bristol, for plaintiff; Gregory, Rowcliffe & Co., agents for Benson & Elletson, Bristol, for defendant.

(In the Second Division of the Court.)

1873. }
April 22. }

NICHOLLS v. HALL.

Penalty—Evidence of Scienter—Contagious Diseases (Animal) Act, 1869 (32 & 33 Vict. c. 70. ss. 75, 103)—Animals Order of 1871, part II. sect. 19—Discovery of Disease—Contravention of Order—Appeal from Justices—Costs.

By the 19th section, part II. of the *Animals' Order of 1871, made under the Contagious Diseases (Animals) Act, 1869, sec. 75, every person having in his possession, or under his charge, an animal affected with a contagious disease is required, with all practicable speed, to give notice to a police constable of the fact of the animal being so affected; and by the 103rd section of the Act, if any person acts in contravention of any Order of Council, he shall be liable to a penalty not exceeding 20l., or when such offence is committed in respect of more than four animals, a penalty not exceeding 5l. for each animal. A person was convicted of neglecting to give the notice required by the above Order, that animals in his possession were affected with the foot and mouth disease, upon a complaint, where no evidence was given to prove that the defendant knew that the animals were so affected:—Held, that evidence was necessary to shew that the defendant knew that the*

(10) 15 Com. B. Rep. 145; s. c. 23 Law J. Rep. (N.S.) C.P. 204.

animals were so affected, and that the conviction must be quashed.

The complaint was preferred by the Inspector of Police against a cattle dealer:—Held, that the appellant having been convicted of an offence, and having shewn that he ought not to have been, the conviction should be quashed, with costs to the appellant.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 105.]

(In the Second Division of the Court.)

1873. } HEMMING, appellant, v.
April 28, 29. } BLANTON, respondent (1).

Limitations, Statute of—Mortgagor and Mortgagee—Adverse Possession—Payment of Interest after Twenty Years—County Court—Time for Appealing—3 & 4 Will. 4. c. 27. ss. 4, 28, 35; 7 Will. 4. and 1 Vict. c. 28. s. 1; 13 & 14 Vict. c. 61. s. 14.

Where a demise for a term of 1,000 years by way of mortgage is created in land, and no payment of principal or interest or acknowledgment is made for more than twenty years, and the mortgagor and those claiming under him remain in possession of the premises without interruption, the title of the mortgagee under the mortgage is thenceforth barred, therefore a payment of arrears of interest and the principal to the mortgagee under a decree in a foreclosure suit, after that time has elapsed, does not revive the title in the mortgagee, and an ejectment does not then lie to recover the possession.

Semble, notice of appeal against the determination of the Judge in a plaint in the County Court is in time where a nonsuit was entered at the trial, and an application to set aside the nonsuit afterwards refused, if it be given within ten days after the refusal to set aside the nonsuit.

Appeal from the County Court of Gloucestershire.

Ejectment was brought in the County

(1) Coram Keating, J., and Honyman, J.

Court by the plaintiff to recover certain premises at Elmstone Hardwicke, on the 10th of May, 1870, against the tenant in possession. The Statute of Limitations was pleaded, and the plaintiff was nonsuited. The plaintiff subsequently applied to the Judge to set aside the nonsuit, which he refused to do. In October, 1828, the premises were conveyed in fee to Oakey. In June, 1829, Oakey demised them for 1,000 years by way of mortgage to Jeynes. Oakey died in 1837, and in April, 1839, Jeynes assigned the said mortgage term to Dobbs, and Oakey's widow was party to and ratified and confirmed the assignment, subject to the equity of redemption. Dobbs died on the 31st of December, 1864, and Marshall became her administratrix, with the will annexed. On the 2nd of March, 1867, Marshall filed a foreclosure suit in the Tewkesbury County Court against Oakey's widow and other devisees under Oakey's will, and obtained a decree. The amount ascertained to be due for principal, interest and costs of suit was afterwards paid into Court by the attorney in the suit for several of the defendants. No re-assignment or transfer of the mortgage securities was made. Marshall became a lunatic, and in March, 1870, an order under the Trustee Act, 1850, was made, vesting the premises and the term under the indenture of June, 1829, and subject thereto, in Hemming, who had been attorney for the defendants in the foreclosure suit, and is now plaintiff. A man named Haules received the rent, and had possession of the premises from forty-three years before this action, till twenty-five years ago, when the mortgagor of the deed of indenture of 1829 gave possession to Haules's son, who kept possession till Blanton, the defendant in this action, purchased the property. In 1852 an action of ejectment was brought in the Superior Court, in which Mary Dobbs was plaintiff, and the tenant then in possession was the defendant; but it was not tried, and the tenant remained in possession. There was no payment of interest or principal prior to the payment into Court under the foreclosure decree.

Notice of appeal was given within ten days after the refusal to set aside the non-

suit, but not until long after the nonsuit at the trial.

Waddy (*Bullen* with him), for the appellant. — A preliminary objection has been made to the hearing of this appeal, on the ground that the ten days' notice of appeal required by 13 & 14 Vict. c. 61, s. 14, was not given in time. Sufficient notice was given as the time is to be reckoned from when the County Court Judge refused the application to set aside the nonsuit and grant a new trial, and not from the time when the plaintiff was nonsuited—*Foster v. Green* (2).

[KEATING, J.—There leave was given to the plaintiff to move to enter a verdict, so that there was no final determination of the Judge until the motion to enter the verdict had been made and refused; but here he did finally decide the cause when he nonsuited the plaintiff; there is, therefore, a distinction between that case and the present one, which goes to the root of the matter.]

The plaintiff, at all events, can appeal against the refusal by the Judge to set aside the nonsuit, and that, in fact, will enable the whole question to be incidentally open to the appellant. Then as to the main point. The plaintiff relies on the mortgage deed and the 7 Will. 4. and 1 Vict. c. 28. That statute protects mortgagees from the operation of the Statute of Limitations, 3 & 4 Will. 4. c. 27, and enables them to recover the land within twenty years after the last payment of interest, although more than twenty years may have elapsed since the time at which the right to bring such action first accrued—*Doe dem. Palmer v. Eyre* (3), *doe dem. Baddeley v. Massey* (4), and *Ford v. Ager* (5).

[KEATING, J.—In those cases the interest was paid within the twenty years; but is there any case in which, where after twenty years have elapsed without

payment of interest, it has been held that the mortgagee may recover?]

No; but the statute expressly enables him to do so if he brings his action within twenty years after interest has been paid.

Dowdeswell, for the respondent, was not heard.

KEATING, J.—This appeal must be dismissed. An action of ejectment was brought in the County Court of Gloucestershire held at Tewkesbury to recover possession of a plot of land adjoining the Tewkesbury and Cheltenham Road. The plaintiff claimed in right of the mortgagee of a term of 1,000 years, made on the 6th of June, 1829, by one Oakey, to whom a conveyance in fee of the premises had been made on the 1st of October, 1828. The plaintiff shewed himself to be the representative of the original mortgagee. There was a transmission through various parties, and by order of Giffard, L.J., the right of the mortgagee was vested in him. The party in possession had been in possession for a great number of years, and there was not evidence to satisfy the County Court Judge that there had been any interruption for forty-three years before this action. And there was some slight evidence that the party through whom the defendant claimed had been let into possession by one who might be said to represent the original mortgagor. It appears that the plaintiff became entitled to the remaining interest in the term by having in 1868 paid into Court in a foreclosure suit the principal and interest due under the mortgage deed; and it was contended by Mr. Waddy that although adverse possession (adverse possession is not since the statute perhaps a strictly correct expression), had continued a sufficient time to give a title *per se*, yet if there was an outstanding term payment of principal and interest entitled the mortgagee to override the title by possession. It appears to me that the object of the 7 Will. 4 & 1 Vict. was to prevent the mortgagee, whose interest had been paid regularly, being barred, so that, if interest had been paid within the twenty years, time would only run against his title from that time,

(2) 30 Law J. Rep. (N.S.) Exch. 263.

(3) 17 Q.B. Rep. 366; s. c. 20 Law J. Rep. (N.S.) Q.B. 431.

(4) 17 Q.B. Rep. 373; s. c. 20 Law J. Rep. (N.S.) Q.B. 434.

(5) 2 Hurl. & C. 279; s. c. 32 Law J. Rep. (N.S.) Exch. 269.

but it is now sought by payment of arrears after twenty years to give a sort of backward effect to such payment, but I think it cannot override the right previously gained. There was no evidence that interest had ever been paid on the mortgage of 1829, therefore about forty years had elapsed before payment of principal and interest. The contention was that, by a payment after that long interval, the payment was to have relation back to a period within the twenty years so as to enable the mortgagee to bring ejectment; such contention amounted to this, that a payment of arrears at any time, however remote, would have that effect. The possession was adverse from the date of the mortgage. No interest was paid from that date till 1868, and the ejectment was brought in 1870. The plaintiff cannot recover; and the learned County Court Judge was right in his decision. The appeal must be dismissed with costs.

HONYMAN, J.—I am of opinion that on the facts found, there was no proof of any payment of principal or interest within the meaning of the 7 Will. 4. & 1 Vict. c. 28. s. 1. Then I do not think there was such a possession as kept alive the rights of the mortgagee—*Doe dem. Ryllance v. Lightfoot* (6). At any time within twenty years, and no longer, the mortgagee might bring ejectment, but the statute never intended to give a fresh right of entry. By the 3 & 4 Will. 4. c. 27. ss. 4, 28, and according to *Doe dem. Jones v. Williams* (7), a mortgagee out of possession, but who had been in receipt of the interest on his loan regularly might in twenty-one years, find himself barred, and by the 34th section the right to bring ejectment was extinguished, consequently in 1849 the right of the mortgagee and those claiming under him was extinguished. The statute applies to all cases where the right of entry is barred. There is nothing in 7 Will. 4. & 1 Vict. c. 28 to do away with that, it only enlarges the time. Then when the right was extinguished came the order of Giffard, L.J., but did that operate to remove the effect of

the statute? Not so. When the plaintiff paid into Court in the foreclosure suit, the lunatic received as mortgagee the mortgage money, but the vesting order did not operate to give more than was then vested in her. The order could only convey what interest the lunatic had. She and those claiming through her may have well been estopped from disputing the title of the mortgagor, but that was not the case here; the facts were that long before 1868 the title of the defendant was acquired by a holding without payment of interest or acknowledgment for more than twenty years.

Appeal dismissed with costs.

NOTE.—In *Stansfield v. Hobson* (3 De Gex, M. & G. 620; s. c. 22 Law J. Rep. (N.S.) Chanc. 657) it was held, on appeal, by the Lords Justices, that an acknowledgement of title by a mortgagee after twenty years adverse possession, but within three years before a redemption suit, was sufficient to exclude the application of the statute, and a decree for redemption was made at the instance of the mortgagor.

Attorneys—Hemming, for appellant; Doyle & Edwards, agents for Taynton & Son, Gloucester, for respondent.

1873.
Jan. 16, 17.
Feb. 24.

THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY (appellants) v. THE BOARD OF WORKS FOR THE WANDSWORTH DISTRICT, BEING THE SURVEYOR OF THE HIGHWAYS IN THE PARISH OF CLAPHAM (respondents).

Railways Clauses Consolidation Act, 1845, s. 65—Variation by Special Act—Revival of General Act.

The special Act of a railway company (with which was incorporated the Railway Clauses Consolidation Act, 1845, so far as it was not expressly varied or excepted) provided that if after notice the company did not, with reasonable expedition, repair a bridge over a turnpike road to the satisfaction of the surveyor of the trustees

(6) 8 Mee. & W. 553; s. c. 11 Law J. Rep. (N.S.) Exch. 151.

(7) 5 Ad. & E. 291; s. c. 5 Law J. Rep. (N.S.) K.B. 231.

thereof, the latter might repair and recover the costs; the Turnpike Act, however, was suffered to expire:—Held, that though the Railways Clauses Consolidation Act, 1845, s. 65, was expressly varied by the Special Act, yet it revived on the cessation of the turnpike trust, and an order to repair the bridge might be made under it.

[For the report of the above case see 42 Law J. Rep. (N.S.) M.C. 70.]

(In the Second Division of the Court.)

1873. } THE VESTRY OF BERMONDSEY v.
May 5. } JOHNSON.

Metropolis Local Management Amendment Act (25 & 26 Vict. c. 102), ss. 75–107
—Building erected beyond General Line—

Limitation of Time for Complaint—Penalty or Forfeiture.

The limitation clause, section 107 of 25 & 26 Vict. c. 102, imposing a limit of six months for making a complaint for the payment of any penalty or forfeiture for an offence against that Act, does not apply to a complaint for the erection of a building beyond the general line of buildings of a street without the consent of the Metropolitan Board of Works, contrary to the 75th section of the Act, which provides the means of obtaining an order for the demolition of such buildings.

Brutton v. The Vestry of St. George, Hanover Square (41 Law J. Rep. (N.S.) Chanc. 134) upon this point dissented from.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. 67.]

END OF EASTER TERM, 1873.

CASES ARGUED AND DETERMINED
IN THE
Court of Common Pleas,
AND IN THE
Exchequer Chamber and House of Lords,
ON ERROR AND APPEAL IN CASES IN THE COURT OF COMMON PLEAS.

TRINITY TERM, 36 VICTORIÆ.

1873. } FOLKARD v. THE METROPOLITAN
June 3. } RAILWAY COMPANY.

Lord Mayor's Court—Leave to appeal.

The Lord Mayor's Court Act, 20 & 21 Vict. c. clvii. ss. 8, 10, provides that in certain cases a party may appeal, if he give notice within two days of the decision, and give security; and that, "if upon the trial" the Judge gives him leave to move in a Superior Court, he may move within the time limited for like motions in such Court.

At the conclusion, on a Thursday, of a trial in the Lord Mayor's Court, the Judge refused to give the plaintiff, who was non-suited, leave to move, but on the ensuing Monday on application made to him granted such leave:—Held, by the majority of the Court (BOVILL, C.J., KEATING, J., and GROVE, J.), that he had no power to do so, because, even if there had been no refusal (which per BOVILL, C.J., determined the time), the leave must be given within a reasonable time, and that would be two days; but per BRETT, J., four days is a reasonable time, and the refusal did not curtail it.

This was an action tried in the Lord Mayor's Court, which resulted in a non-

suit. At the conclusion of the trial, which was on a Thursday, the Judge refused to give leave to appeal, but on an application being made to him on the ensuing Monday, he said he had changed his mind, and gave such leave, pursuant to which a rule nisi was granted.

Kemp shewed cause.—There is no appeal unless the Judge gives leave, or security be given, in accordance with the provisions of 20 & 21 Vict. c. clvii. ss. 8, 10 (1), and as security has not been given here, the plaintiff must rely on the leave of the Judge. But the Judge had no power to give leave, for the leave must be given "upon the trial," and therefore can only be given at its conclusion, and certainly cannot be given after a refusal at that time without any adjournment for the purpose of consideration.

Talfourd Salter, in support of the rule.—

(1) By section 8, in certain cases a party may appeal if within two days after the determination or direction of the Judge he give notice, and if security be given as directed; and by section 10, if upon the trial of the issue the Judge gives leave to move in one of the Superior Courts, the party may apply within the time limited for such motions in such Courts.

What took place shews that the Judge was really in doubt, and practically reserved his decision, which when given referred back to the time of the trial; and further, leave need not be given at the conclusion thereof, as "upon" does not mean "immediately after."

BOVILL, C.J.—The question is, as to the time at which leave to appeal may be given. There have been various statutes respecting certificates for costs, special juries and other matters, in which the wording has been slightly different; here the words are that "if upon the trial" the Judge gives leave to move, the motion may be made. It seems to me that the certificate need not be given during, but may be given after the trial, and that as, even if the words "immediately after" had been used, they would mean within a reasonable time, here the leave may be given within such time. What, then, is the rule which is to govern us in determining what is a reasonable time in the present case? In *Shuttleworth v. Cocker* (2), Maule, J., says: "It is not necessary to enter into the question whether or not the certificate under this statute must be granted immediately; but I should rather say, that it was the intention of the Act to exclude any impression being made on the mind of the Judge except what was produced at the trial;" and Bosanquet, J., says: with regard to giving the certificate, "I am strongly inclined to think that it ought to be granted as soon as the cause is tried, and that it should not be left for a future period, unless the application is made directly, and the Judge by consent takes time for consideration." This case was cited in *Thompson v. Gibson* (3), where the question was, whether a certificate for costs given by a Judge at his lodgings after adjourning the Court was given "immediately afterwards," within 3 & 4 Vict. c. 24, and such certificate was held good. And there Alderson, B., says, as to *Shuttleworth v. Cocker* (2), "My brother Maule's principle is that the Judge should

act only on the impression received by him in trying the cause, and as soon as conveniently may be afterwards. I do not see how, except on that ground, *Shuttleworth v. Cocker* (2) can be supported." Whilst Lord Abinger says, "If I could see upon this Act of Parliament that it was the intention of the Legislature that not a single moment's interval should take place before the granting of the certificate, I should think myself bound to defer to that declared intention. But it is admitted that this cannot be its interpretation; we are, therefore, to see how, consistently with common sense and the principles of justice, the words 'immediately afterwards' are to be construed. If they do not mean that it is to be done the very instant afterwards, do they mean within ten minutes or a quarter of an hour afterwards? I think we should interpret them to mean within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the Judge so as to disturb the impression made upon it by the evidence in the cause; and I am disposed to adopt the construction put upon the clause by my brother Maule, that the certificate is to be 'the result of the Judge's impression at the time.' I read the clause as if the word 'thereupon' had been found in it—that the act is to be done 'immediately thereupon'—that is, upon no other matter than the facts of the cause, and as soon as conveniently may be after the verdict." And Alderson, B., also says that it appears from *Pybus v. Mitford* (4), "that 'though the word *immediately* in strictness excludes all mean time, yet to make good the deeds and interests of the parties it shall be construed such convenient time as is reasonably requisite for doing the thing.'" And Rolfe, B., says, "I think the words used by my brother Maule afford the best test as to the proper construction of the statute, coupling with it the additional qualification that it is to be done with all convenient speed." This seems to be the best interpretation to put on these statutes, and applying it to the present case was leave given within a reasonable time? It appears that at the

(2) 1 Man. & Gr. 829, at p. 840; s. c. 10 Law J. Rep. (n.s.) C.P. 1.

(3) 8 Me. & W. 281; s. c. 10 Law J. Rep. (n.s.) Exch. 241.

(4) 2 Leon. 77.

conclusion of the trial the Judge, acting under the impressions formed at the time, refused leave, and therefore it seems to me the reasonable time was determined; but even if this be not so, section 8 shews that where there is no leave notice of appeal must be given within two days, and, therefore, that would be the extreme time within which leave could be given. I am clearly of opinion that the leave given on the application on the Monday was not given "upon the trial," especially as an application had been made and refused at the conclusion of the trial on the Thursday.

KEATING, J.—I am of the same opinion.

BRETT, J.—The substance of the statute is that if the Judge is of opinion that the matter is fit for the consideration of the Court, he is to give leave to move, and the motion in pursuance thereof is to be made practically within four days, but if there be no leave the party must give notice within two days and also give security. Therefore the substance is that if the Judge thinks the matter fit he is to give leave, and the motion must be within four days. Now this leave is to be given without the interference of the person against whom the leave is given, and without argument, and his presence therefore is immaterial. The question is whether the leave is to be given "immediately after" the trial. Now these words are not used in the Act, and it is admitted that the words "if upon the trial" do not mean "during," therefore they mean "after," and therefore the statute is to be read "if after the trial." Now where the legislature limits the time it does so specially, thus in section 8 there is a limit of two days, and in section 10 practically a limit of four days, the time within which similar motions must be made in the Superior Courts. It follows, therefore, that as respects this matter the time must be a reasonable time. What, then, is a reasonable time? No one is hurt if it be within four days. It is, however, said that the time is limited, because the Judge refused leave, and that though there be no injury he was thereby bound and estopped. But if he can have four days he

was not estopped by what was done, and therefore the leave was a due leave to appeal within the statute.

GROVE, J.—I am of opinion that the rule should be discharged. "Upon" does not necessarily mean "during." Here the matter was not adjourned nor was there simply nothing done, but the Judge refused leave. Under these circumstances the plaintiff during two days had a right to appeal by giving notice and security, but he gives no notice, and the defendants may well conclude the matter to be at an end, and great inconvenience might occur if afterwards the Judge might give leave. At the utmost, even if there had been no refusal, the Judge had power to give leave only up to the time limited for giving notice of appeal, i.e. two days. The Judge cannot after that give leave, particularly as he refused it at the end of the trial.

Rule discharged.

Attorneys—J. Long, for plaintiff; Burchells, for defendants.

[IN THE EXCHEQUER CHAMBER.]
(Appeal from the Court of Common Pleas.)
1878. } PEARSON v. THE COMMERCIAL
June 20. } UNION ASSURANCE COMPANY.

Shipping—Insurance against Fire.

A steamship was insured against fire as "lying in the V. docks, with liberty to go into dry dock." She was taken along the Thames to a proper dry dock, and on her return stopped in the Thames to put on part of her paddles, which had been taken off to admit her into the dry dock, a proceeding usual under the circumstances, and during such stoppage was burnt:—Held (affirming the decision below), that this was not a loss within the insurance.

This was an appeal from a decision of the Court of Common Pleas, reported 33 Law J. Rep. (N.S.) C.P. 85.

The plaintiff insured with the defendants against fire a steamship as "lying in the Victoria Docks, London, with liberty to go into dry dock." The nearest dry dock was too small to admit the ship,

which was therefore taken two miles along the Thames to the only dry dock which she could enter, and then only by taking off a portion of her paddles. On her return she stopped some days in the Thames to put on her paddles, which was found to be usual under the circumstances, and during such stoppage was burnt. The Court below decided that the defendants were not liable.

Watkin Williams, for the plaintiff, contended, first, that the dry dock was a proper one, and secondly, that at the time of loss the ship was covered by the insurance; he cited *Bouillon v. Lupton* (1).

KELLY, C.B.—I have no doubt that the judgment should be affirmed. This is not an insurance on a voyage, but against fire while the ship is in particular places, and attaches not only whilst the ship is in the Victoria and dry docks, but, as she necessarily must proceed to the dry dock, also extends to the short time and to the place where she is during her transit from the one to the other, and her return, without undue delay. But here, instead of returning direct, without unnecessary delay, from the dry dock to the Victoria dock, she was moored for ten days in the Thames, to reinstate her wheels, and if the parties had contemplated an insurance in the river Thames, they would have said so, and it would increase the risk if we held that the insurance applied. It is said that it was usual to do what was done, and, may be, it was so for many purposes; but if so, the plaintiff ought to have insured, so as to cover this. It has been said that only the adjoining dry dock was meant, but it is clear the intention was that the ship should go into a practicable dry dock, and the insurance was on the ship while in the Victoria dock, a practicable dry dock, on her passage there and back, but not whilst in the Thames for other purposes than that of passing from one dock to the other.

MARTIN, B.—I am of the same opinion. The insurance was on the ship while in certain places, viz., the Victoria dock, the dry dock, and there and back.

(1) 15 Com. B. Rep. N.S. 113; s. c. 33 Law J. Rep. (N.S.) C.P. 37.

BLACKBURN, J.—I am of the same opinion. The only doubt I have is as to the time of passing from one dock to the other. I agree, however, with the rest of the Court, and think that the ship was covered in the Victoria dock, the dry dock, and perhaps on her passage between them. But here she was in the Thames, and not in a place where she was insured.

CLEASBY, B.—The ship clearly was not insured at the place where she was lost. Her being there was an entirely unexpected thing; and when it is said it was usual to do what was done, no doubt it was, when that occasion arose, but the matter was not within the policy.

QUAIN, J., and *ARCHIBALD, J.*, concurred.

Judgment affirmed.

Attorneys—C. H. Cotterell, for appellant; Thomas & Hollams, for respondents.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Common Pleas.)

1873. }
June 18, 19. }

REVELL v. BLAKE.

Bankruptcy — Jurisdiction of County Court—32 & 33 Vict. c. 71. s. 87.

Where a petition in bankruptcy is preferred under 32 & 33 Vict. c. 71. in a County Court against a person as residing within its district, and he is adjudicated bankrupt thereon, such adjudication not being rescinded or appealed against is final and conclusive, though it turns out that he traded within the London district; and the trustee in bankruptcy is entitled to the proceeds of an execution on such trader's goods which are retained in the sheriff's hands under section 87, due notice of the petition having been given under that section, as it is not necessary that the adjudication should be against such person as a trader, and it is sufficient if there be an adjudication against him and he be in fact a trader.

This was an appeal from the decision of the Court of Common Pleas, reported 41 Law J. Rep. (N.S.) C.P. 129. The facts of the case are fully set forth in the report of the case in the Court below,

and the following short statement will be sufficient for the purposes of the present report.

The goods of one Maxwell were seized and sold under an execution at the suit of the defendant. Notice was duly served on the sheriff under 32 & 33 Vict. c. 71. s. 87, of a petition in bankruptcy against Maxwell. This petition was preferred at the Greenwich County Court against Maxwell as a gentleman residing within the district of that Court, and not residing or carrying on business in the London district, and was founded on an act of bankruptcy which would render even a non-trader liable to be made bankrupt, and he was eventually declared bankrupt, though it had come to the knowledge of the petitioner that Maxwell carried on business in London, and the plaintiff was made trustee. An interpleader between the plaintiff and defendant was then instituted to try the right to the money in the sheriff's hands, and a verdict was found for the plaintiff with leave to the defendant to move to enter it for himself, pursuant to which a rule *nisi* was granted and afterwards discharged by the Court of Common Pleas.

Benjamin (Bathurst, of the Equity Bar, and Morgan Howard with him), for the appellant, contended, first, that the adjudication was void for fraud, and that the petitioner ought not to reap advantage from wilfully taking wrong proceedings; second, that the County Court was an inferior Court and had no jurisdiction, and that the adjudication was therefore void, and this fact could be shewn; third, that under section 87 the adjudication must be against the debtor as a trader. He cited dicta of Willes, J., in *The Queen v. The Sadlers' Company* (1), and Lord Brougham in *Bandon v. Becher* (2), and *Ex parte Buckland* (3).

R. W. Williams, for the respondent, contended, first, that the County Court was part of the Court of Bankruptcy, which is a Superior Court, that there was jurisdiction, and that the adjudication was valid unless set aside under the statute;

second, that it was sufficient under section 87 that there should be an adjudication against the debtor, and that he should be in fact a trader. He cited *Ex parte Rayner* (4).

KELLY, C.B.—I am of opinion that the judgment of the Court below should be affirmed. It appears to me that every County Court, unless it be excluded therefrom by the order of the Lord Chancellor, has jurisdiction to entertain every petition in bankruptcy and decide it whatever be its nature, provided enough appears on the petition to call on such Court to adjudicate. Let us then see what constitutes a good petition. And looking to section 8 it appears to me that where a petition, framed according to that section, is preferred in a County Court, that Court is bound to entertain it, and if satisfied that the allegations are true and prove the person to be liable to be made bankrupt, has no choice, but is bound to adjudicate him bankrupt; and as respects what is said in that section as to proof of the trading if necessary, that means that if it be necessary in order to make out an act of bankruptcy to allege trading there is to be proof of it. In the present case the petition alleged a sufficient debt, nothing as to trading (except that the person petitioned against did not reside or trade in the London district), and an act of bankruptcy; and such petition being duly presented it became the duty of the County Court to look to the allegations of the petition to see whether they were sufficient if true to make the person bankrupt, and they being so, if it found that they were true, which, if there were no opposition, would be determined on the affidavit verifying the petition, it was the imperative duty of such Court to adjudicate him bankrupt. I think, therefore, that here the petition was correct in form, that it was duly before the County Court, that there were allegations of all that was necessary, and that the Court had jurisdiction, and it was its duty to adjudge the debtor bankrupt. But then it is said that it turned out in fact that the debtor traded within the London district, and the ques-

(1) 10 H.L. Cas. 431; s. c. 32 Law J. Rep. (N.S.) Q.B. 337.

(2) 3 Cl. & F. 479.

(3) 42 Law J. Rep. (N.S.) Bankr. 32.

(4) 41 Law J. Rep. (N.S.) Bankr. 28.

tion is whether the existence of this fact denied in the petition, and not known to the County Court, makes the adjudication void. The consequences of holding that this was so would be that such a petition might be presented, there might be no opposition, nothing to raise a doubt as to the County Court being the proper Court, the assets might be collected and distributed, and everything wound up, and yet years after because it was ascertained that the debtor had a share in some joint stock company, a fact previously utterly unknown, the whole proceedings would be void. Such consequences would be fearful, but there is nothing in the statute to shew (on the contrary it negatives this) a want of jurisdiction, or that the adjudication can be impeached, except in the way pointed out by the statute itself. Suppose even the debtor had appeared and shewn that though it was unknown he was a trader in the London district, the mere allegation would not be proof, the Court must have enquired and ascertained the truth of this, and if satisfied would have dismissed the petition, if not, adjudicated him bankrupt. It may be the decision might be wrong, but if so there is nothing to shew that the adjudication is therefore void, on the contrary sections 71, 72 make ample provision as to what is to be done. Under section 71, the County Court might rescind, or any aggrieved person might appeal, and though it is not necessary to decide so, I think that the execution creditor was an aggrieved person, at all events an aggrieved person may appeal and get the adjudication set aside. And if there be any doubt as to whether it was competent to the County Court to enquire as to the question of trading if raised, section 72 directly confers on that Court power to entertain all questions expedient or necessary for doing complete justice, and its decision is not to be restrained by any other Court or appealed against except as directed by the Act. In the present case, then, even if the bankrupt had appeared, the matter would have been for the County Court, it would have been impossible to determine the fact of trading without enquiry, and the County Court must have determined it, subject to the right of appeal. I think, therefore,

that not only on the presentation of a petition good on its face, and containing the requisites enabling the County Court to adjudicate, is it its duty and is it bound to entertain the petition, and, if satisfied, adjudicate the debtor bankrupt, but that, even without reference to section 10, the adjudication is final and conclusive unless rescinded or appealed from. The last question is whether section 87 applies, the adjudication being against one who is not described as a trader but turns out to be one. And it appears to me that whether he be adjudicated bankrupt as a trader or not this does not affect the section, but that if the goods of a trader be taken and there be notice of a petition in bankruptcy though he be not so described, all its requisites are complied with.

MARTIN, B.—I am of the same opinion, and think that the judgment of the Court below should be affirmed on the ground that the proceedings in the County Court were only irregular, and that as the debtor was a trader the requirements of section 87 were fulfilled.

BLACKBURN, J.—I am of the same opinion, and I will first deal with section 87. The argument is that there must be a petition and adjudication against the debtor as a trader, but this is not so, and where there is a petition and adjudication and he is *de facto* a trader, this is enough, and I think it clear that there is no such thing as a petition against him as a trader. All debtors may be made bankrupt, and though there must be an act of bankruptcy and there are some acts of bankruptcy which apply to the case of a trader only, and the consequences in case of the debtor being or not being a trader are different, still the debtor is to be adjudged bankrupt, and I cannot find anything in the statute to shew that the petition and adjudication are to have a different effect according as he is a trader or not. Looking to section 8 and form 10, it is clear that "if necessary" means only where the act of bankruptcy relied on is one which is only an act of bankruptcy if the debtor be a trader, and the adjudication and form 26 shew that it is only in such case that it is necessary to allege and prove trading.

The fallacy of the argument has been the assertion that there is a difference between a petition against a debtor when he is or is not a trader, but he is a bankrupt whether he is or is not a trader; and though the consequences no doubt are different, it was not meant that there should be any such difference, and it would be monstrous to say that where the adjudication is on the ground of the debtor not being a trader, and it is discovered that he is one, that there must be a fresh petition. And taking this view, section 87 applies where there has been an adjudication, and the debtor is *de facto* a trader.

We now come to the second point which arises on section 59, which, unfortunately by its definition of "the Court," creates some confusion. Here the petition was presented in the County Court, within whose district the debtor resided, in ignorance of his being a trader within the London district, a fact afterwards discovered, and it has been said that the adjudication is void for fraud, but the circumstances fall short of that, and the real question is whether, as my brother Brett thought, the County Court has jurisdiction only if the debtor reside in its district, and do not reside or carry on trade within the London district, and is an inferior Court in the sense that if it exceeds its jurisdiction its proceedings are void, and this fact may be shewn. I do not, however, think that this is so. Section 80, sub-section 6 and sections 65, 66, shew that the County Court is a branch of the Court of Bankruptcy, which is a principal Court of record, whose proceedings can only be set aside on appeal, and section 10 shews that the intention was that any Court trying collateral matters should treat its judgment as conclusive as an adjudication of bankruptcy. If under section 59 it were necessary to enquire whether there was concealed trading, this matter might always be started, but taking the County Court as a branch of a principal Court of record with a right of appeal, there is no reason why its proceedings should not be binding till reversed. It is not necessary to say what should be done in such case, but it is pretty clear, from *Ex parte Buck-*

land (3), what the Chief Judge's opinion is, and I hope he is right, and here he would have transferred the matter to his own Court.

CLEASBY, B.—I am of the same opinion. It is said, first, that the adjudication is unavailable, because of the conduct of the parties; secondly, that the County Court could not entertain the petition; thirdly, that the case is not one to which section 87 applies. The first objection, however, looking to the leave reserved, does not arise, and to be available should have been distinctly taken. As respects the second, forms 10, 37, 38 make it clear, even without sections 10, 72, that it was a matter for the adjudication of the County Court which has adjudicated. As to the third, though I have had doubt, and cannot say it is entirely removed, I think it is the fact of trading, not the form of proceedings, which governs.

QUAIN, J.—I am of the same opinion, on the ground that sections 59, 66, 80, sub-sect. 6, together shew that these Courts are all branches of the same Court, and that if the County Court be wrong this is only an irregularity to be set right by that Court or on appeal; and that as respects section 87, though I have had doubts, it is not necessary that the adjudication should be against the debtor as a trader.

ARCHIBALD, J.—I also am of the same opinion; as I think that the County Court had jurisdiction on such a petition as the present to entertain it and adjudicate, and that if such adjudication stands and there be no appeal, we (especially looking to section 10) cannot say it is invalid; and as I come to the conclusion (as respects section 87), that there is nothing to bind the petitioner to present a petition against the debtor as a trader, except where the act of bankruptcy is one where the debtor must be a trader to make it one, that the adjudication is general, and that if the debtor be in fact a trader, the consequences of that section apply.

Judgment affirmed.

Attorneys—John Rae, for appellant; Brooksbank & Galland, for respondent.

[IN THE HOUSE OF LORDS.]

1872.	} RANKIN, appellant (defendant in the action);
June 28.	
July 1, 4, 5.	
1873.	
Feb. 24.	
May 5.	POTTER AND OTHERS, respondents (plaintiffs in the action).

Marine Insurance—Prospective Freight—Total Loss—Notice of Abandonment.

Notice of abandonment need not be given where there is nothing which on abandonment can pass or be of value to the abandoner.

A ship being chartered for a voyage from Calcutta to London, she being at the time at sea on a voyage out to New Zealand, and thence to Calcutta, the owners effected an insurance on the chartered freight from Calcutta to London, but such insurance was only for the preliminary voyage to New Zealand. The ship, during such preliminary voyage, got aground and sustained such damage as would have justified the owners had they been then aware of the actual extent of it in abandoning the vessel and treating the loss as a constructive total loss, but though several surveys were held on her after she arrived at New Zealand, there were no means there of ascertaining her real condition as it was necessary for that purpose that she should be taken into a dry dock or put on a patent slip, neither of which existed at New Zealand. The surveyors recommended certain repairs being done, and that the ship should be put in a dry dock or on a slip, at the nearest available port, for further examination; but they did not state that they apprehended she had sustained any extensive damage beyond what had been ascertained, and they advised the captain to proceed in ballast on his voyage as soon as the necessary repairs pointed out had been completed. The vessel was partially repaired and proceeded in ballast to Calcutta, where on putting her into dry dock, her real condition was ascertained. On the owners being informed of this, they at once gave notice of abandonment to the underwriters both on the ship and on freight, there having been also an insurance on the ship. The accident to the ship had occurred in May and June, 1863, and she might have left New Zealand in the following September, but for the captain

NEW SERIES, 42.—C.P.

not having sufficient funds to effect the necessary repairs. This deficiency of funds arose from great expenses which had been incurred in getting the vessel off from where she had grounded, and in meeting claims of passengers for breaches of the Passenger Act, and of consignees of the outward cargo for damage thereto, and also from the unwillingness of the owners' agent at New Zealand to advance what was required without specific directions from the owners to do so. When at length these directions arrived the money was advanced and the ship repaired without further delay; but the result of it altogether was the detention of the ship at New Zealand to the 14th of April, 1864, on which day she left for Calcutta:—

Held, first, that as there was a constructive total loss of the ship, it was impossible for its owners to earn the chartered freight, and there was therefore an actual and not a constructive total loss of such freight; therefore no notice of abandonment was necessary. Secondly, that no such notice was necessary inasmuch as the ship never having been ready to receive the chartered cargo there was nothing to abandon to the underwriter on freight. And thirdly, that sufficient notice of abandonment of freight was given, if such notice was necessary, in order to recover as for a total loss on the insurance on freight.

This was an appeal, upon a joint CASE, against a judgment of the Court of Exchequer Chamber, which reversed a judgment of the Court of Common Pleas upon an action brought upon a policy of insurance on freight to be earned by a ship called the *Sir William Eyre*, of which the plaintiffs were owners as mortgagees in possession. The freight was to be earned under a charter-party entered into between the plaintiffs and one De Mattos, dated the 9th February, 1863, by which it was agreed that the ship, then at sea, should proceed to New Zealand with a cargo for the owners' benefit, and having arrived and discharged the same, and being made tight, staunch and strong, and every way fitted for the voyage, should proceed to Calcutta, and there, being tight, staunch and strong, and every way fitted for the voyage, should load from the factors of the freighter a full and complete

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cargo, and convey it for certain stipulated freight to Liverpool or London.

The policy of insurance was in the following terms—"Lost or not lost at and from Clyde to Southland, while there, and thence to Otago (New Zealand) and for thirty days in Port there after arrival." The subject of the insurance was "4,000l. on homeward chartered freight."

Thus, it will be observed, that the insurance was on freight to be earned, not on the voyage during her performance of which the vessel was insured, but on a subsequent voyage.

The vessel, *The Sir William Eyre*, arrived at Bluff Harbour, Southland, on the 23rd of April, 1863. While there she drifted and took the ground and remained aground floating at intervals till the 29th of May. On that day a violent gale arose, and again she took the ground, and remained fixed till the 4th of June. After that she grounded again, and was not finally got off till the 1st of July, when she left for Dunedin and she arrived at Port Chalmers, which is the port of Dunedin, on the 4th of July. Surveys were held on her at Bluff Harbour and also at Port Chalmers, but in neither of those places could the extent of the damage sustained by her grounding be ascertained, as it was necessary for that purpose that she should be taken into a dry dock or put on a patent slip, neither of which existed in New Zealand, nor was to be found anywhere nearer than Port Sydney.

The *Sir William Eyre* remained at Port Chalmers until the 14th of April, 1864, being prevented solely by want of funds from proceeding to Calcutta, the master not having sufficient funds to defray the ship's charges and disbursements, and her liabilities to her passengers under the Passenger Act. But while the ship was thus detained there, the captain permitted her to be used as a store ship for coals, for which he received a rent amounting altogether to 778l. 3s. 5d.

In February, 1864, the captain received funds, by means of which he had certain repairs done, which had been recommended by the surveyors, to enable the ship to proceed in ballast to Calcutta, and on the 14th of April, 1864, these repairs having been completed, the *Sir*

William Eyre left Port Chalmers, and she arrived at Calcutta on the 7th of June, 1864.

Upon her arrival the master applied to the agents of De Mattos to carry out the charter-party. They, however, had received information that De Mattos had failed and stopped payment in December, 1863, and they refused to have anything to do with the ship, or with providing a cargo.

The *Sir William Eyre* was then put into dry dock and surveyed, and it was discovered that the damage she had sustained in New Zealand was much greater than had been supposed, and that the cost of repairing her would exceed her value after being repaired. Whereupon, in the month of August, 1864, the plaintiffs gave notice of abandonment to the defendant, the underwriter on freight, and also to the underwriters on ship; but neither of these notices of abandonment was accepted by the respective underwriters.

After the above survey had been made at Calcutta, the ship was moored in the Hooghly, and whilst she was lying there a violent cyclone, on the 5th of October, 1864, drove her from her moorings, and she was stranded and became a total wreck.

It was admitted that the sea damage which the ship sustained at New Zealand was such as would have justified an abandonment, and a claim under the policy for a constructive total loss, if the damage had been then ascertained and notice of abandonment given.

On the hearing of the case in the Court of Common Pleas, that Court held that the plaintiffs were not entitled to recover, on the ground that there was no absolute loss of the ship, and consequently no total loss of the freight, and that the notice of abandonment given was not sufficient to convert a partial into a total loss. Upon appeal to the Court of Exchequer Chamber, the judgment of the Court of Common Pleas was reversed, on the ground that the loss of the freight was not a partial loss, but one that was total and absolute—*Potter v. Rankin* (1). From

(1) 37 Law J. Rep. (N.S.) C.P. 257; s. c. Law Rep. 3 C.P. 562; in Ex. Ch. 39 Law J. Rep. (N.S.) C.P. 147; s. c. Law Rep. 6 C.P. 341.

this judgment the underwriter appealed to this House.

The Judges were summoned, and Martin, B., Bramwell, B., Blackburn, J., Mellor, J., and Brett, J., attended.

Benjamin and Cohen, for the appellants.—Firstly, the thing insured by the policy sued upon in this case was not freight, but an interest in a charter-party, a thing *in futuro*, a chose in action, a thing which, as it turned out, might not be worth anything for the charterer might, as he did, fail. It was, therefore, a matter of no great concern to the ship-owners whether they tendered their ship at the time and place specified in the charter-party or not; and the conduct of their agents shews that this was so, otherwise the delay of a whole year after the misadventure at Bluff Harbour, and before the ship was examined at Calcutta, would not have been allowed to take place. That delay, if not intentional, was due to the negligence of the master or captain, or of the owners' agents. And it is evidence of one thing, namely, that the owners elected not to abandon the vessel to the insurers, but rather to repair her, and to take their chance with her. An election to abandon ought to be exercised at once, on the spot, then and there; and even if the election could not be properly exercised at Bluff Harbour, by reason of the want of knowledge as to the amount of the disaster, at all events no time ought to have been lost in sending the ship to a dock, where she might have been properly examined. So prolonged a delay is evidence the owners elected not to abandon. The partial repairing also of the vessel was an election not to abandon—*Stewart v. The Greenock Marine Insurance Company* (2); *Fleming v. Smith* (3); and an election once made is irrevocable—*Martin v. Crokatt* (4); *Cambridge v. Anderton* (5); *Rous v. Salvador* (6). After the ground-

ing of the ship at Bluff Harbour, the owners not only treated her as their own property, by earning money with her as a store ship, they insured her with other insurers, and on her total loss in the Hooghly, they recovered on the policy, as detailed in *Barker v. Janson* (7). Therefore it is clear that after the time when the owners must either have abandoned or elected to go on, they asserted their ownership of the vessel, and succeeded in a Court of Justice on a claim which renders the idea of an election to abandon impossible to be entertained.

Secondly, without an abandonment, as the thing existed in specie, there can be no recovery from the underwriters as upon a total loss, and the custom is, that an election to abandon shall be declared by notice. In other words, where the loss is only a constructive total loss, there must be notice of abandonment—*Martin v. Crockett* (4); *Cambridge v. Anderton* (5); *Rous v. Salvador* (6); *Knight v. Faith* (8); *Stewart v. The Greenock Marine Insurance Company* (2); *Fleming v. Smith* (3). Also an abandonment to be effectual, where there is not an actual total loss, must be made during the continuance of the policy, and here though the injury was sustained during the voyage covered by the policy, the notice was not given till after, the vessel having arrived at Calcutta, and having been tendered to De Mattos, the voyage contemplated by the policy was completed—*Benson v. Chapman* (9); *The Scottish Marine Insurance Company of Glasgow v. Turner* (10).

Thirdly, the final determination of the owners to abandon was due to the failure of De Mattos. It is a mistake to say that the freight was proximately lost by the perils insured against. The loss was occasioned by the delay in the ship's arrival at Calcutta, so that she only

(2) 2 H.L. Cas. 159.

(3) 1 H.L. Cas. 513.

(4) 14 East, 465.

(5) 2 B. & C. 691.

(6) 1 Bing. N.C. 526; s. c. 4 Law J. Rep. (N.S.) C.P. 156; reversed in Error 3 Bing. N.C. 266; s. c. 7 Law J. Rep. (N.S.) Exch. 328,

(7) 37 Law J. Rep. (N.S.) C.P. 105; s. c. Law Rep. 3 C.P. 303.

(8) 15 Q.B. Rep. 642; s. c. 19 Law J. Rep. (N.S.) Q.B. 509.

(9) 1 H.L. Cas. 696.

(10) 1 Macq. H.L. 334.

arrived after the failure of De Mattos, and this delay was due to the negligence of those in whose direction the ship was, not to the perils insured against; as to the misadventure arising from those perils, the owners had elected to go on after its occurrence, and it was only when they found that, owing to the delay for which they were answerable, the freight was lost, that they determined to abandon. Therefore, even if no notice of abandonment was necessary, as is suggested by the other side, on the ground of there being nothing to abandon which the underwriters could take to, still the loss of the freight being due to the owner's laches, they are not now entitled to turn round and make a claim on the insurers, which except for circumstances in the case besides, and other than the damage from the perils insured against, they would not have attempted to make.

As to the suggestion that notice of abandonment is not necessary where there is nothing to abandon, although notice may not be required—*Farnworth v. Hyde* (11)—there must be an abandonment. The object of notice is not so much to pass the property in the thing abandoned as to mark the election of the assured. The notice does not pass the property, that passes by operation of law immediately on abandonment, immediately the insured has exercised his election to abandon. That election can only be made once; it must be made then and there, when the occurrence has happened; it is irrevocable whether it be to abandon or not to abandon, and it was exercised by these owners at Bluff Harbour, as evidenced by their repairing, by their delay, by their earning money with the vessel as a store-ship, by their treating the vessel as their own when they insured her over again and recovered on that policy, and by their applying to De Mattos' agent for the freight.

On the question of the necessity of notice where nothing passes, the learned

counsel cited *Mount v. Harrison* (12), *Hamilton v. Mendes* (13), *Abbott on Shipping* (14), *Arnould on Insurance* (15), *Cologan v. The London Assurance Company* (16), *Hunt v. The Royal Exchange Assurance* (17), *Wilson v. Rankin* (18), *McCarthy v. Abell* (19), *Idle v. The Royal Exchange Assurance Company* (20). But it is a mistake to say that there was nothing to abandon. If the insurers had had early notice of the abandonment, they might have found it worth their while to have joined with the underwriters on the ship and have repaired her so that she should have earned the freight.

Sir George Honyman and Lanyon, for the respondents.—The insurance was that nothing on the previous voyage should prevent the owner from earning this freight; that which occurred at New Zealand did prevent this. In such a case it is of no consequence whether the ship was lost or not. By what happened there was a loss of this freight, and that too by the perils insured against, although the parties were not at the time aware of what had happened—*Moss v. Smith* (21), *Rosetto v. Gurney* (22), *Farnworth v. Hyde* (11), *The Scottish Marine Insurance v. Turner* (10), *Dickinson v. Jardine* (23), *Kidston v. The Empire Marine Assurance Company* (24), *Carr v. The Wallachian Petroleum Company* (25). There was no-

(12) 4 Bing. 388; s. c. 1 M. & P. 14.

(13) 1 W. Black. 279; s. c. 2 Burr. 1198.

(14) 11 Edit. pp. 10—15.

(15) 3 Edit. 989.

(16) 5 M. & S. 447.

(17) 5 M. & S. 47.

(18) 6 B. & S. 208; s. c. 35 Law J. Rep. (n.s.) Q.B. 87; s. c. Law Rep. 1 Q.B. 162.

(19) 5 East 388.

(20) 3 Moore 115; s. c. 8 Taunt. 755.

(21) 9 Com. B. Rep. 104; s. c. 19 Law J. Rep. (n.s.) C.P. 225.

(22) 11 Com. B. Rep. 176; s. c. 20 Law J. Rep. (n.s.) C.P. 257.

(23) 37 Law J. Rep. (n.s.) C.P. 321; s. c. Law Rep. 3 C.P. 639.

(24) 35 Law J. Rep. (n.s.) C.P. 250; s. c. Law Rep. 1 C.P. 535; in Ex. Ch. 36 Law J. Rep. (n.s.) C.P. 156; s. c. Law Rep. 2 C.P. 357.

(25) 35 Law J. Rep. (n.s.) C.P. 314; s. c. Law

(11) 18 Com. B. Rep. N.S. 835; s. c. 34 Law J. Rep. (n.s.) C. P. 207, reversed in Ex. Ch. 36 Law J. Rep. (n.s.) C.P. 33.

thing here to pass on abandonment to the underwriters, therefore no notice of abandonment was necessary—*Stringer v. The English and Scottish Marine Insurance Association* (26), *The North of England Steam Navigation Company v. Armstrong* (27). Salvage vests in underwriters without any notice—*Green v. The Royal Exchange Assurance Company* (28), *Idle v. The Royal Exchange Assurance Company* (20), *Phillips on Insurance* (29). As the extent of the injury sustained was not known till after the arrival of the ship at Calcutta, notice of abandonment could not have been given before that time, and the only question is whether the notice was given within reasonable time after the discovery of the extent of the injury sustained. Notice of abandonment is given in time if it is given as soon as all the circumstances of the case have come to the knowledge of the insured. Such notice will refer back to the time of the occurrence of the injury—*Arnould on Insurance* (30), *Cammell v. Sewell* (31), *King v. Walker* (32), and *Jurydom v. The Marine Insurance Company* (33).

Benjamin in reply.—The rule is that total loss of freight may be claimed without abandonment where the ship has been justifiably sold, and unless the ship has been justifiably sold the insured cannot recover for total loss without notice of abandonment. He cited *Morrison v. Parsons* (34), *Splidt v. Bowles* (35).

The following questions were then (Session, 1872) put to the Judges.

Rep. 1 C.P. 636; s. c. affirmed in Ex. Ch. 36 Law J. Rep. (n.s.) C.P. 286; s. c. Law Rep. 2 C.P. 468.

(26) 38 Law J. Rep. (n.s.) Q.B. 321; s. c. Law Rep. 4 Q.B. 691.

(27) 39 Law J. Rep. (n.s.) Q.B. 81; s. c. Law Rep. 5 Q.B. 244.

(28) 6 Taunt. 68.

(29) Vol. II. ch. 17, secs. 1487, 1497, 1501.

(30) 3 Edit. p. 886.

(31) 5 Hurl. & N. 728; s. c. 27 Law J. Rep. (n.s.) Ex. 447; s. c. affirmed in Ex. Ch. 29 Law J. Rep. (n.s.) Exch. 350.

(32) 3 Hurl. & C. 209; s. c. 33 Law J. Rep. (n.s.) Exch. 167 & 325.

(33) 1 John's New York Rep. 190.

(34) 2 Taunt. 407.

(35) 10 East 279.

1st. Was there a loss by the perils insured against during the term of the policy?

2nd. Was notice of abandonment either of ship or freight, or of both, necessary to enable the plaintiffs to recover for a total loss on the policy on freight?

3rd. If notice of abandonment was necessary, was the notice given in time?

4th. If notice of abandonment of the ship was necessary in order to make a constructive total loss of the ship, and such notice was not given in time, does the want of due notice as to the ship affect the right of the plaintiffs upon the policy on freight?

5th. Was there any such conduct on the part of the assured after the time of the alleged constructive loss of the ship as discharged the underwriters from their liability upon the policy on freight?

6th. Ought the judgment to be for the appellants or the respondents?

The learned Judges answered as follows:—

BRETT, J.—My Lords,—In order to answer your Lordships' questions, it seems to me convenient to determine, in the first place, what is the correct interpretation of the policy in respect of which those questions arise, and to point out its peculiarity. What is the subject matter insured? The description is that the insurance is made "on homeward chartered freight." Having regard to the surrounding circumstances when the policy was made, to these words of reference, and to the statement in paragraph 7 of the case, the policy is not on homeward freight generally, i.e., on any homeward freight, but on the homeward chartered freight to be earned under the charter-party of the 9th of February, 1863. It was argued that the subject matter insured was not freight strictly so called, but some right which the counsel described at different times in different terms. It seems to me that those terms are either other phrases to describe the charter-party freight I have mentioned, or that they do not describe what is the only subject matter insured by this policy. The voyage insured, as descriptive of the voyage during which the perils insured against may arise, is a voyage "at and

from Clyde to Southland, while there, and thence to Otago (New Zealand), and for 30 days in port there after arrival." This is a different voyage from and does not comprise any part of the voyage on which the charter-party freight can be earned, which latter is a voyage from Calcutta to Liverpool or London. The subject matter insured then is freight; the freight insured is not any but one particular freight; it is not freight which might be earned on the voyage insured or part of it; the goods in respect of the carriage of which the insured freight may be earned cannot be at risk during any part of the voyage insured; and therefore the loss of freight covered by this policy cannot occur through damage to goods by a peril insured against, but only through damage to the ship. Assuming, then, this to be a valid policy, which is not disputed, the true interpretation of the contract seems to be, that the insurers undertake to indemnify the assured if there be a loss of the freight to be earned by the charter-party, in consequence of and proximately caused by such damage to the ship from a peril insured against during the voyage from England to New Zealand, as will prevent the assured from being able to earn the whole or any part of the charter-party freight on the voyage from Calcutta to England.

The next matter material to be observed seems to me to be that there is only one contract to which the plaintiffs and the defendant are both parties, namely, the policy; and there are only two contracts with which both of them are concerned in this matter, namely, the policy and the charter-party referred to in the policy. The defendant is in no way a party to the policy on ship. He incurs no liability under it and has no rights by virtue of it. It seems therefore contrary to all rule to argue either for or against him from anything depending for its materiality on the existence or non-existence of the policy on ship.

It seems to me convenient, in the next place, to consider what does or does not amount to a loss, and what amounts to a total loss under ordinary policies on freight. On an ordinary policy on "freight in general terms" there is no

loss at all on freight for which the underwriter on freight is liable, by reason of partial damage to the ship, however great, causing an average loss of a policy on ship, or of partial damage to cargo causing an average loss, however great, on the cargo generally under a policy on goods. There is a partial loss of freight under a general policy on freight if there be a general average loss caused by a peril insured against giving rise to a general average contribution; or under certain circumstances if there be a total loss of part of a cargo; or if in case of total loss of the ship the cargo be sent on in a substituted ship; or if in case of a total loss of the cargo the ship earn some freight in respect of other goods carried on the voyage insured. There may be an actual total loss of freight under a general policy on freight, if there be an actual total loss of ship, or an actual total loss of the whole cargo. An actual total loss of ship will occasion an actual total loss of freight, unless when the ship be lost, cargo be on board, and the whole or a part of such cargo be saved, and might be sent on in a substituted ship so as to earn freight. An actual total loss of the whole cargo will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship capable, as to time, place and condition, of earning an equal or some freight by carrying other cargo on the voyage insured.

It has become a question in this case whether there may not be on a general policy on freight another kind of actual total loss, namely, by such damage to the ship as would justify notice of abandonment and make thereupon a constructive total loss of ship under a policy on ship, although there be no loss of cargo, or an average loss of cargo, without means of sending on the cargo. In such a state of things the ship may or may not be insured; if the ship be insured, due notice of abandonment of ship may or may not have been given. If the ship be not insured, what must happen upon the assumption? The assumption is that a prudent owner will not repair. Then the ship will not be repaired. If not repaired she will remain a wreck, or be sold as a wreck. She cannot therefore sail on the voyage

insured in the policy on freight. Then such freight is and must be in fact absolutely and totally lost. There is no freight, no chance of freight, to abandon to the underwriter on freight. It has never been suggested that the ship should be abandoned to the underwriter on freight. There is nothing then which can be abandoned to him of which he could take possession or from which he could derive profit. If the ship be insured and due notice of abandonment be given to the underwriter on ship, the property in the ship passes to the underwriter on ship. In such cases the new owner of the ship will in almost every case sell her as a wreck. Again, there would be nothing, and no chance of anything, to abandon to the underwriter on freight. If from exceptional facilities the underwriter on ship should repair the ship and earn full freight on the voyage described in the policy on freight, such freight would belong to the new owner of the ship; none of it could go to the assured or underwriter on freight; but freight would have been earned on the voyage insured in the policy on freight, and as the insuring of the ship is the voluntary act of the shipowner, and the abandonment is also his act, it has been decided in your Lordships' House that in such exceptional case there is no loss at all of freight for which the underwriter on freight is liable—*The Scottish Marine Insurance Company v. Turner* (10). If this had not been a decision in your Lordships' House, I should have ventured to think that a valid abandonment of ship was of the same effect as leaving her a wreck, and that the real total loss of freight suffered by the assured on freight was covered by the only policy which could cover it, namely, the policy on freight. But the exceptional case thus mentioned, which according to the decision causes no loss at all of freight on the policy on freight, need not be further noticed. It is the same case as if the shipowner uninsured on ship, but insured on freight, should unnecessarily and unreasonably repair the ship, sail her on the voyage insured in the freight policy, and earn full freight. In such case it is held that there is no loss at all on the freight policy. If the ship

be insured, but due notice of abandonment of the ship be not given to the underwriter on ship, then the ship is left on the hands of the assured as if she were not insured. Does not this case become the same as that first put, namely, the case of the shipowner having insured freight but not ship?

It seems impossible to maintain that upon a question of construction the rights of either the assured or underwriter on the freight policy can be altered by anything done or omitted to be done on the policy on ship. To hold otherwise is to mix up two independent contracts, and contracts between different parties. The excepted case above mentioned of the ship being repaired and earning freight on the voyage insured is made to depend not on what is done under or by virtue of another contract, but on what is done to and by the ship. If the ship earn freight by reason of repairs recklessly or improvidently made, the same result follows whether the ship was insured or not. In determining then the construction of the policy on freight as to liabilities and rights under it, it must be immaterial whether the assured on a policy on the ship has lost or made perfect his right to recover on that policy for a constructive total loss of ship by failing to give or giving due notice of abandonment under that policy.

The only question is whether there is any implied contract or condition in the policy on freight, under any of the states of circumstances above mentioned, where there is any loss of freight, imposing upon the assured under that policy the obligation of giving notice of abandonment to the underwriter of that policy. And it was to meet this question that the arguments were propounded at the bar with regard to the reason for giving notice of abandonment. On the one side it will be found that the arguments were founded on the assertion that notice of abandonment need not be given where there is nothing to abandon, where there is nothing, and no chance of anything, which can pass or be of value to the abandonee. On the other side, the real point of the argument was that if the thing insured could be said to exist in

specie, notice of abandonment of it must be given, although it could not pass to the abandonnee, and he could not derive any value from it. This argument took the form of asserting that the notice is required in order to signify an election by the assured, or to give an opportunity for inquiry to the underwriter. The propositions thus enunciated on the two sides were treated by the appellant's counsel as so contradictory the one of the other, so inconsistent, that if the one prevailed the other must fail. It may, however, be that they are consistent, and that where there is anything to abandon, the caution of great merchants and lawyers has by usage engrafted upon contracts of marine insurance the implied condition that notice of abandonment must be given quickly, both in order to signify the election of the assured and to give the underwriter opportunity for inquiry and action, but that where there is nothing to abandon, notice of abandonment, being futile, is unnecessary. The end to be obtained by abandonment would seem to be the preservation of the cardinal principle of marine insurance, the principle of indemnity, and to that end to prevent the assured from having at the same time payment in full of the sum insured and the thing insured of value in his hands. It may be that it is as an incident of the rule, and in order to secure its application, that the assured, where he must abandon in order to recover the full sum insured, must give quick notice of his intention to abandon.

But whatever be the reason of the rule as to the time of giving notice of abandonment, it is and must be inapplicable where no abandonment need be made. The question therefore really is whether there must be abandonment in order to enable an assured to recover as for a total loss when there is nothing to abandon. If there is such a necessity, it arises upon a condition to be implied. It seems to me to be a proposition without foundation of reason to say that there must be an abandonment where there is nothing to abandon. If the case of *Knight v. Faith* (8) decided the contrary, I with deference think it is a wrong decision. The view of the Court of Common Pleas in *Farn-*

worth v. Hyde (11), not overruled as to this point in the Court of Error, seems to me to be correct. I venture to affirm that it is a correct proposition of insurance law to say that no abandonment is necessary, and no notice of abandonment is required, where there is nothing to abandon which can pass to or be of value to the underwriter. It follows that on a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required, where the ship is damaged to such an extent or under such circumstances as would authorise an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or if on board, where none is saved with the chance of an opportunity of its being forwarded in a substituted ship. In the several states of circumstances above set forth and considered the loss of freight on the policy on freight would be an actual total loss. This conclusion does not, as it seems to me, go the length of determining that there never can be a constructive total loss of freight. If, for instance, the ship be damaged as described, but cargo which was on board be saved under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship, or if the cargo be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight.

Another form of policy on freight, not unusual, but not so frequent as a policy on freight in general terms, is a policy insuring "chartered freight." In such policies the voyage insured commences usually at or from the port of sailing on the voyage described in the charter-party, or on or at the commencement of the voyage the ship must make to reach that port; but in both cases the voyage insured usually covers also the whole voyage to be sailed under the charter-party. Such a policy attaches earlier than a policy on freight in general terms; it

attaches before any goods are on board the ship. If the ship be lost or damaged, or the cargo be lost after the goods are on board, the same circumstances must arise and the same considerations apply as have been related and treated of in the case of a policy on freight in general terms. Before any goods are shipped the loss can occur solely by reason of damage to the ship; but if the ship be then actually totally lost, or so damaged as to be possibly a constructive total loss, so much of the above reasoning as is applicable to a loss by damage to the ship seems to be equally if not more cogent to shew that no part of the chartered freight could possibly be earned by the assured, that there would be no freight or chance of freight to be abandoned, and therefore that no abandonment or notice of abandonment would be necessary; but that the loss of the chartered freight would be an actual total loss on the policy on freight.

These considerations and this inquiry into the rules applicable to ordinary policies on freight seem to me to determine what must be the decision on this unusual policy on freight under the circumstances which have arisen. The questions raised are, whether there is any loss of freight by a peril insured against, and if so, is that loss a total loss? The ship was damaged during the voyage insured. She was damaged by a peril insured against. Unless the damage to the ship should be wholly or sufficiently repaired, the insured freight could not be earned. If the damage to the ship could not be sufficiently repaired to enable the assured to earn the chartered freight by carrying goods on board that ship, it seems to me that the damage to the ship caused by a peril insured against during the voyage insured is the cause of the loss of the earning the chartered freight by that ship. Loss of freight by reason of such damage to the ship caused by such a peril is a loss against which, according to the interpretation put upon the policy at the commencement of this opinion, the underwriter on this policy on freight has in terms agreed to indemnify the assured. The question therefore is, whether the ship could have been suffi-

ently repaired to enable the assured to earn the chartered freight. Physically or mechanically she could. But as matter of business carried on according to the dictates of sense she could not. The true meaning of the 24th paragraph of the case is that a prudent owner of this ship, that is to say, an owner conducting himself according to the dictates of common sense in business, would not repair the ship. In such case the law holds that within the meaning of such a policy as this, the ship could not be repaired so as to earn the freight or any part of it by the use of that ship. The assured not being able to tender that ship, and having none of the goods in his possession, had no claim to carry any goods under the charter-party in a substituted ship.

Without therefore relying upon the other obvious impediment and prevention in the way of the plaintiff's earning the charter-party freight, namely, the certainty from the extent of damage that the ship could not be repaired so as to be seaworthy within any time during which the charterer would be bound to wait for her, it seems to me that the other facts which I have mentioned shew conclusively that there was a loss of freight by reason of damage to the ship caused by sea peril happening during the voyage insured; and that such loss of freight is, upon the construction put upon the policy at the commencement of this opinion, a loss by peril insured against; and that inasmuch as without repairing the ship, which the assured did not do, and was not bound to do, because in consideration of law it could not be done, no part of the chartered freight could be earned by anyone; and that there was therefore no part of the chartered freight, or any chance of earning any part of it, which by a pretended abandonment could pass to or be of value to the underwriter on freight; and that consequently the loss of freight was an actual total loss without notice of abandonment.

If notice of abandonment were necessary, the question whether in this case it was given in due time seems to me to be more doubtful. There was no reason in this case to doubt the accuracy of the infor-

mation forwarded to the assured. The question, therefore, as it seems to me, is, whether at any time before the surveys made at Calcutta were received, the assured had information of damage to the ship of such a nature and to such an extent as rendered the prospect of a total loss of the chartered freight imminent but not certain. If he had he was bound to give notice at once. If the case had been on trial before a jury, I should say that they should have been asked to find whether at any time there was laid before the assured information so certain and of such a nature as would lead an assured of ordinary care and intelligence to conclude that there was great danger of a total loss of the chartered freight, but a chance of such loss being obviated, and that they should have been directed that, if such information was at any time conveyed to the assured, he was bound immediately to give notice of abandonment.

As in this case the Court was to draw inferences of fact, the question is, whether before the surveys made at Calcutta were received, the assured had information of damage to the ship of such a nature and of such an extent as I have described. The information upon these points which the assured had received were the surveys made at Bluff Harbour and at Port Chalmers. As to the first, made on the 27th of May, 1863, I think it was of no importance. The survey of the 10th of July, 1863, made at Port Chalmers, does seem to me to disclose formidable damage to the ship. If it had stood alone I should have been inclined to think that it disclosed such damage as ought to have so greatly alarmed the assured as that he ought to have acted upon it by giving immediate notice of abandonment. But it seems to me that the surveys of the 25th of August, 1863, and of the 4th of September, 1863, received about the same time, would modify the view to be derived from the former survey, and would lead the assured to believe that the ship would proceed to Calcutta, and be repaired to such an extent, and within such a time, as would enable him to earn the chartered freight. I therefore come to the conclusion, though with some doubt,

that there was no information before the arrival of the surveys made at Calcutta which made it incumbent on the assured to give notice of abandonment, assuming notice at some time to be necessary, and that upon the same assumption the notice given upon the receipt of the Calcutta surveys was given in due time.

If no notice was necessary, if there was an actual total loss, I cannot think that the right of the assured to payment of a total loss can be affected by a delay demanding such payment. Delay in giving notice of a total loss seems to me to amount to no more than delay in asking for the settlement of it. I know of no obligation in insurance law to give immediate notice of an actual total loss. Immediate notice would not enable the underwriter to make the loss in any way less.

I therefore answer your Lordships' questions thus: As to the first, there was a loss by the perils insured against during the term of the policy. As to the second, no notice of abandonment either of ship or freight was necessary. As to the third, if notice of abandonment was necessary, it was given in time. As to the fourth, that in the case supposed, want of due notice as to the ship would not affect the rights of the plaintiffs upon the policy on freight. As to the fifth, there was no such conduct on the part of the assured as discharged the underwriters from their liability upon the policy on freight. As to the sixth, that the judgment ought to be for the respondents.

MELLOR, J. — My Lords, I answer all the questions proposed by your Lordships to the Judges who attended during the argument in this case in favour of the plaintiffs below, the respondents in your Lordships' House.

In answer to the first question, I am of opinion that there was a loss of the subject-matter of insurance by the perils insured against during the term of the policy.

In answer to the second question, I am of opinion that no notice of abandonment either of the ship or freight was necessary under the circumstances to enable the plaintiffs to recover for a total loss on the policy on freight.

In answer to the third question, I am of opinion, although with some hesitation, that if notice of abandonment was necessary, it was under the circumstances given in time.

To the fourth question, I answer that in my opinion if notice of abandonment of the ship was necessary, in order to make a constructive total loss of the ship, and such notice was not given in time, the want of due notice as to the ship does not affect the right of the plaintiffs upon the policy on freight.

To the fifth question, I answer that in my opinion there was no such conduct on the part of the assured, after the time of the alleged constructive loss of the ship, as discharged the underwriters from their liability upon the policy on freight.

To the sixth question, I am of opinion that the judgment ought to be for the respondents.

In order to arrive at a right conclusion in this case, it is most essential accurately to ascertain the subject-matter insured by the policy in question, and against what perils it was agreed by the underwriters to insure; and to keep absolutely distinct the considerations which alone affect the policy on the contemplated homeward freight from those considerations which would apply to an ordinary case of insurance of the ship; and I cannot help saying with great respect, that the error into which the Court of Common Pleas appears to me to have fallen, has arisen from not keeping distinct the character of the plaintiffs as owners of the ship, from their character as insurers of an entirely distinct subject-matter of insurance, viz., the freight contemplated to be earned on the homeward voyage.

The charter-party is between the owners of the *Sir William Eyre* and W. N. De Mattos, Esq., of London, merchant and freighter, and provides that the ship shall, with all convenient speed, sail and proceed to New Zealand, with a cargo for owners' benefit, and having arrived and discharged same, and being made tight, staunch and strong, and every way fitted for the voyage, shall sail and proceed to Calcutta, and there being tight, staunch

and strong, and every way fitted for the voyage, shall load from the factors of the said freighter a full and complete cargo of legal merchandise, &c., and being so loaded shall therewith proceed to Liverpool or London as ordered, &c., at and after the rate of 4*l.* per ton net delivered (the act of God, the Queen's enemies, fire and all and every other damage and accidents of the seas, rivers and navigation of whatever nature or kind soever during the said voyage always mutually excepted), and the freight to become due on unloading and right delivery of the cargo, and to be paid in cash two months after the vessel's report inwards at the custom-house.

The policy which was effected was as follows: "Lost or not lost at and from Clyde to Southland, while there and thence to Otago, New Zealand, and for thirty days in port there after arrival." And the subject insured by the policy was assumed and treated in the argument at the bar to be a valued sum of 4,000*l.* on homeward chartered freight, valued at 5,000*l.*, although the latter figure is not filled in the policy as set out in the appendix. It is to be observed that the nature of the interest insured is not an interest in anything actually existing and of which possession can be had, such as a ship or cargo, or freight of cargo on board, but it is the interest only in the right to have a cargo provided by the charterer at Calcutta, on the condition that the ship, when it arrived there, should be tight, staunch and strong, and every way fitted for the voyage home, notwithstanding any perils of seas which might happen to the ship on her voyage to New Zealand, and for thirty days in port there after arrival. In other words, it is a warranty that "no peril of the seas" which might happen to the ship on her voyage to New Zealand, and for thirty days in port there after arrival, should prevent the ship from arriving at Calcutta, and from being there tight, staunch and strong, and every way fitted for the voyage home, with the cargo there stipulated to be loaded by the agent of the charterer, and the right to have such cargo loaded, and to earn the stipulated freight on the voyage home, and

the interest in such right is by the policy valued at the sum of 4,000*l*. And the question really is, was the ship so damaged by perils of the seas during the period covered by that policy, as to be practically disabled from arriving and being at Calcutta in such condition of seaworthiness as to entitle her to require from the charterers' agent the loading of the stipulated cargo.

In the judgment of the Court of Common Pleas it is said that "the case of insurance of specific charter freight to be carried upon a future voyage against perils to be incurred in the present one, is so far as we can learn exceptional in practice, though not unprecedented." And I cannot forbear to add that I think it to be an eminently inconvenient and unsatisfactory course of insurance. The subject matter of the insurance under the policy in question appears to me to be accurately appreciated and stated by the Court of Common Pleas in the report of the case (36) ; but I think that the foundation of the error into which, as it appears to me, the Court fell, is to be found in the following passage of the judgment : "The insurance of a subject thus dependent upon the possession of the ship, though not properly an accessory thereto, nor incident to the voyage insured, yet being insured by the ordinary form of policy, *ought to be dealt with upon the same principles as an insurance of the ship itself*, and as subject to the *same conditions in respect of abandonment and otherwise*, unless so far as the character of the subject matter rendered abandonment idle or inapplicable." I have already stated that in my opinion the true effect of the policy under consideration was to insure the ability of the ship to earn the freight contemplated by the charter-party, upon the cargo to be loaded at Calcutta for the homeward voyage, against perils to be encountered by the ship on the voyage to New Zealand, and for thirty days in port there after arrival, so that she should not be prevented from getting to Calcutta in such a state of seaworthiness as to give the owners a right of action against De

Mattos, if he did not load the cargo pursuant to the charter-party.

The condition of the ship when at New Zealand, as regarded the sea damage which she sustained there during the time covered by the policy, was such as was admitted in the joint case would have justified an abandonment and claim for a constructive total loss. The admitted facts as regards the condition of the ship at New Zealand being such as would have justified an abandonment of the ship as for a constructive total loss, it now becomes important to consider whether the right to earn the freight under the charter-party was, and to what extent, affected by the actual condition of the ship at New Zealand. Baron Cleasby is reported to have said in the Court of Exchequer Chamber that the thing insured "is the right to earn the freight, and this is neither destroyed nor irretrievably lost because the ship is damaged to the extent alleged. The condition of earning it, namely, repairing the vessel, is not made impossible, but expensive and therefore difficult of performance, but these expenses and the difficulty form the equivalent in such case to damage to the thing, where the thing exists in specie, and mere damage to any extent does not constitute total loss." With great respect this appears to me to confound the considerations which arise upon two distinct contracts, namely, that of an ordinary policy on the ship, and a policy confined to the right and ability of the ship to earn the stipulated freight. The ship was in fact in such condition from sea damage in New Zealand that no uninsured owner of ordinary prudence would have repaired her, and so far as he was concerned, had he known the actual facts, he would have been justified in at once abandoning her to the underwriters.

So soon as the ship became so sea damaged that no prudent uninsured owner would repair her, I think that from that moment her capacity to earn the stipulated freight on the homeward voyage had become a practical impossibility, so that she could not be effectually tendered to the agent of the freighter at Calcutta as a ship "tight, staunch and strong, and every way fitted for the

(36) 37 Law J. Rep. (N.S.) C.P. 262 ; s.c. Law Rep. 3 C.P. 567-8.

voyage," that is the homeward voyage. It must be taken for granted that if the actual extent of the damage had been ascertained at New Zealand, the owner would then have done what he did at Calcutta, namely, abandon the ship to the underwriters; but the doing that, or the not doing it, either at New Zealand or Calcutta, could not and does not, as I think, assist in determining whether in fact by reason of perils of seas during the time covered by the policy the ship had become incapable of earning the contemplated freight, pursuant to the charter-party. I accept the dilemma proposed in the judgment of the Court of Common Pleas, that "the assured must answer that the total loss was complete, actual and absolute, without abandonment at Bluff Harbour, immediately upon the happening of the damage, to repair which would cost more than the value of the vessel, and if that were so, the subsequent proceedings of the owner were immaterial, inasmuch as no freight, properly so called, was in fact subsequently earned."

I think that my brother Lush was right in the opinion he expressed in the Court of Exchequer Chamber, namely, "That which, in the language of maritime commerce, constitutes a loss of a ship is damage to an extent not worth repairing, followed by a determination not to repair. As respects her capacity to earn freight, a ship in such condition is as much lost to the owner as if she had sunk or broken up."

It is true that the ship was taken to Calcutta under the charter-party as an existing ship, such as was supposed capable of being repaired at a cost which might reasonably be incurred in order to enable her to prosecute her voyage. But when the true condition of the ship was ascertained and she was found to be damaged to an extent which justified the owners in abandoning her to the underwriters, as a constructive total loss, and they did abandon her, the inference arising from those facts is entirely rebutted. I do not feel it incumbent on me to do more than to say, that whatever was then done or omitted to be done with a view to abandonment by the plaintiffs as

owners of the ship, has no real bearing upon the question to be determined in this case. If I am right in assuming that by reason of damage from perils of the sea, she had within the time covered by the policy become practically disabled from being tendered at Calcutta to the freighters' agent, as a ship answering the conditions of the charter-party the subject matter of insurance had become a total loss. There was nothing which the assured as insurers of the anticipated freight could do, or leave undone, which could affect the position or conduct of the underwriters in regard to the contract contained in the policy on freight.

To say that the plaintiffs as insurers of the freight were in fact identified with the owners of the ship, and were therefore bound to act or not to act, to elect or not to elect, in conformity with the proceedings of the plaintiffs as owners of the ship, is to confound the rights and obligations of the parties under two separate and distinct contracts. It does not appear from the case whether there was an insurance on the ship, but I collect from the judgment in *Potter v. Campbell* (37), that there was such a policy on the ship covering the voyage to New Zealand; but I am entitled, in considering the effect of the policy in question, to treat the ship as uninsured, and to deal singly with the loss of the anticipated freight. The right to call upon De Mattos to load a cargo at Calcutta had been rendered abortive by perils of seas, resulting in such damage to the ship at New Zealand as rendered it practically impossible to make an effectual tender of her to receive cargo at Calcutta. What was there then in the power of the assured under this policy to do, or say to the underwriters, which would not have been an idle ceremony?

The plaintiffs in their character of owners of the ship had a duty to elect and give notice of abandonment within a reasonable time after the discovery of the true state of the facts, and it may be that they were guilty of such laches in delay in the discovery as rendered their notice of abandonment when given inoperative; but I am at a loss to see how

that affects the plaintiffs under the policy in question. Their election was made for them, when the condition of the ship owing to perils insured against became such as practically destroyed her capacity to earn the contemplated freight. The ground upon which a notice of abandonment is held not to be necessary, where a ship founders at sea, and an actual total loss takes place, is, that there is nothing left which the assured can cede to the underwriters, or by which their position can be affected, and it appears to me that the reasoning of Lord Abinger in delivering the judgment of the Exchequer Chamber in *Roux v. Salvador* (6), applies strictly to the circumstances of the present case. Had it not been for the respect which I feel for the opinions of the Judges, who expressing the same view which I entertain of the subject matter of insurance under the policy in question, have come to a different conclusion, I should have been content to have stated my opinion to be in conformity with the judgments of the Lord Chief Justice Cockburn and my brother Lush in the Court of Exchequer Chamber.

Entertaining a very strong opinion that no notice of abandonment was necessary, I feel some difficulty in dealing with the question whether if a notice of abandonment was necessary it was given in time. In considering this question as applicable to the policy on freight simply, it appears to me that questions of fact quite distinct from those which would affect the policy on the ship may arise, and it may well be that what is a reasonable notice in the one case, is not reasonable in the other; but I cannot fix any precise time, under the circumstances of the present case, from which if a notice was necessary to be given, it would be or not be in time, as a matter of reasonableness. If it is to depend upon the diligence with which the owner pursues the inquiry into the actual condition of the ship arising from sea peril, I do not discover in the facts stated any such laches or neglect, or any such conduct on the part of the master in his dealing with the ship until the extent of the damage was discovered, as would induce me to differ from the opinion expressed by the

majority of the Judges in the Exchequer Chamber.

Before concluding, I ought not to omit to notice a point that was made in the argument, and which I believe is adopted by one of my learned brothers for whose opinion I entertain the greatest respect, viz., that the insolvency of De Mattos, and not the perils of the seas, was the proximate cause of the loss of the anticipated freight, and further, that the delay in the ship's arrival at Calcutta had discharged De Mattos, even if solvent, from loading a cargo under the terms of the charter-party. I cannot help thinking that this view of the case arises from not keeping strictly in view the subject matter of insurance under the policy. If the matter insured was the right and ability of the ship to earn the homeward freight by being at Calcutta, tight, staunch and strong, and every way fitted for the voyage home, and that such state of the ship was a condition precedent to the right to require the loading of a cargo at Calcutta by the agent of De Mattos, the ship neither did nor could fulfil that condition, owing to the perils of the seas during the time covered by the policy, and that I think was a loss insured against independently of the solvency or insolvency of De Mattos on her arrival.

It was further said that the fact of the insolvency of De Mattos would have equally prevented his agent from providing a cargo, even if the ship had arrived at Calcutta in seaworthy condition. Had the policy not been a valued policy that fact might have seriously affected the damages, but I do not see how it can afford an answer to the present action.

Then with regard to De Mattos being discharged from the obligation to load a cargo in consequence of the delay which had taken place on the arrival of the ship, that can be no answer to the action, if I am right in attributing that delay to the effect of sea damage within the policy.

I have therefore come to the conclusion that all the questions propounded by your Lordships to the Judges ought to be answered in favour of the plaintiffs below who are the respondents in your Lordships' House.

BLACKBURN, J.—My Lords, your Lordships have in this case proposed six questions to the Judges, all of which I answer in favour of the plaintiffs in the cause, who are the respondents in your Lordships' House. I will first state generally my reasons for deciding in favour of the plaintiffs on the merits. The plaintiffs being mortgagees in possession of the ship *Sir William Eyre*, then on a voyage to New Zealand from the Clyde, had entered into a charter-party with De Mattos, by which it was agreed that the ship should sail to New Zealand with a cargo for owners' benefit, and having arrived and discharged the same, and being made tight, staunch and strong, and every way fitted for the voyage, should proceed to Calcutta, and there being tight, staunch and strong, and every way fitted for the voyage, should load from De Mattos' agents a cargo and convey it for freight to Liverpool or London.

It is to be observed on this charter-party, that it is a condition precedent to the earning of the freight, that *The Sir William Eyre* should be in due time at Calcutta, and there seaworthy for the voyage from Calcutta to Liverpool or London. The plaintiffs could not substitute any other vessel for her, and that being so, the plaintiffs might be prevented from earning that freight by any disaster which befel the *Sir William Eyre* on her voyage out to New Zealand, or during her stay there, or on the voyage from thence to Calcutta, or during her stay there, if the effect of that disaster was to render it impracticable to tender the *Sir William Eyre* at Calcutta in due time, and in a seaworthy condition for the voyage home round the Cape of Good Hope; but that they had a vested expectation of earning this freight, if no such disaster happened. They had therefore in respect of this freight an insurable interest during the whole of the outward voyage. This is not, as I understand, disputed, but if authority is required for it, I would refer your Lordships to *Barber v. Fleming* (38) and *Foley v. The United Marine*

Insurance Company of Sydney (39). Being so situated they entered into the policy. In my opinion the whole merits in this case depend upon the accurate understanding of the contract contained in this policy.

I must first observe on a matter which is perhaps not strictly before your Lordships. It is stated at page 163 of the Appendix, that this insurance was for 4,000*l.* on freight valued at 5,000*l.*, and throughout the argument, and in the judgments below, the policy was treated as a valued policy, and consequently no question was discussed as to the amount to be recovered, nor whether the insolvency of De Mattos, and the consequent diminution in value of the freight insured, affected that amount. In the policy itself, however, as set out in the Appendix to the case, the space which, if this was the case, ought to have been filled up with 5,000*l.*, is left blank, and the policy is in form an open one. It is possible that the policy is miscopied, but I think it more probable that it was drawn up in this form by mistake, and that the underwriters, either from a sense of honour or from knowing that the contract could be reformed in equity, have been content to act on the contract as it ought to have been drawn up. I presume your Lordships would not like to put any obstacle in the way of such a fair proceeding. I shall therefore make no further remark on the amount to be recovered.

The insurance is "lost or not lost at and from Clyde to Southland, while there, and thence to Otago, New Zealand, and for thirty days in port there," upon the *Sir William Eyre*. And the subject matter is 4,000*l.* on homeward chartered freight. I think that the meaning of this contract is that the underwriters are to indemnify the assured, if by any of the perils insured against, the *Sir William Eyre* is during the voyage from the Clyde to New Zealand, or during thirty days after arrival there, so damaged that in consequence the homeward chartered freight cannot be earned.

In the judgment in the Common Pleas

(38) 10 B. & S. 872; s. c. 39 Law J. Rep. (N.S.) Q.B. 25.

(39) 39 Law J. Rep. (N.S.) C.P. 206; s. c. Law Rep. 5 C.P. 155.

in this case it is said, "The policy under consideration thus differs from an ordinary insurance upon freight. First, in that it could not be affected by loss of cargo, because the freight insured was not for cargo in existence or appropriated during the risk; next, that it was not subject to general average either of ship or cargo, because the freight was not to be earned during the voyage insured, and as a consequence, that the underwriter was not in any case to contribute to repairs of the ship, not even in respect of general average, and lastly, that as the freight rested in contract for the future employment of the ship only, it would not pass by bare abandonment to the underwriters upon ship, but would simply come to nothing upon such abandonment if justifiable, because the abandonment would be in effect an election by the owner to treat the charter as at an end by reason of the usual exception of sea perils in the charter-party, and he would not be bound to incur in favour of the underwriters on ship any new responsibility not connected with the voyage on which the ship was insured." So far I completely agree, and instead of repeating this in other words I adopt this language as my own, but in what follows in that judgment I do not agree.

I think that if there was damage to the ship, such that though it was physically possible to repair the ship, the expense would be so great that, according to the rule laid down in *Moss v. Smith* (21), it was unreasonable so to do, the owner might, as between him and the charterer, elect not to repair the ship, but to treat the charter as at an end by reason of the exception of the sea perils, and if under such circumstances the owner did not in fact repair her, the freight was totally lost by the perils insured against, and not as stated in the judgment of the Common Pleas, by the owner's default, for the owner was not bound to repair the ship. There would be no loss from the perils insured against, if the owner did in fact repair the ship, which, though not bound to do so, he had a right to do if he pleased.

If indeed there had been a partial loss or damage, such that the owner could reasonably repair the ship, he was bound

to do so, and if in such a case he declined to do so, I should agree with the judgment in the Common Pleas in saying that he would lose the freight by his own choice or default, and not by any peril insured against. But I think that where the damage is so great that the owner is not bound to repair the ship, if he declines to do so he would lose his freight, not by his own default, but by the perils insured against. This seems an elementary proposition, but as much of what I consider the error in the judgment of the Common Pleas arises from not bearing it in mind, I will proceed to state some authorities for it.

The principle is thus expressed in the judgment of the Queen's Bench in *Stringer v. The English, &c., Insurance Association* (26): "The assured, if he, by any means such as he could reasonably be expected to use, could have prevented the loss (which was in that case by a sale in the Prize Court) "was bound to use them, and if the sale was directly occasioned by his default, though remotely by the perils insured against" (in that case a seizure) "he cannot recover against the underwriters. But the assured are not bound to use unreasonable exertions in order to preserve the thing insured; and if the giving of a bond or deposit of money" (in the present case the repairing of the ship) "would have exposed them to expense or risk of expense beyond the value of the object, or as the same idea is often expressed, if the steps necessary to prevent the sale" (loss) "were such as a prudent uninsured owner would not have adopted, we think they were not in default, and the sale was then a total loss occasioned by the seizure."

I do not cite this as conclusive, for it is for your Lordships to determine whether it is correct or not, but as expressing what I think the true principle. So far as regards the case of a ship it is very concisely and I think accurately expressed by my brother Lush in his judgment in the Court below when he says, "That which in the language of maritime commerce constitutes the loss of a ship is damage to an extent not worth repairing, followed by a determination not to repair."

I must here observe that in my opinion (which in this respect differs from that expressed in the judgment of the Court of Common Pleas below) there might well be a state of things in which the assured could recover on this policy for a total loss of the freight, though the assured could not, either with or without notice of abandonment, recover against the underwriters on ship for a total loss. The questions between the assured and the two sets of underwriters are not the same. The question between the assured and the underwriters on the ship is whether the damage sustained may be so far repaired as to keep her a ship, though not perhaps so good a ship as she was before, without expending more than she would be worth. The question between the assured and the underwriter on the chartered freight is whether the damage can be so far repaired that the ship can be at Calcutta, *seaworthy for a voyage round the Cape of Good Hope*, without expending more than she would be worth. I should have added a further term that the repairs could be done so promptly that she might arrive at Calcutta within a reasonable time, as between the shipowner and De Mattos, were it not for the case of *Hurst v. Usborne* (40) which seems to me an authority against this position. And though I should not hesitate to advise your Lordships to reconsider that case if necessary, I think it is not necessary so to do in the present case.

My position therefore is that if the ship were so damaged that she could be brought to Calcutta and there made seaworthy for a voyage round the Cape, but not without expending say 10,000*l.*, and would then, all things considered, be worth only say 9,000*l.*, but that she could by an expenditure of say 4,000*l.* be made a ship quite fit for short voyages, though not for such a voyage as that round the Cape, and would then be worth say 5,000*l.*, there would be a total loss of the freight, though no total loss of the ship. No notice of abandonment whatever given to the underwriters on ship could have con-

verted that which on those figures was only a partial loss into a total one. This was decided by the Exchequer Chamber in *Kemp v. Halliday* (41), a case which was not cited at your Lordships' bar, but to which I venture to refer your Lordships, as the passages contained in pages 749 to 754 of the report in *Best & Smith* will shew your Lordships that the opinions I now express are not formed for the first time.

I now proceed to consider the answer to your Lordships' first question. That in my opinion depends upon a question of fact, which I think is answered by the very important addition to the case made during the argument in the Exchequer Chamber, and now contained in paragraph 24 of the case: "It is admitted that the sea damage which the ship sustained at New Zealand during the time covered by the policy would have justified an abandonment and claim for a constructive total loss." This can only mean that the damage to the ship was so great that the ship could not be repaired without spending more than she was worth, and consequently that the shipowner might justifiably elect not to repair her.

I think that under such circumstances the shipowner had a right as against his underwriters on ship to come upon them for a total loss. But if he does so, then on general principles of equity not at all peculiar to marine insurance, he who recovers on a contract of indemnity must and does by taking satisfaction from the person indemnifying him cede all his rights in respect of that for which he obtains indemnity. It was held in *Mason v. Sainsbury* (42), that the Hand-in-Hand Insurance Company having paid the plaintiff for a loss under a fire policy were entitled to recover in an action in his name against the hundred. This cession or abandonment is a very different thing from a notice of abandonment, though the ambiguous word "abandonment" often leads to confounding the two. There is no notice of abandonment in cases of fire insurance, but the salvage is transferred

(41) 6 B. & S. 763; s. c. 35 Law J. Rep. (N.S.) Q.B. 156.

(42) 3 Doug. 61.

(40) 18 Com. B. Rep. 144; s. c. 25 Law J. Rep. (N.S.) C.P. 209.

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on the principle of equity expressed by Lord Hardwicke in *Randall v. Cochran* (43), that "the person who originally sustains the loss was the owner, but after satisfaction made to him the insurer." In *Godsall v. Boldero* (44), the same principle was acted upon in the case of life insurance. That case was overruled in *Dalby v. The India and London Life Assurance Company* (45) because the principle was misapplied to a life insurance, which is not a contract of indemnity; but the principle itself has never (that I know of) been questioned.

When therefore the party indemnified has a right to indemnity and has elected to enforce his claim, the chance of any benefit from an improvement in the value of what is in existence, and the risk of any loss from its deterioration, are transferred from the party indemnified to those who indemnify, and therefore if the state of things is such that steps may be taken to improve the value of what remains, or to preserve it from further deterioration, such steps from the moment of the election concern the party indemnifying, who therefore ought to be informed promptly of the election to come upon him, in order that he may, if he pleases, take steps for his own protection. And on general principles of law (still not confined to marine insurance) an election, once determined, is determined for ever, and such a determination is made by any act that shews it to be made. And therefore anything that indicates that the party indemnified has determined to take to himself the chance of benefit from an increased value in the part saved, and only claim for the partial loss, will determine his election so to do. I may refer for an exposition of this general principle to the judgment of the Exchequer Chamber in *Clough v. The London and North-Western Railway* (46).

In cases of marine insurance the regular mercantile mode of letting the under-

writers know that the assured mean to come upon them for a complete indemnity is by giving notice of abandonment, which is a very different thing from the abandonment or cession itself. This notice when given is conclusive that the assured, if still in a situation to determine his election, has determined to come upon the underwriters for a total loss, the consequence of which is that everything is ceded (to avoid the use of the ambiguous word "abandoned") to the underwriters. Abbott, C.J., in *Cologan v. The London Assurance* (47) says, "I do not consider an abandonment as having the effect of converting a partial into a total loss." . . . "The abandonment, however, excludes any presumption which might have arisen from the silence of the assured that they still meant to adhere to the adventure as their own."

If before giving this notice the assured have already indicated by their acts, or if the circumstances are such that they indicate by their silence, that they have elected to adhere to the adventure as their own, the notice of abandonment obviously comes too late. A very good example of such a case is afforded by *Mitchell v. Edie* (48), as explained in *Hous v. Salvador* (6). There a ship laden with sugar, and bound for London, was captured and finally taken into Charlestown, where the sugar was sold and the proceeds lodged in the hands of a person resident in Charlestown. From the state of political affairs at that time sugar was dear at Charlestown, and, as Lord Abinger conjectured, the sugar had come to a very good market and the assured was satisfied and took to the proceeds. A year afterwards the person in whose hands the money was became insolvent, and after that it was, with obvious justice, held that it was too late to come upon the underwriters for a total loss. Thus explained the case is a good example of the principle stated in *Stringer v. The England, &c., Insurance Company* (26), where it is said, "As is well pointed out in 2 *Phillips' Insurance*, S. 1669, where the cargo still subsists in specie, and may be recovered,

(43) 1 Ves. sen. 98.

(44) 9 East 72.

(45) 15 Com. B. Rep. 365; s. c. 24 Law J. Rep. (N.S.) C.P. 2.

(46) 41 Law J. Rep. (N.S.) Exch. 21; s. c. Law Rep. 7 Exch. 34, 35.

(47) 5 M. & S. 456.

(48) 1 Term Rep. 608.

the question depending on abandonment is, which party should be at the risk of the market and the solvency of agents, neither of which, independently of the direct effect of the perils insured against, concerns the insured. To allow the assured to change his election whilst the circumstances remain the same, would enable the assured to treat the property as his so long as there was a prospect of profit from the rise in the market, and as the property of the insurers, so soon as there was a certainty of loss, which would be inequitable: *qui commodum sentit sentire debet et onus.*"

I should apologize to your Lordships for dwelling so long on what seems to me the principle on which abandonment, and the necessity of notice of abandonment, when required, depend, had it not been argued at your Lordships' bar on the authority of *Knight v. Faith* (8), that there is a technical rule of insurance law by which notice of abandonment must be given if the thing exist in specie at all, though the state of things is such that the underwriters could do nothing in consequence of the notice. I think it more convenient to postpone my remarks on that case till I answer your Lordships' last question. In the meanwhile I proceed to say that I should be very sorry to throw any doubt on the principle expressed by Lord Abinger in the following passage in his judgment in *Roux v. Salvador* (6) where, after stating the state of circumstances which gives the insured a right to treat the case as one of total loss, he proceeds: "But if he elects to do this, as the thing insured, or a portion of it, still exists and is vested in him, the very principle of indemnity is that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value."

But I think this is from the nature of things confined to cases where there are some steps which the underwriter could take, if he had notice. When they can do so I think that the neglect to give

notice of abandonment may determine the owner's election. This is a matter that is now of much greater practical importance than it was when Lord Abinger delivered that judgment. For then the assured could not learn that his ship had got into difficulties at a distant place till long after the disaster, and the underwriters could only send out orders which would arrive later still. Under such circumstances a notice of abandonment was often a very idle ceremony, and in my opinion unnecessary if the facts did amount to a total loss, inoperative if they did not. Now, when by means of the electric telegraph the underwriters' orders might promptly reach the spot where the ship was in peril, a notice of abandonment may be of great practical importance. What would be a reasonable time, and whether the neglect to give notice of abandonment does determine the election, must, I think, depend in each case on the circumstances, and principally on what steps the underwriters might take if they had notice. If there was nothing they could do, no notice I think is required. This I apprehend is the principle of *Cambridge v. Anderton* (5), *Roux v. Salvador* (6), and *Farnworth v. Hyde* (11). For, as has often been observed, a sale by the master is not one of the underwriters' perils, and is only material as shewing that there is no longer anything which can be done to save the thing already sold for whom it may concern. It conclusively determines that neither assurers nor assured can do anything, and consequently that a notice of abandonment would be but an idle form on which nothing could be done, and which therefore is unnecessary.

If these which I have submitted to your Lordships are the true principles on which the law depends, it seems to me to be obvious that in this case there was a total loss of the freight in consequence of the damage by sea perils being so great that the shipowner was not bound to repair her. No doubt the shipowner might have repaired her if he pleased, and if, as in *Benson v. Chapman* (9), he had elected to repair her, and had done so, though at a ruinous expense, the freight would not have been lost. But the ship in this case never was repaired so as to make her

capable of earning the freight, and the insured was under no obligation to repair her at a ruinous cost.

This brings me to the second question. I cannot see how the contract between the plaintiffs and the defendant, by which the latter undertakes to indemnify the former against loss on the freight, can be at all affected by the fact that the plaintiffs had made a contract with other persons by which they undertook to indemnify the plaintiffs against loss on the ship. If the facts are not such as to amount to a loss of freight from the perils insured against, no transaction between the plaintiffs and third persons could make them amount to such a loss. If they were such as to amount to a loss of the freight it can make no difference to the defendant whether the plaintiffs can or cannot recover for the damage to their ship from other persons. It is true that a transaction with third persons may as evidence prove that the plaintiffs had elected not to repair the ship, as the sale of the wreck in *Cambridge v. Anderton* (5), and in *Farnworth v. Hyde* (11), did. And so if the plaintiffs in the present case had given notice of abandonment at once to the underwriters on ship, and recovered from them as for a total loss, it would have afforded conclusive evidence that they had elected not to repair the ship. As it was they delayed so long that I think the fair conclusion of fact is that, as between them and the underwriters on ship, they had elected to take their chance of making a better thing of it by keeping her as a ship to themselves, and coming on the underwriters for a partial loss only.

I do not go into the facts, as the question whether they could have recovered a total loss on the policy on ship or not is only collaterally raised in this case, but in my opinion they completely bring the case within the principle stated by Lord Chancellor Cottenham in *Fleming v. Smith* (3), where he says, "They were sufficiently informed of what had taken place to enable them, if they thought proper, to take upon themselves the chance of the benefit of retaining the ownership of the property, instead of taking the sum which was secured to them by the policy effected with the underwriters on the vessel; and

if they acted upon that opportunity of election they surely cannot afterwards turn round and go against the underwriters as for a total loss." I should therefore, as at present advised, have concurred with the Court of Common Pleas in their decision in *Potter v. Campbell* (37). But I think that this in no way affects the question between the plaintiffs and the underwriters on freight. I agree with what has been said by my brother Brett; the plaintiffs not having come upon the underwriters for ship leaves the case just as if the ship had never been insured at all.

This brings me to consider whether it was necessary for the plaintiffs to give notice of abandonment to the underwriters on freight. It was argued at your Lordships' bar that by the law of marine insurance a notice of abandonment was as imperatively necessary as a notice of dishonour is by the law merchant on bills of exchange. On this I shall submit some observations at the end of this opinion, but at present I will assume that the true principle is that notice of abandonment is only requisite when from the state of facts it may make a difference to the underwriters if the assured delays making his election whether he will adhere to the property, taking his chance of profit or loss from so doing, or come upon the underwriters for a total loss. If that be the principle, it seems to me to follow from it that inasmuch as there was nothing which the underwriters on freight could have done to alter their position in consequence of a notice of abandonment, and that it would have been an idle ceremony, no notice could ever be required, and, not being required at all, could not be too late.

These are the reasons for which I answer, to your Lordships' second question by saying, that in my opinion no notice of abandonment either of ship or freight was necessary to enable the plaintiffs to recover for a total loss on the policy on freight; to the third question, that in my opinion no notice at all being required, it never could be out of time; and to the fourth question, that though I think that under the circumstances of this case the plaintiffs have precluded themselves from

recovering for a total loss of the ship, that in no way affects the rights of the plaintiffs upon the policy on freight.

I now come to your Lordships' fifth question. From what I have already written your Lordships will perceive that in my opinion the decision of the case really should depend on the answer to this question. I have already indicated that I think that the assured so conducted themselves as to discharge the underwriters on ship from the liability for a total loss, for the assured took to themselves the chance of benefit from retaining the ship as their own, and so made their election as to the ship. But as to the freight, I can see nothing which could have been done by the underwriters if the idle ceremony of a notice had been gone through. It was indeed suggested that the underwriters on freight might have made some arrangements with the underwriters on ship, by which they were to repair the ship, send her on, and in the name of the owners tender her to De Mattos. But in all cases, and especially in cases of insurance, we look to what is practically possible, and not to remote theoretical imaginations. If it could be shewn that the delay in this case, which was certainly considerable, had in any way altered the position of the underwriters, if there was anything which they could have done, if the claim had been made on them at the time when the disaster happened at New Zealand, or in the interval, which they cannot now do, or if any prejudice had been sustained by them in consequence of the delay, the case would be different. I should then have to consider whether the prejudices sustained were sufficient to give rise to a preclusion. But as the facts are there is nothing of the sort. I therefore answer your Lordships' fifth question by saying that in my opinion there was no such conduct as to discharge the underwriters from their liability upon the policy on freight.

The answers to those five questions would answer the sixth and last, were it not that I have reserved to this time the discussion of the proposition argued at your Lordships' bar, that there is a technical necessity for a notice of abandonment in a case of marine insurance, whe-

ther any use can be made of it or not, and whether the failure to give it works any prejudice or not. It was said it was required by the law merchant as to insurance, just as notice of dishonour is required by the law merchant on a bill of exchange.

Such is the law in some foreign countries, but I will submit to your Lordships my reasons for thinking that it is not and never was the law of England. Emerigon, in the first section of the 17th chapter of his celebrated *Treatise on Insurance* (2 volume, p. 207, of the edition by Bonly Patty, 1827), states that by the general law merchant, or, as he calls it, "*le droit des nations*," there was no need for any notice of abandonment, the contract being one of indemnity only. I do not pretend to have made any research myself as to what was the ancient law merchant, but from Emerigon's high character for learning and research I assume that he is correct. He then proceeds to say that the law merchant did not prohibit persons from making a stipulation that under certain stipulated circumstances the subject matter of the assurance might be abandoned to the underwriters, who then should pay the whole sum assured, without having any option merely to indemnify the assured. And he observes that doubtless the usual clauses to that effect gave rise to established rules on the subject. He then cites from Cassaregi's three rules which Emerigon seems to consider as truly stating the law merchant on the subject. They are as follows—1. That the abandonment is a form which is sufficiently complied with by the simple fact that the assured demands from the assurers payment of the whole sum insured. 2. That the assured may, without having recourse to abandonment, recover the salvage, and claim payment from the assurers of an average loss only. 3. That in case of total loss abandonment is an idle form, "*le délaissement est une formalité inutile*." The editor of Emerigon observes, in a note, that the first and third of those rules are not the law of France at this day. And Emerigon points out that all this was in France (and, in consequence, in those countries which have adopted the French

law) altered by the positive enactments contained in the celebrated Ordonnance de la Marine of 1681, by the 46th article of which it was enacted that "No abandonment shall be made except in case of capture, shipwreck, 'bris'" (a word for which I know of no English equivalent, "breakage" or "fracture" not being used in this technical sense), "stranding, arrest of princes, or total loss of the things assured, and that all other losses shall be deemed average losses only." On this Emerigon treats at great length in the following sections of the 17th chapter.

There seems to have been at first much controversy and dispute as to the true effect of the enactment, but it seems to have been finally settled in France that the assured could never recover for a total loss without abandonment, even though the thing assured was totally destroyed. "Such," says Emerigon (chap. 17, sect. 6, 2 vol., p. 252), "is the enactment of our ordonnance, to which we must submit." And it was further established that when any of the events specified in the 46th article had happened, the assured might by giving notice of abandonment recover for a total loss, though the thing insured was quite safe and uninjured. This Emerigon justifies, or at least accounts for, by saying that the ordonnance created a presumption, which was *juris et de jure*, that where any of the first five cases had happened the thing was lost. This was carried so far that where a ship was stranded and got off without injury either to herself or cargo, the owners of the cargo were permitted to give notice of abandonment and recover as for a total loss. This highly artificial conclusion was corrected by a supplemental ordonnance of 1779, but till then it remained the French law, *see* Emerigon, chap. 17, sect. 2, vol. 2, p. 212.

Now the enactments of the French law, contained in the ordinance of the Marine, can have no force in England, except in so far as they have been adopted into our law. As far as regards the law that by giving notice of abandonment the assured can recover for a total loss, because by a presumption *juris et de jure* the property is to be taken as lost in law, though it is safe in fact, it certainly

is not the law of England, and never was. In *Hamilton v. Mendes* (13) Lord Mansfield strongly laid down the doctrine that a policy of marine insurance is a contract of indemnity, and that "if the thing in truth was safe, no artificial reasoning shall be allowed to set up a total loss."

No one would for a moment now venture to contend that a notice of abandonment could in England entitle an assured to recover as for a total loss on a policy on goods if the ship was captured, though set free, or wrecked but the cargo saved uninjured, or in a case of simple stranding. So far the law of the ordonnance is clearly not adopted in England. Even in the case where the loss is, at the time of the notice of abandonment, total, though capable of being reduced by a change of circumstances to a partial loss—*see Dean v. Hornby* (49), the assured (unless in the very uncommon case of the notice being accepted) cannot recover as for a total loss if that change of circumstances does occur before the trial. Nor can it be for a moment contended that a notice of abandonment is essential to the assured's right to recover for a total loss where the loss is in fact total.

But though in no one of these cases has the French enactment been adopted in the English law, it is argued that it has been so adopted as in the case of what is somewhat unhappily called a constructive total loss, to render a notice of abandonment a necessary technical preliminary to an action for the total loss, though it is not required for any useful purpose, though no prejudice has been sustained for want of it, though the loss at the time of the trial still continues total, and though, according to Cassaregis, as cited and approved of by Emerigon, the law merchant looked on the notice of abandonment in case of total loss as being "*une formalité inutile*."

It is unnecessary to refer to any English decisions prior to the great case of *Roux v. Salvador* (6). All the authorities bearing on the point were, I believe, cited and considered in the elaborate judgments

(49) 3 E. & B. 180; s. c. 23 Law J. Rep. (N.S.) Q.B. 129.

delivered in that case; and the decision of the Court of Exchequer Chamber was that no notice of abandonment was necessary, because, as is there stated by Lord Abinger, "Neither the assured nor the underwriters could at the time when the intelligence arrived exercise any control over the goods, or by any interference alter the consequences."

It may be, however, convenient to refer your Lordships to the portion of Mr. Phillips' *Treatise on Insurance* in which he treats on this subject. I know of no text writer who treats the law of insurance with more learning, and certainly of none who treats it with as much sound sense and appreciation of the bearing of the doctrines laid down on practical business. It is, however, to be borne in mind that he writes in America, and that, as he clearly states in sect. 1536 (2 vol. 3 ed. p. 271), "It is a general rule in the United States that if the ship or goods insured are damaged to more than half of the value by any peril insured against, or more than half the freight is lost, the assured may abandon and recover for a total loss." He adds in sect. 1536, "This rule of abandonment on account of loss over fifty per cent. of the value of the subject makes the most material difference between the American and English jurisprudence, relative to total loss and abandonment, and is to be kept in mind in examining the decisions of the tribunals of the two countries. This rule, and that rule in the United States whereby the validity of the abandonment is tested by the circumstances existing at the time of making it, instead of the time of bringing the suit, as in England, give a wider range to constructive total loss and abandonment in the United States."

Bearing this distinction in mind, anyone who wishes to understand this subject will derive great assistance from perusing the whole of Mr. Phillips' 17th chapter on total loss and abandonment. I will only refer your Lordships to sect. 1491, where he says, "An abandonment being a transfer, it can be requisite only where there is some assignable transferable subject on which it can operate." . . . "When nothing remains to be assigned or transferred, an abandonment is useless and unnecessary."

And to sect. 1494, where he observes, "But the better rule in such case is that if the insured neglect to abandon, he shall recover only according to the state of things at the trial; since, as we shall see, under a declaration for a total loss he may recover for a partial loss, and the underwriter ought to have the advantage of whatever may occur to make the loss partial so long as the assured delays to elect a total loss. If he has judgment for a total loss, this is equivalent to an abandonment, and gives the underwriter a right to salvage." And to section 1497, where he says, "The distinction mentioned above as to recovering a total loss without abandonment is to be observed, viz., that the assured is charged with the proceeds in the adjustment of the loss as in a salvage loss, though the same may not have actually come to his hands. This circumstance being borne in mind will reconcile most of the decisions on this subject which otherwise would appear to be directly contradictory according to the language commonly used by the courts, which must, however, be construed in reference to one or the other description of case under consideration." Your Lordships will appreciate the shrewdness of the latter part of this remark if you examine the various dicta cited in *Roux v. Salvador* (6) and *Knight v. Faith* (8).

To return to the English authorities, the decision of the Court of Exchequer Chamber in *Roux v. Salvador* (6) was, as far as I can learn, received with general approbation at the time. There was, however, one exception. Lord Campbell never could be brought to think it right. In the case of *Fleming v. Smith* (3) the counsel for the appellants (the Attorney-General Jervis, afterwards Chief Justice, and Sir F. Thesiger, now Lord Chelmsford) argued, as I think logically, from the decision in *Roux v. Salvador* (6), that notice of abandonment could not be in any case required except where there was something which could be done by the underwriters in consequence; and then the failure to give notice of abandonment might be material as determining the election which the assured had, whether to treat the loss as total or not. This, as

I have already stated to your Lordships, is what I consider to be the law. Lord Campbell was of a different opinion, and, in his opinion, says, "The law therefore requires that notice shall be given in order to convert a constructive into a total loss;" but, though that was his opinion, it was not the judgment of the House of Lords. Lord Chancellor Cottenham (and Lord Brougham concurred in his opinion), carefully puts the decision exclusively on the ground that the assured had, in fact, elected to treat the loss as a partial loss only. This studied silence on his part may prevent us from saying that he differed from Lord Campbell; but he certainly did not express any concurrence with him.

After this, in the Queen's Bench, when Lord Campbell was Chief Justice, there arose the case of *Knight v. Faith* (8). The manner in which that judgment came to be delivered was very peculiar. There was a very brief case stated for the opinion of the Court of Queen's Bench. On the statements in it the Court came to the conclusion, as stated in the judgment (50) that "slight repairs might have been sufficient again to fit her, the ship, for navigation," and the Court say (51), that though she was sold, "We are of opinion that as against the insurers the sale is not shewn to be lawful." On such facts the assured could never have recovered for a total loss, even if he had delivered all possible notices of abandonment from the first to the last. Yet the Court forced the counsel to amend the case by inserting a statement that no notice of abandonment was given, and pronounced an elaborate judgment on a point which it was wholly unnecessary to notice, except for the purpose of recording dissent from the decision of the Exchequer Chamber in *Roux v. Salvador* (6). It should in candour, however, be added that the other Judges of the Court joined Lord Campbell in this. Still I think that the fact that a judgment was not necessary for the decision of the case before the

Court always diminishes its authority. And I think that on perusing the judgment in *Knight v. Faith* (8), it will be found that no argument is produced which had not been used in *Roux v. Salvador* (6), and that no new authority is produced except Lord Campbell's own opinions in *Fleming v. Smith* (3), and a passage from the judgment of Lord Chancellor Cottenham in *Stewart v. The Greenock Marine Insurance Company* (2).

The question in that latter case was what passed to the underwriters on ship, who were liable for a total loss of ship. They raised the very question alluded to in the Section 1497 of Philips already cited. The ship having been destroyed just before she entered the docks, kept together as a ship so that she entered the docks, delivered her cargo, and so earned freight, and the underwriters on ship said they were entitled as salvage to the freight thus earned after the disaster. This House decided that they were entitled to this benefit, on the precise principle long before laid down in *Randall v. Cochran* (43), and the other cases I referred to in the beginning of this opinion, that the plaintiffs "claiming as upon a total loss must give up to the underwriters all the remains of the property recovered, together with all the benefit and advantage belonging or incident to it." But I cannot see how, or in what way, the assertion of the doctrine that recovering for a total loss operates as a cession of everything, can be said to amount to the assertion of that other doctrine that the handing in of a notice of abandonment is a condition precedent to the right to claim for a total loss. And as it seems to me every dictum cited in *Knight v. Faith* (8) is capable of being reconciled with the judgment of the Exchequer Chamber in *Roux v. Salvador* (6), if it is only borne in mind that the abandonment or cession consequent on recovering for a total loss is one thing; the notice of abandonment supposed to be a condition precedent to claiming for a total loss is another. I have dwelt on this point at perhaps unnecessary length, for all that it is necessary to decide in this case is that where there is nothing to abandon no notice is requisite.

(50) 15 Q.B. Rep. 656; s. c. 19 Law J. Rep. (n.s.) Q.B. 514.

(51) 15 Q.B. Rep. 657; s. c. 19 Law J. Rep. (n.s.) Q.B. 514.

I have therefore to conclude by saying, in answer to your Lordships' last question, that in my opinion judgment ought to be for the plaintiffs in the cause, the respondents in your Lordships' House.

BRAMWELL, B.—In this case I think it convenient to consider (though it has been already done in the judgments delivered), the precise effect of the contract the plaintiffs seek to enforce. The owners of the ship *Sir William Eyre* had entered into a charter-party with De Mattos, whereby the ship, then on a voyage to New Zealand, was to proceed to Calcutta and there load a cargo for Liverpool or London, to be provided by him. The contract in question is a policy of insurance by the owners (now represented by the plaintiffs), whereby the underwriters (the defendant being one), insured against certain perils of the seas, which might happen on the voyage then in progress to New Zealand, preventing the owners from earning or being entitled to earn the chartered freight. And the policy is to be taken to be a valued policy, and 4,000*l.* the value. The insurance did not extend to the voyage from New Zealand to Calcutta, the stay there, nor the voyage home. In effect, therefore, the insurance was against perils on the voyage to New Zealand which should prevent the ship getting to Calcutta in such a state as to give the owners a right of action against De Mattos if he did not load the cargo, and in such a state as should enable the vessel to bring the cargo home loaded, and earn the freight. For if De Mattos had loaded the cargo, and if owing to perils covered by the policy (perhaps undiscovered at Calcutta), the vessel had failed to bring the chartered cargo home, I apprehend the underwriters would have been liable.

It seems to me, therefore, with great respect, that on this policy there might have been a partial loss, with a partial or total loss of the ship. I am not speaking of what is probable, but it is possible, I suppose, that the ship might have been so injured on the outward voyage as to be unseaworthy for a whole cargo; it is possible that the charterer, though having a right to refuse to load an unseaworthy ship or a partial cargo, might have elected

to do so. In such case there might be a partial loss. And it is, I suppose, possible that a peril covered by the policy might have injured the ship in such a way that it became necessary to jettison a part of the cargo on the home voyage, and yet the rest might be carried home in the ship and freight earned. This also I conceive would be a partial loss, and without a total loss of the ship. So also, if by perils insured against the ship had been disabled from reaching Calcutta by an agreed time in the charter, or not in time to make the voyage the same as the charter provided for. I do not know that it is necessary to enter into these speculations, but to my mind they help to clear the matter.

It seems to me, then, that the insurance was that perils of the seas on the voyage to New Zealand should not destroy or prevent the right of action against De Mattos to accrue on the ship's arrival at Calcutta, and his refusal to load, and should not prevent the earning of the freight, if he performed his contract to load.

Whether such an insurance should be called an insurance on freight is only a question of words. But it is very important in most cases to use the right word. Certainly this insurance is practically more an insurance on ship in respect of freight than on the freight. For if the ship sustained no damage on the voyage to New Zealand from perils insured against, there could be no claim on the underwriters. This, perhaps, is true of all insurances on chartered freight till the cargo is loaded. For till then nothing that can happen to the cargo, or its carriage, can be in question. If Mr. Justice Willes' expression is accurate in this respect, this is wholly an insurance on the ship. He says, "The policy was in its nature therefore against total loss of freight by total loss of ship." Of course I do not mean that all the incidents of an ordinary insurance on ship attach, nor that none of those on freight do.

It seems to me that the foregoing statement of the case answers the first difficulty put on behalf of the defendant, viz., that De Mattos' insolvency or the destruc-

tion of the ship by the cyclone was the cause of the plaintiffs' loss of the freight. This is not so. For the perils on the outward voyage had put the ship into such a condition that the plaintiffs had no right of action against De Mattos for not loading. They *thought* they had when the vessel arrived at Calcutta, and so probably did De Mattos' agents. But they thought so because they did not know the true state of the facts. Had they sued De Mattos he would have had an answer, that the ship was not seaworthy. Nor could they have said in reply that they were ready to make her so within a reasonable time. For her state was such, that on its being known to them, they would not have been ready to do so. One of the losses therefore insured against, viz., inability to enforce the charter against De Mattos, accrued by reason of perils insured against. The assured would indeed probably, as the chartered freight was higher than the market rate, have lost the benefit of the charter by reason of De Mattos' refusal or inability to load, even though they had not lost it through perils of the sea. But the loss would have been different. They might have recovered damages from him, or proved against his estate. No doubt they would not in this way have got 4,000*l.*, but they would have got something. I agree with the illustration of Mr. Justice Willes, of the house left out of repair and subsequently burned down, and with that of Sir George Honyman, of an injury to a man's leg which a subsequent injury made it necessary to cut off. I think therefore there was a loss of the chartered freight by perils insured against, loss which accrued, and gave a vested cause of action when the ship was damaged by taking the ground at New Zealand.

Another difficulty made for the defendant was, that as the ship remained *in specie*, and could have been repaired so as to carry the cargo and earn the freight, and the assured did not think fit to repair, but abandoned the ship to the underwriters on ship, therefore the freight was lost, not by perils of the sea, but by the voluntary act of the plaintiffs. I think the answer to this is that it was not their voluntary act, but one to which

they were practically compelled by the extent of the damage. If this argument is good, it must apply to every case of insurance on freight, where the ship remains *in specie*. But this is not pretended.

I think, therefore, there was a loss of the thing, or one of the things, insured by perils insured against.

But the great question is, was there a total loss? I think this question ought to be and is unaffected by there having been an insurance on ship. For suppose there had been none, then the ship, or her materials, would have belonged to the assured, who would have broken her up or sold her to be broken up. In that case they would own the salvage of the ship, instead of the underwriters doing so. And indeed in this case the Court of Common Pleas held that the abandonment was ineffectual. There is no estoppel on that matter between the present parties, and the question there decided would have to be reconsidered in this case. But it seems to me immaterial whether the ship was insured or not, whether validly abandoned or not. In any case, if she was so damaged by the perils insured against that a prudent owner would not repair her, her owners were rendered practically unable to enforce the charter-party against De Mattos, and so there would be a total loss of the chartered freight, actual or constructive. Now there was a damage or loss to such an extent. But the ship though so injured remained a ship, and could have been repaired so as to earn the freight, though at a loss. The loss of the ship, therefore, though total, was what is called constructive, an unfortunate expression, but one for which I know no substitute. It was actually a total loss, the materials of the ship remaining in the form of a ship. Whether this should be called an actual or constructive total loss seems to me very doubtful. I incline to think it was an actual total loss of the freight by a constructive total loss of the ship. The damage or loss to a ship may be absolutely or necessarily total, as where it is burned or sunk to a hopeless depth. It may be total where it remains *in specie* afloat or ashore. In

that case it is so, or not, at the option of the assured. He may, if he thinks fit, treat the loss as partial and repair her. It is obvious that except in cases of valued policies the question is comparatively unimportant. In the case of a valued policy the question may be much more important.

But in both sorts of policies where the ship remains in specie, afloat or ashore, though the loss is really total, though she is practically lost as a ship, and what remains is the materials of a ship fastened together in the form of a ship, the option is with the assured to keep his ship or his salvage, and claim for a partial loss, or to claim for a total loss, giving up his interest in the ship or its materials to the underwriters. This is abandonment. It always supposes there is something to abandon, something to cede. If the ship is burned, or sunk to a hopeless depth, there is nothing to abandon. So if she is dashed to pieces on the shore there is no ship to abandon; by the destruction of the ship the loss of the ship is total, and the pieces as a consequence belong to the underwriter. What would be the law in the supposable case of the ship being rebuilt of the old materials, to whom she would belong, and what consequences would follow as to other matters, it is not necessary to consider. It is enough to say that where the thing exists, as it is called, *in specie*, in such condition as to be capable of utilization as the thing insured, the assured to claim for a total loss must abandon; where it does not so exist he need not. Surely this is equally true of goods and of every other subject of insurance. Now here there was absolutely nothing to abandon. To hold that it was necessary to abandon, or to give notice of abandonment, would be to hold, not that it was necessary to *do*, but to *say* something. For let what might be said, nothing would thereby be *done*, no possible effect could follow. I cannot find the notice of abandonment in the case, and I can hardly think what words could be used. If they were that all right to the freight was abandoned they were idle words, for there was no such right, no right at all.

It is suggested that the underwriters

might have chartered a ship and proposed to De Mattos to let them bring home the cargo. But the power to do this, and the possibility of their doing it, would not be anything, nor the consequences of anything abandoned to them. It would not be a right at all, much more a right acquired by abandonment. It might equally be done by them though there was no abandonment. But this is the utmost that can be suggested; as there was nothing to be done, and nothing nor any right which could be abandoned, I think it was not and could not be necessary for the assured to say they abandoned, nor consequently to give any notice thereof. I beg to refer to the judgments of Lord Chief Justice Cockburn and Mr. Justice Lush on this point, to which I cannot profitably add.

But it is argued that though no notice of abandonment may have been necessary, or possible, yet that the assured ought to have given notice that they elected to treat the loss as total. That is, that they elected not to repair the ship, and so qualify themselves to enforce the charter against De Mattos. I may observe in passing that I could not find as a fact, acting as a juryman, that they could have repaired the ship in time for it to be ready for the adventure for which De Mattos agreed to find the cargo, and indeed, as the case stands, I should think he might have refused on the ground that the ship was a year overdue. But on the question of giving notice of their election, if they were bound to do so, it must be by virtue of some general rule of law, or some rule of insurance law, some implied part of the contract of insurance. I know of no such rule, either of the general or particular law. I know of no rule which compels a person, having an option, to give notice which way he exercises it, where the position of the other party would not be affected by the giving or withholding of notice, when his conduct would not be regulated thereby. On this point I refer to the judgment of Mr. Justice Lush.

The opinions in favour of the defendant seem to me to be influenced by a fallacy, which may be thus expressed. The plaintiffs, it is argued, are prosecu-

ting the voyage or adventure till they give notice of abandonment of the ship ; therefore they are prosecuting what would give them a right to the freight ; therefore there could not be a total loss of freight at that time ; and that time was long after the damage, and therefore the total loss was not then actual. In a sense this is true. But as soon as the ship is abandoned there is a total loss of freight, or rather that which was doubtful when the damage happened is by the abandonment of the ship ascertained to be a total loss of the freight. Suppose instead of abandonment, and instead of destruction by the cyclone, the assured had themselves broken up the ship at Calcutta, would not the loss of freight then have been total ? No doubt the cause of action would have accrued when the damage happened at New Zealand, and from that date the statute of limitations would run ; but the character of the loss would be doubtful till the owners of the ship elected to treat the loss of ship as total. Suppose this had been a case of a sub-charter, viz., that the owner had chartered to the assured, who had sub-chartered to De Mattos. Whether in such case there would be a total loss of the sub-chartered freight would depend on whether the shipowners elected to treat the loss of the ship as total. So here, though the owners and the persons with whom De Mattos made his charter are the same, yet it is on their election as owners to treat the ship as totally lost or not that their total loss of freight as lessors of the ship by charter depends. They fill two characters, owners and parties to the charter ; on their election in the former character depends their loss in the latter. With great respect this seems to me the answer to the argument in the judgment of the Common Pleas. I think their judgment for the defendant arises from not adverting to this consideration. No doubt had the owner repaired the ship the loss of freight would not have been total, supposing the repairs in time for the voyage for which De Mattos undertook to find a cargo, which, if it were in controversy, I could not find in the plaintiffs' favour. True it is also that for a long time the plaintiffs

thought they could and would repair, but when they found out they practically could not, and so would not, the loss of the freight, till then in doubt, became certain and fixed. On these grounds I think no notice of an abandoning of the freight was necessary.

On the question of whether if notice of abandonment was necessary it was given in time, I feel this difficulty : thinking none necessary, I am yet to say when it ought to have been given ; whether the assured used due diligence in the performance of a duty which did not exist ? I come to the conclusion that if it was necessary to give it, it was not given in time. I agree with the reasoning of Mr. Justice Willes on this. It is a rule that where a man is put on informing himself, he is in the same position as though he had notice. I think that what had happened was enough to make the assured bound to inform themselves as to the extent of the damage. I think their delay in doing so was unreasonable, bearing in mind that the stay in New Zealand was attributable, in part at least, to their own misconduct in breaking the law. Further, I incline to think the question raised by Mr. Justice Willes should be answered unfavourable to the assured. I think that (as a matter of fact, not as a matter of law) the vessel should have been taken to Sydney to be examined—See *Gernon v. The Royal Exchange Assurance Company* (52). On this part of the case I feel great doubt, arising from the complication of the facts and the conflict of opinions.

Dealing generally with the case, I cannot but think that much of the difficulty has arisen from the unusual nature of the policy and the peculiar circumstances of the loss, the delay, the insolvency of the charterer, and the subsequent destruction by the cyclone. For suppose the ship safe and arrived at Calcutta, the charterer ready to load, a policy on the freight extending to perils at and from Calcutta, and the day before the loading began the ship driven ashore by a storm, and so damaged as certainly and obviously not worth repair, in short, a constructive total loss, would abandonment then have

been necessary, and of what? There would have been, could have been, nothing to abandon. But that case does not in substance differ from the present. Suppose that instead of the vessel proceeding to Calcutta her state had been known in New Zealand, and that she was not worth repair, and suppose there had been no insurance on ship, but her owners had kept her there existing in form as a ship, but used as a coal hulk only, would there not have been a total loss of this freight, and would notice of abandonment have been necessary? It seems to me clearly not.

I answer your Lordships' questions as follows—To the first, yes; the second, no; the third, no; the fourth, no; the fifth, no; the sixth, for the respondents.

MARTIN, B.—I assure your Lordships if I had merely consulted my own feeling I would rather not have delivered my opinion upon this case; but having read very carefully the judgments delivered in the Court of Common Pleas and in the Exchequer Chamber, and having arrived at the conclusion that the judgment of the Court of Common Pleas and that of my brother Cleasby in the Exchequer Chamber are right, I think it my duty to state the reasons which have led me to that conclusion, especially as your Lordships will find yourselves obliged in determining this case to decide what is the effect of a constructive total loss of ship upon an insurance on freight. Under these circumstances your Lordships will excuse me for bringing before you my view, and the more so as it is not exactly that either of my brother Cleasby or of the Court of Common Pleas.

This is an action upon a policy of insurance on freight, and the main question arises upon a novel state of facts. Nothing similar, so far as I know, has been the subject of decision in a Court of law. A ship called the *Sir William Eyre* had sailed from the Clyde on a voyage to New Zealand, to deliver cargo and passengers at two places, viz., Southland and Otago. After she had sailed a charter-party was executed on behalf of the plaintiffs, who were mortgagees in possession, and a Mr. De Mattos, whereby it was agreed that

the ship after having discharged her cargo at New Zealand should proceed to Calcutta, and there load from the agents of De Mattos a full cargo of merchandise for England for freight, 4*l.* per ton. It was also provided that the ship should be consigned to De Mattos' agents at Calcutta. On the 16th of February, 1863, a few days after the date of the charter-party, the policy now sued upon was effected. It is in the common printed form. The risk was "lost or not lost, at and from the Clyde to Southland, whilst there, and thence to Otago, and for thirty days in port there after arrival." The subject insured was "4,000*l.* homeward chartered freight." The freight was to be earned on the voyage from Calcutta to England. The perils insured against were to be incurred on the voyage from the Clyde to Otago, and thirty days after arrival.

The plaintiffs, to succeed, must therefore establish that the freight from Calcutta to England was lost by a peril which occurred on or before the 5th of August, 1863, when the last of the thirty days expired, and their contention is that the facts stated in the Special Case do so. The material facts are these—The ship arrived at Southland on the 23rd of April, 1863, and remained there until the 31st of July. Whilst there she sustained very considerable damage. Upon the 4th of July she arrived at Otago, and there discharged the remainder of her cargo. Whilst there she was surveyed, but there was no dry dock, and the extent of damage could not be ascertained. And I think it must be taken that the master acted *bona fide*, and believed that with some temporary repairs the ship would be capable of proceeding in ballast to Calcutta, and there made fit to carry the chartered cargo to England, and earn the freight. The temporary repairs were not commenced until February, 1864, and the ship remained at Otago (Port Chalmers) until the 14th of April. The cause of the delay is thus stated in the 14th paragraph of the Case—"The *Sir William Eyre* remained at Port Chalmers until the 14th of April, 1864, being prevented solely by want of funds from making the necessary preparation to proceed to Calcutta; the master had not

sufficient funds to defray the ship's charges and disbursements, and the liabilities which she had incurred in New Zealand, and not being able to raise such funds in New Zealand, nor Messrs. Dalgetty, to whom the ship was consigned at Otago, being willing to advance him the money he required for the purposes aforesaid, he was obliged to wait until he had obtained a sufficient remittance from the plaintiffs." Whilst the ship was there the master, in order that she might not be wholly unproductive, used her to store coal, and earned upwards of 700*l.* for storage rent. On the 14th of April she sailed for Calcutta, and arrived there on the 7th of June. The master immediately went to the agents of De Mattos and applied to them to carry out the charter. A copy of it had several months before been forwarded to them, but De Mattos had become insolvent in the December previous, and they had provided no cargo, and absolutely refused to provide any, or to have anything to do with the ship. The ship was afterwards put into a dry dock and surveyed (53). On the 2nd of August, upon the receipt in the United Kingdom of the survey, dated 8th of June, the plaintiffs gave notice of abandonment of the ship to the underwriters on ship, and of freight to the defendant, the underwriter on the freight. Neither were accepted. The ship in her damaged state was of the value of 3,000*l.* On the 8th of October the ship was stranded in a cyclone and became a wreck. Paragraph 24 of the case is as follows—"It is admitted that the sea damage which the ship sustained at New Zealand during the time covered by the policy was such as would have justified an abandonment, and claim for a constructive total loss." There are some other statements in the case, but the above are the material ones.

Upon these facts it was contended,—First, that there was a loss of the freight insured by perils of the sea at New Zealand, by reason of the damage sustained at Southland before the expiration of the thirty days. This contention I think cannot be sustained. The loss of the ship

no doubt causes a loss of freight, but there are two kinds of losses of ship, actual and constructive, and so long as a ship exists in specie, and retains the character of a ship, and is dealt with as such, and is capable of being repaired, there is no actual loss; there may be the elements of an inchoate constructive total loss, but to make such a loss of ship there must be an abandonment—*Knight v. Faith* (8). The only case referred to in the judgment of the Exchequer Chamber upon this point was *Roux v. Salvador* (6). But it seems to me to have no bearing upon it. It was an insurance on hides from Valparaiso to Bordeaux. The ship sprung a leak, and put into Rio; the hides were found there to be in an incipient state of putrefaction, and it was certain that if they had been sent on to Bordeaux they would have lost the character of hides and become a mass of putrefaction before their arrival. The master of the ship sold them at Rio, and it was held to be not an average but a total loss, with benefit of salvage. I do not see how that case bears upon the present. The ship after the expiration of the thirty days existed in specie, was treated and dealt with as a ship, performed a two months' voyage from New Zealand to Calcutta without apparently exhibiting any symptom of weakness or damage, and was tendered by the master to De Mattos' agents there as a ship capable of being repaired and earning the insured freight, and was of the value of 3,000*l.* Under such circumstances I think there could not be a loss of freight by perils of the sea until the plaintiffs had elected not to repair the ship and not prosecute the voyage from Calcutta.

Secondly. It was contended that there was a constructive total loss of the ship by the abandonment to the underwriters of the ship on the 2nd of August. The Court of Common Pleas, in a case, *Potter v. Campbell* (38), which was an action upon a policy on the ship, adjudged that the abandonment was not in time, and that there was not a constructive total loss of ship.

I think this judgment right, and I understand all my learned brethren are of the same opinion. I also agree with them that the constructive total loss of ship

(53) See 39 *Law J. Rep.* (N.S.) C.P. 148, 149.

and the validity of the abandonment is not the test of the defendant's liability, and that the question is the same as if there had been no insurance on the ship at all. The main and substantial question is: Was the freight from Calcutta lost to the plaintiffs by perils of the sea? In my opinion this is to be determined by the state of facts existing at the time the plaintiffs elected not to repair and prosecute the voyage from Calcutta to England, and is, in a great measure, if not entirely, a question of fact. When the policy was effected the subject insured was freight expected to be earned, and if the ship had been sunk or wrecked before the expiration of the thirty days (the 5th of August, 1863), the defendants would have been liable, for the expected freight would have been lost proximately, indeed directly, by a peril of the sea. But the ship arrived at Calcutta, and assuming the liability of the defendants to be then continuing, it seems to me that the ordinary rule as to insurance on freight applies, viz., there must have been cargo at Calcutta in order to earn it; if there were no cargo, it might be that the plaintiffs might have had a cause of action against De Mattos for not providing it; but unless there were cargo the freight insured was lost to the plaintiffs, not by the peril of the sea, but by the default of De Mattos. The ship arrived at Calcutta on the 7th of June, and was immediately tendered to De Mattos' agent, under the provision in the charter-party; but he had become insolvent in December previous, and the agent declared that he had no cargo for the ship, and would provide none, and did provide none. Therefore, before the extent of damage was ascertained, and the election not to repair made, the earning of the freight had become hopeless, indeed impossible, and was in reality and truth lost to the plaintiffs by a cause wholly beside, and independent of, the perils of the sea. It seems to me a crucial test that if the ship had sustained no damage, and had arrived at Calcutta perfectly sound and seaworthy, the freight would have been equally lost to the plaintiffs. In my opinion, the utmost that can be said is, that if De Mattos had been willing to provide the cargo, and

had had it to provide, there would have been a loss of the freight by reason of the damage to the ship at New Zealand. But this hypothetical loss is not a loss by perils of the sea for which underwriters are liable. It is a well-established and settled rule that the underwriter is liable for no loss which is not proximately caused by the perils insured against. The maxim, "*Causa proxima non remota spectatur*," is a fundamental principle of insurance law. The rule laid down by Lord Ellenborough in *Forbes v. Aspinall* (54) is, "that it is incumbent upon the assured, in order to recover on a policy on freight, to prove that unless the perils insured against had intervened the freight would have been earned." The facts stated in the Special Case disprove this, indeed prove the contrary.

It has hitherto been assumed that De Mattos was bound to supply a cargo at Calcutta, but it is quite clear that he was not, and that he was discharged from this obligation by the delay at New Zealand. In any action brought against him it would have been a material and traversable averment, that the ship had sailed and proceeded from New Zealand to Calcutta in a reasonable time, and this the delay at New Zealand would have disproved. De Mattos was in no way responsible for or concerned with this delay, and its existence would have been an answer to the action against him.

In my opinion, therefore, the freight was not lost by perils of the sea; the proximate and direct cause of its loss was the non-existence of cargo; and to bring the perils of the sea to bear upon it two things must have existed which do not, one that De Mattos was willing to provide cargo, although he was under no legal obligation to do so, the other that he had had it to provide. For these reasons I think the underwriters are not liable.

But a much more important question remains behind, viz., the application of the principle of constructive total loss of ship to insurance on freight. No case has been cited, and I believe none exists, in which this has hitherto been done. The doctrine as regards

ship was conclusively established by this House in 1847, in the case of *Irving v. Manning* (55). But it must be admitted by its warmest admirers, that its application coupled with valued policies has in many instances enabled shipowners to obtain and compelled underwriters to pay double the value of ships which the owners were desirous to get rid of.

For the purpose of this question it may be assumed that De Mattos had provided a cargo, and was ready and willing to load it. There are several definitions of constructive total loss, but that given by Chief Justice Tindal in *Benson v. Chapman* (9) is generally adopted—"that where the damage to the ship is so great from the perils insured against, that the owner cannot put her in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship (when repaired), he is not bound to incur the expense, but is at liberty to abandon and treat the loss as a total loss and recover the whole amount." A constructive total loss of ship can, therefore, only be upon condition that the assured abandon the ship. Abandonment is of the essence of it, it is a different thing altogether from total loss with benefit of salvage, of which *Roux v. Salvador* (6) is an instance. The word "abandon" is one in ordinary and common use, and in its natural sense well understood; but there is not a word in the English language used in a more highly artificial and technical sense than the word "abandon;" in reference to constructive total loss it is defined to be a cession or transfer of the ship from the owner to the underwriter, and of all his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it, including the freight then being earned. Its operation is as effectually to transfer the property of the ship to the underwriter as a sale for valuable consideration, so that, of necessity, it vests in the underwriter a chattel of more or less value, as the case may be. In the numerous discussions which preceded the final establishment of the doctrine of constructive

total loss, nothing was more strenuously urged in favour of it than that by abandonment the underwriter became the absolute owner of the ship, a thing of value, capable of being repaired and earning freight, if the abandonee thought fit. A constructive total loss is grounded upon a calculation. In the present case the calculation would be, present value of the ship 3,000*l.*, expense of repairs 7,500*l.*, total 10,500*l.*; against value of ship when repaired 5,264*l.*, freight which, if repaired, she would have earned, say 3,500*l.*, total 8,764*l.* The valued freight was 4,000*l.* It would, therefore, be for the pecuniary interest of an uninsured owner of ship not to repair, and if insured to abandon the ship and claim for a total loss; but against this the underwriter would have the ship of the value of 3,000*l.* The present question is, in such case can the freight be truly said to be lost by perils of the sea? The assured has made a calculation upon certain items, one of which is this very freight, and satisfied himself that it is for his pecuniary interest to sacrifice it and make no attempt to earn it, and has by his own voluntary act transferred the ship, by which alone it could be earned, to a third person, and thus deprived himself of the possibility of earning it. The freight is lost, remotely it may be, in consequence of sea damage, or, in other words, the perils of the sea, but directly and proximately by the voluntary act of the assured himself. The perils of the sea may be "*the sine qua non*," but certainly they are not the "*causa causans*." Suppose the underwriter thought fit to repair the ship and earn the freight, as he has a right to do, the underwriter on freight would be free, the event would have happened the not happening of which by reason of certain perils creates his liability. And can it be that the right of the assured and the liability of the underwriter on freight depend upon the conduct of a third person, a stranger to both, and over whom neither of them have any control?

But the point seems to me decided by the cases of *McCarthy v. Abel* (19) and *The Scottish Insurance Company v. Turner* (10). In *McCarthy v. Abel* (19) an insurance had been effected on homeward

freight from Riga. The greater part of the cargo had been loaded, but on the 7th of November, 1800, the ship was seized under a Russian embargo. On receipt of the intelligence the assured gave notice of abandonment to the underwriters on ship and on freight, he having effected separate insurances with different sets of underwriters. The embargo was taken off in May, 1801, and the ship arrived safely and earned her freight. This freight belonged to the underwriter on ship by reason of the abandonment, and the assured brought an action against the underwriter on freight, as for a total loss. The Court held it could not be recovered. Lord Ellenborough said it could not, for two reasons; first, that there had been no loss of freight at all, as in the event the freight had been earned; second, that if it could be considered in any other sense lost to the assured, it had become so by his own act in abandoning the ship to the underwriter thereon, with which, and its consequences, the underwriter on freight had nothing to do. The principle of the second reason of this judgment seems to me directly against the plaintiffs' contention in the present case. I will hereafter refer to *The Scottish Insurance Company v. Turner* (10). For my own part I am at a loss to see why, if the contract of insurance of freight in the present case was of any value, it did not pass to the underwriter on ship by the abandonment, so that the plaintiffs' interest in it was at an end before action brought; and it is not alleged that the action was brought or is now maintained for the benefit of the underwriter on ship. But suppose the ship was not insured, upon the above calculation it would have been for the pecuniary interest of the plaintiffs not to repair and to abandon the charter-party and the voyage to England. They would then have the ship of the value of 3,000*l*. Can it be that they can realise this and at the same time compel the defendant to pay him the freight as if the ship had become an actual wreck at New Zealand? There would be no obligation upon the plaintiffs to sell the ship or break her up, and if after they had received the sum claimed (4,000*l*.) they thought fit to repair her,

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there would then be a ship sailing the sea, and earning freight, which had by construction of law been totally lost. Nor is there any reason why, by application of the same principle, she might not be totally lost half a dozen times over with the same result.

But it is said the plaintiffs have abandoned the freight. It is true that in one sense they have abandoned it, they have thrown up the adventure, and if there was anything to earn have, so far as in them lay, deprived the defendant of the possibility of its being earned. But they have made no abandonment in the sense of transferring to the defendant a thing of value, anything which might go in part to indemnify him against the payment of the loss. The abandonment was a mockery, there was nothing to abandon, not even a right of action against De Mattos for not loading the ship. It is an abuse of language to call this an abandonment of freight in the sense and meaning of the word in reference to a constructive total loss.

In the case, *The Scottish Insurance Company v. Turner* (10), there were separate insurances on ship and freight. The ship sustained such damage as to justify an abandonment, but it was not known until the arrival of the ship with her cargo at the port of discharge. The plaintiff then abandoned to both sets of underwriters. The underwriters on ship seem to have accepted the abandonment and became entitled to the freight. The plaintiff then brought an action against the underwriters on freight and claimed a total loss. He contended (the precise contention of the plaintiffs here) that the real cause of the loss to him was the perils insured against, that the abandonment of the ship was a legal and proper act superinduced by these perils; that it made no difference to him that the freight was earned by the master of the ship, who became agent to the underwriters on ship by the abandonment, as it was lost to him. The Court of Session in Scotland held him entitled to recover, but your Lordships reversed the judgment, and held that the freight was lost to the plaintiffs by his own election in abandoning to the underwriters on the ship, and

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not by the perils which caused or led to that election. This appears to strike at the root of the argument on behalf of the plaintiffs, that the freight was lost by the damage sustained at New Zealand. It was said this case did not govern the present, because the abandonment was after the freight was earned. I do not see how this affects the principle of the judgment. But in the case of *McCarthy v. Abel* (19) the abandonment was before the freight was earned.

I think these cases have a distinct bearing upon the present question. The plaintiffs could have repaired the ship, but for their own pecuniary interest elected not to do so, and abandoned her. The present question is, did they thereby secure to themselves the sum insured on freight as if the ship had gone to the bottom at New Zealand, or did they discharge the underwriters on freight?

There is a further subordinate point, viz., that the defendants were discharged by the delay at Otago. I have already said that in my opinion *De Mattos* was thereby discharged from the obligation to load the ship. He was entitled to have the ship dispatched from New Zealand in a reasonable time, and he was neither directly nor indirectly concerned with the want of funds wherewith to repair her between July, 1863, and February, 1864. She was used for a very considerable time as a store ship, a purpose quite beside and foreign to, indeed inconsistent with, the due prosecution of the voyage contemplated by the charter and the policy of insurance. The time is not stated, but it must have been considerable, as the storage rent amounted to between seven and eight hundred pounds. Looking at the time actually occupied by the repairs and by the voyage to Calcutta, the ship ought to have been there in October or November, 1863, and no one can tell what would have been the consequence if she had arrived before *De Mattos's* failure, and had found a cargo awaiting her by the carriage of which she would have earned a good freight. It might have materially affected the judgment of the plaintiffs as to repairing. It may be said that the occasion of the delay

was the perils insured against, and had there been no damage there would have been no delay. But the underwriters on freight were under no obligation to make these repairs, or provide funds for the purpose. The delay for the time necessary to make them was excusable; but the delay from July to February consequent upon the misunderstanding between the plaintiffs and their agent at Otago as to advances seems to me to be the misfortune of the plaintiffs, and one with which the defendant is in no way connected. I agree with the judgment of the Court of Common Pleas, that great and substantial delay is attributable to the plaintiffs in keeping the ship at Otago, and is traceable to causes for which they and the master were alone answerable, and not to sea perils. The question is, does this delay discharge the defendant? The case of *Mount v. Larkin* (56) and the judgment of Chief Justice Tindal were much relied on. He says, "The voyage in the commencement or prosecution of which any unreasonable delay takes place becomes a voyage at a different period of the year, at a more advanced age of the ship, and in short a different voyage from that prosecuted with reasonable and ordinary diligence; the risk is altered from that which was intended when the policy was effected." Besides this, it seems to me that persons who carry on the business of underwriting have a right to have the voyage insured prosecuted with due and reasonable dispatch, in order that their risk may be determined within a reasonable time. There can be no doubt as to the delay. The question is, do the facts stated in the 14th paragraph of the Special Case excuse it as between the plaintiffs and the underwriters on freight? I think they do not. The law and all the cases on the subject will be found in Mr. Arnould's book, page 383.

The result is that in my opinion there are only two ways by which the plaintiffs below can establish a case against the defendant. One is, that the sea damage at New Zealand being such as would have justified an abandonment and a claim for

a constructive total loss of ship, was a loss of the freight by perils of the sea at New Zealand, and entitled the plaintiffs to maintain an action upon a writ sued out immediately after this damage occurred. This I think not sustainable, and that until the plaintiffs elected not to repair and not prosecute the voyage from Calcutta, there was not a loss of the freight by perils of the sea in any sense. The other is, that all the circumstances of the case, including the election not to repair and the abandonment of the ship and freight in August, 1864, constituted a loss of the freight by perils of the sea. I have already stated at length why I think they do not. It may suffice to state here that one of these circumstances, viz., that no cargo ever existed whereby freight could be earned, created the real and actual loss of freight before the election not to repair and the abandonment were made, and that this, and not a peril of the sea, was the direct and proximate cause of the loss of freight to the plaintiffs.

The liability of the underwriters is upon a written contract, if the contract be that they shall pay 4,000*l.* if the ship should sustain damage from the perils insured against on the voyage from the Clyde to New Zealand and the thirty days there, to such an extent that a prudent uninsured owner would not have repaired her, or in other words be a wager policy that such damage should not occur, the underwriters are liable. On the other hand, if the contract be one of indemnity, and that it is essential for the plaintiffs to shew that the freight insured was lost to them by reason of such damage, the underwriters are not liable, for as a matter of fact it is established beyond doubt or controversy that the freight, and all remedy in respect to it, was lost to the plaintiffs by the insolvency of De Mattos and its consequences, and the unjustifiable detention and delay of the ship at New Zealand.

The facts stand in the following order:—First, policy on freight; secondly, damage to ship capable of being repaired, but to such an extent as to make repair not prudent for shipowner; thirdly, failure of charterer to provide cargo wherewith to

earn the freight; fourthly, election not to repair.

The question is, are the underwriters on the freight liable under these circumstances? I think they are not.

I answer your Lordships' first question, that there was not a loss by the perils insured against during the term of the policy.

I answer the second, that notice of abandonment either of ship or freight was not necessary in one sense of the word "abandonment;" but notice of the election of the assured not to repair, and to give up and abandon the voyage, was, under the circumstances, necessary, to enable the assured to maintain an action against the underwriters.

I answer the third question, that if notice of abandonment was necessary it was not given in time.

I answer the fourth question, that the notice of abandonment of ship does not, as such, affect the right of the plaintiffs upon the policy on freight.

I answer the fifth question, that there was such conduct on the part of the assured as discharged the underwriters from their liability upon the policy on freight.

I answer the sixth question, that judgment ought to be given for the appellants.

LORD CHELMSFORD.—My Lords, this is a case of some novelty, and from the difference of opinion which has existed upon it amongst the Judges must be regarded as not entirely free from difficulty. [His Lordship here stated the facts above set forth and continued.] The questions raised by the appeal are—

Firstly. Whether there was an actual total loss of the chartered freight by perils insured against during the term of the policy?

Secondly. Whether notice of abandonment, either of ship or freight, or both, was necessary to enable the plaintiffs to recover for a total loss on the policy on freight?

Thirdly. If notice of abandonment was necessary, whether the notice was given in time?

Fourthly. Whether the conduct of the plaintiffs, the owners of the ship after the time of the injury sustained by her at

New Zealand, was such as to discharge the underwriters from their liability upon the policy on freight?

Firstly. Upon the question as to the loss of the freight it is necessary to bear in mind the exact nature of the insurance. The freight insured is chartered freight upon a cargo to be loaded on board the *Sir William Eyre* at Calcutta, and to be conveyed to Liverpool or London. The voyage insured is a voyage "at and from Clyde to Southland, while there and thence to Otago (New Zealand), and for thirty days in port there, after arrival." In other words, it is an insurance that the assured shall not be prevented earning the freight under the charter-party by any perils of the seas which might happen on the voyage from Clyde to Otago, and for thirty days afterwards. As this outward voyage is entirely distinct from that on which the freight was to be earned, and as no right to such freight could possibly accrue until the arrival of the *Sir William Eyre* at Calcutta, the loss of freight could only happen by such damage to the ship by the perils of the sea during the time covered by the policy, as would prevent the assured from earning the chartered freight on the voyage from Calcutta to England.

It is admitted that the sea damages which the ship sustained at New Zealand during the time covered by the policy were such as would have justified an abandonment, and a claim for a constructive loss. The owners might, if they pleased, have repaired the ship and she might have been sent to Calcutta in a fit state for a voyage from thence to England. But they merely effected temporary repairs sufficient to enable the ship to reach Calcutta; and on her arrival there a survey disclosed the extensive nature of the injuries which she had sustained in New Zealand, and the consequent impossibility of her performing the homeward voyage without such an amount of repairs as would have cost more than her value would have been when repaired. Upon this fact being ascertained notice of abandonment was given to the underwriters, which if sufficient would have entitled the shipowners to recover for a total loss.

Upon these facts and circumstances the first question arises, was there a total loss of the freight during the period covered by the policy? In determining this question I think it right to leave out of consideration the fact of the insolvency of De Mattos before the arrival of the ship at Calcutta, because although one of the learned Judges, who assisted us upon the hearing of the appeal, delivered an opinion that "the freight was not lost by the perils of the sea, but that the proximate and direct cause of its loss was the non-existence of cargo," it appears to me that this is not a correct view of the case. Between the underwriters and the assured on freight the question is, whether the ship had sustained such damage in New Zealand as to prevent her arriving at Calcutta in such a state of seaworthiness as would enable her to be tendered to the charterer in the terms of the charter party as being "tight, staunch and strong, and every way fitted for the voyage" to England. Upon this question it is obviously immaterial whether a cargo would have been provided at Calcutta or not. The loss for which the underwriters are liable (if at all) cannot depend upon such a contingency, and if it could it must be observed that their liability attached long before the insolvency of De Mattos, which happened in December, 1863, months after the ship had sustained the sea damage for which the claim upon the underwriters is made.

In the argument the counsel for the appellant complicated the question by introducing the consideration of the conduct of the plaintiffs, with reference to the policy on the ship, as bearing upon their rights under the policy on freight. It appears to me that this cannot properly be done in this case, where the injury to the ship was practically not repairable. The contracts are entirely independent of each other, and between different parties. The rights and liabilities under the policy on freight ought to be determined without reference to what may have been done or omitted to be done by the assured on a policy on the ship.

A plain and clear view upon the facts and circumstances of the case can only be

obtained by removing the policy on the ship out of the way, and looking at the case as if there were no other policy in existence but that on freight. Under this policy it seems to me that the only question is, whether by the perils of the sea the ship was so damaged at New Zealand during the term of the policy as to be rendered incapable, unless sufficiently repaired, of performing the voyage from Calcutta to England for which she was chartered. Upon that subject it appears, from the admission to which I have already adverted, that the sea damage was such as would have justified an abandonment and claim for a constructive total loss. By this I understand that the amount of damage was such that a prudent uninsured owner would not have incurred the expense of repairing the ship. And this appears clearly from a further admission stated in the report of this case in the Court of Common Pleas (57), viz.—that the cost of repairing the vessel at Calcutta, so as to make her seaworthy for carrying a cargo to England, would have exceeded the value of the ship when repaired, *plus* the difference between the chartered freight and the current freight, which would amount to about 450*l*. No prudent man would in such a state of things incur the expense of repairing the ship, and the shipowners electing not to repair were entitled to consider the charter at an end, and the chartered freight is totally lost by a peril of the sea.

Secondly. The next question to be considered is, whether the assured can recover against the underwriters without a notice of abandonment. The counsel for the appellant argued that by the law of marine insurance a notice of abandonment is in every case required just as by the law merchant notice of dishonour is upon bills of exchange. The rule as to abandonment seems to be that which was referred to by Mr. Justice Blackburn, as contained in Mr. Phillips's book on Insurance, Sec. 1491, where he says, "An abandonment being a transfer, it can be requisite only where there is some assignable transferable subject on which it can operate.

When nothing remains to be assigned or transferred an abandonment is useless and unnecessary." It must be observed that "abandonment" and "notice of abandonment" are two distinct and separate things, though they are frequently confounded together in expression.

Where a notice of abandonment is given it is conclusive proof that the assured intends to claim from the underwriters for a total loss, and then the assured must, as Lord Cottenham said in *Stewart v. The Greenock Marine Insurance Company* (2), "give up to the underwriters all the remains of the property recovered, together with all the benefit and advantage belonging or incident to it, or rather (he adds) such property vests in the underwriters."

But although an abandonment or cession must be the necessary result of every claim for a total loss, it does not follow that notice of this abandonment must always be given to the underwriters before a total loss can be claimed.

It was argued at the Bar, on the authority of the case of *Knight v. Faith* (8), that in every case where the subject matter insured exists in specie, though in a damaged state, a notice of abandonment is necessary to entitle the assured to make a claim as if it had been actually destroyed. This was the opinion expressed by Lord Campbell in delivering the judgment of the Court in that case. The necessity for a notice of abandonment was not considered upon the first argument, but the Court desired to hear the case further argued on the question, whether, under the circumstances of the case, the plaintiffs could claim for a total loss without giving notice of abandonment. It seems to have been quite unnecessary for the determination of the case to introduce this question, because the circumstances were such that the assured could not have been entitled to recover for a total loss if he had given the most timely and sufficient notice of abandonment. Lord Campbell had before, in *Fleming v. Smith* (3), stated the rule as to notice of abandonment in the same unqualified terms, saying, "According to all the old authorities a constructive total loss can only entitle the owners to recover as for an actual

(57) 39 Law J. Rep. (N.S.) C.P. 150; s. c. Law Rep. 5 C.P. 351.

total loss by a notice of abandonment." It had been previously decided by the Exchequer Chamber, in the case of *Roux v. Salvador* (6), that notice of abandonment was unnecessary where it could be of no use to the underwriters, who in that case, if they had received notice of the loss could have exercised no control over the goods insured, nor by any interference have altered the consequences. The case was an action upon a policy of insurance upon hides from Valparaiso to Bordeaux; on the voyage the hides were found to be in a state of putridity, occasioned by a leak in the ship, and they were sold for a fourth of their value at Rio Janeiro. The assured received the news of the damage to the hides and of their sale at the same time. The Court of Common Pleas gave judgment for the defendants, the underwriters, on the ground that the assured could not recover as for a total loss without a notice of abandonment. But this judgment was reversed in the Court of Exchequer Chamber, and Lord Abinger, in a very elaborate and carefully considered judgment, laid down the principle as to notice of abandonment, that when an assured claims for a total loss, and part of the subject insured remains *in specie*, notice is only necessary to be given where upon receiving it the underwriters could do something in the exercise of their rights over the salvage. In that case the assured receiving the news of the damage to the hides and of the sale of them at the same time, a notice of abandonment to the underwriters would have been idle and useless.

In *Farnworth v. Hyde* (11), under similar circumstances, that is where notice of the loss of the ship insured, and of her sale, reached the assured at the same time, it was held that the underwriters were liable for a total loss without notice of abandonment. This seems to place the rule as to notice of abandonment on a reasonable foundation. No prejudice can possibly arise to the underwriters from withholding a notice where it is wholly out of their power to take any steps to improve or alter their position.

Upon this ground, therefore, I am of opinion that there was no necessity for the assured in this case to give notice of

abandonment of the chartered freight to the underwriters. Mr. Justice Willes, in delivering judgment in the Court of Common Pleas, apparently adopting the rule as laid down in *Knight v. Faith* (8), said, "The general rule of Insurance Law applies, that where the thing exists in specie (and here the thing insured, viz.: the chance of earning the freight, did survive the risk) and can be restored, though at an improvident expense, in order to make a total loss, there must be an abandonment." But I am at a loss to understand what chance of earning the freight can be said to have existed after the ship *Sir William Eyre*, mentioned in the charter party, had sustained such sea damage as to render her incapable of performing the voyage by which the freight was to be earned, and had become at the election of the owners a total loss. The underwriters could not have substituted any other ship and tendered her to the charterer in performance of the charter party on the owner's part.

It was suggested in argument that the underwriters on freight, if they had had timely notice of abandonment, might have arranged with the underwriters on ship to repair the ship at their joint expense, and have sent her on to Calcutta, and tendered her to De Mattos in fulfilment of the owner's contract. But this is the suggestion of a mere possibility, and contains in it nothing practical, nor can it reasonably be taken into account in judging of the rights and liabilities of the parties. I have no difficulty in coming to the conclusion that there was no necessity for any notice of abandonment of the chartered freight to the underwriters on freight.

Thirdly. This being my opinion, it seems to me wholly unnecessary to consider whether the notice of abandonment which was given was given in time. The rule is, where notice of abandonment is necessary, it must be given in a reasonable time after information of the damage which has occurred to the subject of insurance. Whether sufficient notice was given depends upon the facts of each particular case, and the decision upon one case can be no authority or guide upon any other. I therefore deem it un-

necessary to express my opinion as to which of the learned Judges I should be disposed to agree with upon this question.

Fourthly. There only remains to consider the question whether the conduct of the owners of the ship, after the damage she sustained, was such as to discharge the underwriters on freight. Upon this I have already incidentally made some observations. It is unnecessary to examine in detail the various acts by which it was contended that the owners had elected to retain the ship, and to come upon the underwriters on the ship merely for a partial loss. I think with regard to that policy that the owners, by their course of dealing with the ship, and by their long delay in making their claim, had precluded themselves from a right to claim for a total loss. But I do not see how the conduct of the ship-owners, however it may affect their rights under one contract, can have any influence on their rights and the liabilities of another party under a separate and independent contract. If the sea damage which the ship sustained in New Zealand was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to England without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage to the ship had been such that it might have been repaired at a reasonable expense and put into a condition to earn the freight, and the ship-owners had declined to take this course, they would have lost the freight, not by perils of the sea, but by their own election. But the damage being such as to render the repair of the ship practically impossible, the question between the assured and the underwriters on freight must be regarded as if there were no policy on the ship, and then it becomes the simple consideration whether the freight was not totally lost by the perils of the sea, by what must be regarded in relation to it as the total destruction of the ship by which it was to be earned.

I think that the judgment of the Court

of Exchequer Chamber ought to be affirmed.

LORD COLONSAY.—My Lords, this case appears to be attended with a great deal of nicety, it is novel, too, in its circumstances; indeed, the policy here is peculiar, and the consequence has been, that there has been a great deal of difference of opinion among the Judges, and a great expenditure of ability and of ingenuity in discussing the question. It appears to me that a good deal of that has been expended in consequence of mixing up together things which are substantially separate. I think there are two questions, or rather perhaps only one, namely, whether the freight was lost by reason of the perils of the sea insured against, and I think that that question must be considered altogether apart from the question of an insurance by other parties upon the ship. Now notwithstanding that one of the learned Judges, of whose assistance we have had the benefit, and for whose opinion I entertain the highest respect, has expressed the opinion that the loss was not caused by the perils assured against, but by the inability of De Mattos to furnish a cargo, I am compelled to differ from him. It appears to me that upon the admission contained in Article 24 of the Case we are to hold that the condition of things within the period to which the insurance applied was such that the vessel was in a condition in which an abandonment might have been made, as for what is called a constructive total loss, that is to say, that she was not in a condition to be worth repairing. If that be so, I think that the liability then attached, and that the risk having been incurred, and the peril having been sustained, and the vessel having been rendered incapable of earning the freight, by reason of that damage done at sea or in port within the period insured against, that terminated the question. No doubt it was not then ascertained what the damage was, but it was afterwards ascertained that that damage was sustained within that period, and that must be treated as an admission in the case.

Now I do not see how the matter of

De Mattos having failed in the month of December, and having been unable to supply a cargo, or having declined to supply a cargo, is a matter which can be said to be the cause of the loss of the freight. Something is said about proximate and remote causes, and these are matters which are very apt to lead us into philosophical mazes; but I think that it is very clear that before De Mattos failed the ability to earn the freight was gone, by reason of the perils insured against having happened, and that appears to me to be sufficient. De Mattos was under no obligation, it is said, to furnish a cargo, because of the delay of the owners of the vessel to tender the vessel. De Mattos was under no obligation to furnish a cargo, unless there was presented to him a vessel fit and sufficient to carry that cargo to Britain, and that was the failure that occurred. There was no vessel fit and sufficient to carry the cargo to Britain presented to De Mattos, and that was a state of matters that occurred before the vessel arrived at Calcutta.

The only other question is the question as to the notice of abandonment. I think that throughout this matter we must consider this case as if there had been no insurance upon the ship. If there had been no insurance upon the ship, what would have been the object of the notice of abandonment, or what was to be gained by such a notice being given? I do not see, after what has occurred, what the underwriters on the freight could have done. The vessel was not fit to be repaired. They could not have compelled the owners to have repaired her when she was not worth it. What was to be gained then by the notice of abandonment being given? It is true there was a puzzle raised by some of the Judges as to who would have been the party entitled to the freight, and therefore the party who would have been entitled to the insurance upon the freight, if the vessel had been timeously abandoned and had been repaired and freight had been earned. But, my Lords, I do not think that there is really any puzzle in the case at all. At all events, it is clear that if the freight had been earned there would have been no loss of the freight, and a different con-

dition of matters would have arisen. The question as to the right to demand the insurance if the vessel had been lost is a different question altogether. The only party who had a right to demand the insurance is the party who effected it, and if there had been no insurance upon the vessel that right would equally have existed with regard to the freight. I therefore think there is really no substantial ground for this question as to the notice of abandonment, and until there is more decided authority adduced upon the subject, I am not prepared to receive the doctrine that notice of abandonment in a matter of this kind stands upon the same mercantile footing as notice of dishonour of bills of exchange. The reason of the thing, in my apprehension, is against that doctrine. I think that the reason of the thing tells us that where there is nothing substantially to abandon to the party to whom the notice of abandonment is given, and he could gain nothing by it, there it is not necessary to give that notice. Therefore I think that all that puzzle which has arisen from the circumstance of there being an insurance upon the vessel is quite out of the question, when you come to consider purely the liability of the underwriters upon the freight. In this case it appears that there was no timeous notice of abandonment, or no notice of abandonment at all, according to a judgment elsewhere. And therefore in that view also, the question would not arise. But I think the real question is, whether this right to freight was lost by the perils of the sea during the period embraced in the policy of insurance. I think it was, and I think the liability attached, and I see nothing afterwards to relieve the parties from that liability.

LORD HATHERLEY.—This is a case in which the owner of a ship entering into a certain charter-party, agreed that his vessel being about to proceed to New Zealand, should, after her voyage thither, and after a certain delay there, proceed to Calcutta, and take on board a cargo from one De Mattos: also, that on her arrival at Calcutta she should be tendered to De Mattos for the purpose of taking the cargo, and be in a condition tight, staunch and strong,

sufficient for the purpose of conveying the goods of De Mattos from Calcutta to England, for conveying which she is to earn a freight that will then be due from De Mattos. This being the entire course of the vessel's proceeding, the owner is minded to ensure himself against perils of the sea in two respects, and I mention this because I apprehend there can be no doubt—indeed, the learned Judges said they hardly thought it right to consider the question—there can be no reasonable doubt, however peculiar the terms of the policy may be, that there is nothing to prevent a shipowner, during the whole course of his ship's voyage, insuring against the perils of the sea during any part of the voyage, and this too although the perils insured against may not be such as shall prevent the ship from performing that part of her voyage during which she is insured, or from earning freight during that part, but may be such as shall prevent her being able to fulfil the subsequent part of her voyage in respect of which she is not insured, or from earning during such subsequent part of the voyage the freight which is insured. I think one of the learned Judges, Mr. Baron Martin, who has given a very valuable and able judgment in this case, though I do not agree with him, seems to have thrown out whether or not the mode of effecting the policy was one that could be sustained, but he dwelt but lightly upon it. I need say no more upon that, because no authority was cited for saying that the insurance was contrary to the common law of insurance. It is simply this, that the vessel is to proceed to New Zealand, and on the voyage thither, and on her stay there for thirty days, the whole of that period, she is not, says the policy, to be injured or damaged by perils of the sea to such an extent as to prevent her being tight, staunch and strong enough, on arrival at Calcutta, to take the expected cargo to England. That is the undertaking which is given by the policy, and that is the risk that is insured against. It is clear and plain from the admissions in this case, and the evidence that has been given, that she was injured during the period insured against, that is to say, she was injured on her arrival at New Zealand just about the time of her

NEW SERIES, 42.—C.P.

arrival, and during the time she was in the neighbourhood of Bluff Harbour, she was injured to such an extent that, although at Bluff Harbour it could not be ascertained what the extent of the injury was, and although at Dunedin a certain amount of repair was effected, so as to enable the vessel to proceed to Calcutta, she was not tight, and staunch, and strong enough for a voyage to England when she arrived at Calcutta, and her being in that condition was wholly due to the injuries she had sustained during the insured period. It is further admitted on the case that the injuries were of such a character that no prudent owner would have repaired her for the benefit of the contract which had been entered into as to freight, because, in order to make those repairs, it would have been necessary to expend more than the whole of the value of the ship, in other words, when it was ascertained what the extent of the injury was, it was found she was in such a condition that, had the owners been minded to abandon at the time when the injuries were sustained to those who had effected the policy on the ship, as distinguished from the particular policy on the freight in question which is now before us, they would have been justified in doing so. As between the owners and those who insured the ship itself, there might arise a question, and indeed there did arise a question in the case against Campbell, whether or not they had given timely notice of abandonment of the vessel to those who insured her, or whether by their conduct in delaying their voyage to Calcutta for a very considerable time, by their employing the ship in the meantime to a certain extent as a storehouse for coals, I think, and taking other steps which occasioned possibly great and unnecessary delay in New Zealand, they had, before giving notice of abandonment, put themselves in such a condition as respected the insurers of the vessel, as to have lost their right of abandonment. But that matter appears to me, I confess, to be wholly immaterial as regards the question of insurance on freight. It appears when the vessel came to Calcutta, there was no actual tender of the vessel to De Mattos, and it was found that De Mattos had become insolvent, and

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the assignees of De Mattos declined to furnish any cargo before a thorough examination had been made in Calcutta. However, when the examination was made, it was found, as I have described, that no prudent owner would have put her in such a state and condition as to continue the voyage to Great Britain. That being so, it appears to me that every element of the contract which the insurers entered upon is satisfied, and it is shewn distinctly that the liability of the insurers as to freight had actually accrued, unless, indeed, the question that has been raised as to the sufficiency of the notice of abandonment in respect of the insurance on freight should prevail. The ship had been insured during this period, and in consequence of the injury which I have described, she undoubtedly was unable to perform the voyage to England, and she could not therefore be tendered to De Mattos in a fit state and condition to continue the voyage. I will postpone for the moment the question of De Mattos' insolvency. Then—putting the question aside how far De Mattos' insolvency may be regarded as the proximate cause of the abandonment, and not the state of the ship in the anterior part of the voyage—comes the question, was it necessary to give notice of abandonment in this case, and, secondly, was it given in time?

As regards the necessity for the notice of abandonment, I think that is a point that was most pressed upon us by the counsel for the appellant, and they relied upon some *dicta* of Lord Campbell upon the subject, and they contended strongly that it was necessary in all cases whatever of a claim upon underwriters as for a total loss for the insurers to give notice of abandonment of the thing insured, whatever may be the circumstances or position of the insured, and whether, in truth, any advantage could possibly be made of that notice of abandonment or not; and they put it upon this ground, that it was for the insurers to say what advantage they could make if a notice were given. But no authority has been cited to shew that this notice of abandonment is considered necessary in a case where no advantage could possibly accrue to the insurers. If the vessel be not really wholly lost; if it

be a constructive total loss, as it is termed, though that is perhaps not a very happy phrase; but if it be a constructive total loss, if the expense of repairing the ship would exceed the whole value of the ship when repaired, so that she was not worth repairing, still if there be something *in esse* to be handed over to the insurers, it is necessary that they should be informed of this, in order that they may make the best use they can of what remains of that which they insured; it is not right to treat that as an absolute total loss which is not in fact a total loss, there being something in the nature of salvage, or fragments of wreck, or something of that kind, which may be of value to the insured. In this case nothing has been suggested out of which any advantage could be derived by the insurers from any such notice being given to them on the part of those who had insured, except this; namely, it is said, true it is we insured that this freight should be earned, and certainly that depended upon the arrival of the ship at Calcutta in a condition to earn it, and it would have been folly to have expended money in repairing the ship which would have exceeded the value of the ship when repaired; but if you had told us that you were about to claim as for a total loss in respect of this freight, we should have been in this position: we should have found that you had insured the vessel; the insurers of the vessel were in a similar disadvantageous plight with ourselves; you having a demand upon them in respect of their insurance, and we two might have been minded to make such an arrangement together that with regard to what each had to pay upon our respective insurances, it might have been worth our while to put the vessel in a state to earn the freight. It should be borne in mind that those who had insured the freight could not tender any other vessel. The particular insurance we had before us was on a freight to be earned by the *Sir William Eyre*, and by no other vessel; it could not be earned by tendering any other vessel. It is supposed that they might have made such an arrangement with the underwriters on the hull as would have resulted in their making it something which would not have resulted in a

total loss to the insurers. But I apprehend that is much too remote a contingency to render it necessary for the insured to give the insurers notice on the principle which I have before referred to, namely, of their being able to save something out of the wreck. It is not necessary to go into a variety of cases to shew that the necessity of abandonment under such circumstances would carry the doctrine to the remotest extent, and would include in the bargain persons who might or might not be interested in the ship, so that persons who might purchase the vessel, or the wreck, might, if they pleased, be affected by the law as to the question of total loss. The whole principle of the notice of abandonment is, that you are to place the insurers in such a position that they shall have all the advantages you now possess in respect of the vessel, supposing they can make those advantages available for the purpose of effecting a salvage of some portion of that which has been lost in consequence of the perils they have insured against.

Now in regard to the observations made by Mr. Baron Martin, that the loss really was not a loss by perils of the sea, but was due to the insolvency of De Mattos, I think there is a fallacy in that. First, as has been said by Lord Chelmsford, the loss had accrued before the insolvency of De Mattos occurred;—the accident happened and the damage occurred at Bluff Harbour, some time before the insolvency of De Mattos took place. But I do not think it necessary to rest it upon that as being anything which would absolve the insurers from the loss which undoubtedly accrued, on account of the ship being unfit for the voyage. There is nothing to absolve them from the liability to pay the insurance, because of the insolvency of De Mattos, in point of time. He might become solvent again before the necessity arose for the vessel completing the voyage. But the question that has to be decided is this, were the insured in a position to enforce their rights against De Mattos whatever they may be? Were they in a position, by tendering the vessel, to insist upon his tendering the freight then and there, or to insist upon such rights as might accrue from his non-performance of the contract, or were they

disabled from occupying that position by the perils of the sea? Were they, in short, by what happened at Bluff Harbour, prevented from fulfilling the contract with De Mattos, and prevented from tendering a ship tight, staunch and strong to proceed with the cargo to England?

If that be so, it is clearly within the terms of the policy, and that being so it seems to me clear that the underwriters must be liable, unless this one point of want of notice of abandonment in time is such a point as to disentitle them to recover. I think it clear that no such notice was necessary, and therefore it is unnecessary to consider the question of the time at which such a notice was given. Therefore I think that the contentions of the appellant fails, and that the appeal should be dismissed.

Judgment of the Court of Exchequer Chamber affirmed; and Appeal dismissed with Costs.

Attorneys—Field, Roscoe & Co., agents for Bateman & Co., Liverpool, for appellants; Thomas & Hollams, for respondents.

1873. }
May 31. }

ROBINSON v. KNIGHTS.

Shipping — Freight — Right to Lump Freight where Part of Cargo Lost.

By a charter-party, the ship was to be loaded with a full cargo, and to have a deck cargo, and being so loaded was to proceed to London, and "deliver the same on being paid freight as follows: a lump sum of 315*l.* . . . the freight to be paid in cash, half on arrival, and remainder on unloading and right delivery of the cargo." The ship arrived in London with the whole of the cargo, with which the charterer had loaded her, with the exception of a deck load, which had been lost during the voyage by one of the excepted perils in the charter-

party, and without any default on the part of the master or crew:—Held, that the shipowner was entitled to the whole of the lump freight without deducting the proportion of freight payable in respect of the deck load which had been lost.

This was an action, brought in the Mayor's Court of London, to recover the sum of 16*l.* 19*s.* 9*d.* as the balance of freight due in respect of the plaintiff's ship *Nile* under a charter-party made between the plaintiff and defendant on the 3rd of October, 1872, by which it was agreed that the said ship should proceed to Riga, to load at Balderaa or Muklgraben, "and there load from the agents of the said affreighter a full and complete cargo of lathwood, the ship to be provided with a deck cargo" not exceeding what she could reasonably stow and carry over and above her tackle, &c., and being so loaded should therewith proceed to London, "and deliver the same on being paid freight as follows: a lump sum of 315*l.*, two guineas gratuity in full of all port charges and pilotages. The cargo to be brought to and taken from alongside the ship at merchant's risk and expense." "(Restraint of princes, &c., and all and every other the dangers and accidents of the sea, &c., during the said voyage always excepted.) The freight to be paid in cash, half on arrival and remainder on unloading and right delivery of the cargo less four months' discount on half at 5*l.* per cent. per annum."

The action was tried before the Common Serjeant without a jury, on the 10th of February last, when it was admitted that the ship was duly loaded according to the charter-party, and proceeded on her voyage to London, and that in the course of such voyage so much of the cargo as formed the deck load of the ship was lost by one of the excepted perils in the charter-party, namely, by an accident of the sea, and without any default on the part of the master or crew. It was also admitted that the ship duly arrived in London, and delivered the residue of the cargo, the defendant paying the whole of the agreed freight, less 16*l.* 19*s.* 9*d.* the amount sued for, which it was admitted

represented the proportion of freight payable in respect of the lost cargo, if it should be held that the freight was apportionable.

It was contended on the part of the defendant that no freight was due, as the carriage of the goods had not been performed. The learned Common Serjeant gave judgment for the plaintiff, but he reserved the point as to the plaintiff's right to recover, and gave leave to the defendant under section 10 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), to move to enter a nonsuit. Pursuant to such leave,

Talfourd Salter, for the defendant, obtained a rule *nisi* to that effect, on the ground that the evidence did not entitle the plaintiff to recover the whole of the freight mentioned in the charter-party, and he cited *The Norway* (1), where, though the freight was lump freight Dr. Lushington, in the Admiralty Court, held that a deduction might be made from it in respect of goods jettisoned during the voyage.

Grantham shewed cause.—The deck cargo having been lost by the excepted perils, without any misconduct on the part of the master, the shipowner is entitled to the whole lump freight contracted for by the charter-party. The ship was taken by the charterer for a certain sum, and it was in effect the same as if there had been a letting of the ship. In *Abbott on Shipping*, 13th ed. p. 367, it is said, "in the case of a charter-party, if the stipulated payment is a gross sum for an entire ship or an entire part of a ship for the whole voyage, the gross sum will be payable, although the merchant have not fully laden the ship; and if a certain sum be stipulated for every ton or other portion of the ship's capacity for a whole voyage, the payment must be according to the number of tons, &c., which the ship is proved capable of containing, without regard to the quantity actually put on board by the merchant, or to the number of tons burthen mentioned in the description of the ship." For this is cited *Roccus Not.*, 72 and

(1) 2 B. & Ald. 421.

75, and *Hunter v. Fry* (2). It is no answer to an action for freight that the cargo has been so damaged even by the negligence of the master and crew as to be worth less than the freight—*Dakin v. Ozley* (3). The case of *The Norway* (1), relied on when the rule was moved for, came afterwards on appeal before the Privy Council, and there the Privy Council took a different view of the facts and considered that the jettison and loss of goods were owing only to the perils of the sea without blame to the master, and that as that was the case there ought to be no deduction from the lump freight on account of the goods lost. Knight Bruce, L.J., in delivering the judgment of the Court, said, "although the lump sum is called 'freight' in the charter-party and bills of lading, yet we think it is not properly so called, but that it is more properly a sum in the nature of a rent to be paid for the use and hire of the ship on the agreed voyage." That case is expressly in point, and the present case is not distinguishable from it.

Cock, in support of the rule.—No freight is due until the goods have been carried. By the charter-party the freight is made payable "on unloading and right delivery of the cargo," and if the shipowner fails to deliver part he has not performed his contract, and cannot claim the whole lump freight. The charter-party in *The Norway* (1) was different in its terms from the present one, it was there an agreement to pay, "as freight for the use and hire of the vessel 11,250*l.* lump sum," so that it was in the nature of rent for the hire of the vessel; that is not the case here.

KRATING, J.—I am of opinion that the rule in this case should be discharged. The question which arises is as to the right of a shipowner to recover a sum described as lump freight, without deduction in respect of the loss of a deck cargo, which took place without any default on the part of the shipowner. Now the charter-party is dated 3rd of October,

1872, and by it the plaintiff's ship was to go to Riga, and to load a full cargo of lathwood, and she was to be provided with a deck cargo; therefore a deck load was contemplated by both parties. The ship was then to proceed to London, and deliver her cargo "on being paid freight as follows—a lump sum of 315*l.*," and the freight was to be "paid in cash, half on arrival, and remainder on unloading and right delivery of the cargo."

The ship took in a full cargo, and there was a deck load, and that last was lost by the perils of the sea, and without default by the master or crew; and the question is whether the shipowner is entitled to the whole sum of 315*l.*, or whether a proportionate deduction is to be made in respect of the freight of the deck load which was lost. Now some things are quite clear. There is no doubt that under this charter-party, if the charterer had loaded the vessel with less than a full cargo, the shipowner would still have been entitled to have been paid the full lump freight, and the question is whether there is any difference, in this respect, between a deficiency of cargo caused by less having been put originally on board, or by a loss afterwards from the perils of the sea, and I see none. The only case in point is that of *The Norway* (1), which was in the Court of Admiralty, and afterwards in the Privy Council. There, where the charter-party was not distinguishable in principle from that in the present case, the Privy Council held that the shipowner was entitled to be paid the lump freight, without any deduction for a loss of part of the cargo occurring during the voyage without the negligence or fault of the shipowner. It is true, as has been pointed out, that although the charter-party in that case spoke of the sum to be paid "as freight," yet it said it was to be "for the use and hire of the vessel," but I do not think that that makes any substantial difference between that case and the present one, for in both cases it is one entire sum which is to be paid for the service which the shipowner was to render. What was that service? Was it that he was to bring to the port of destination all the cargo that was put on board his ship, or only all that was

(2) 15 Com. B. Rep. N.S. 646; s. c. 33 Law J. Rep. (N.S.) C.P. 115.

(3) 12 Law Times, N.S. 57; and on appeal 3 Moore P.C. N.S. 245.

put on board and not lost by means of the perils excepted by the charter-party? I think that the latter is what was intended by the parties, and that the same construction should be put on this charter-party as was put on the charter-party in the case of *The Norway* (1), and that where a portion of the cargo is lost without the default of the master or crew the shipowner is entitled to the lump freight, notwithstanding the loss of such portion of the cargo. The rule in the present case must therefore be discharged.

BRETT, J.—It is true that the terms of this charter-party are not exactly the same as those of the charter-party in the case of *The Norway* (1), but still the stipulation is for the payment of a gross sum for the use of the whole ship for the whole of the voyage. Now, in such a case it is clear that the whole lump sum is payable though the merchant does not put a full cargo on board. It seems to me, therefore, that the charter-party in the present case is, in effect, the same as the charter-party in the case of *The Norway* (1). There the sum was called freight, and it was not called money in respect of a demise of the ship. Still it was one gross sum payable for the use of the entire ship, instead of money payable for each portion of the cargo carried. It was argued that it was to be paid only on the delivery of the cargo at the port of discharge; but the question is what cargo? and the answer is this—it is what the merchant has elected to put on board, and which has not been lost by any of the excepted perils. Now, it is admitted that the loss here was by a peril which was within the exception, and without any blame to the master or crew. In the case of *The Norway* (1), the Court of Privy Council doubted whether, even if the loss occurred through the negligence of the master, the shipowner was not entitled to the whole lump freight, without deduction, leaving the freighter to his cross action, but that is a matter which we are not called on to decide, because here, as in the case of *The Norway* (1), the loss arose without the default of the master. The present case comes entirely within that case, and although the decision there, which was that of the Privy Council, is

not binding on this Court, still I think it was a proper decision, and one which we should follow.

Rule discharged.

Attorneys—G. & W. Webb & Pearson, for plaintiff; Parson & Lee, for defendant.

1873. }
June 3. }

DEVERILL v. BURNELL.

Contract — Alternative Promise — Construction of Contract alleged in Declaration.

A declaration alleged that the defendant received certain bills of lading and drafts on the terms that on the acceptance of the latter by one B., the former should be delivered to him, that the defendant should present such accepted drafts to B. for payment, and remit to the plaintiff the proceeds if the same should be paid, and if the said drafts should not be paid, either return the same to the plaintiff, or pay him the amount, for reward to the defendant; that everything happened to entitle the plaintiff to have the drafts returned or the amount thereof paid by the defendant, yet the defendant did not return the said drafts, nor did he pay to the plaintiff their amount. Judgment went by default, and it appeared that the drafts were of no value:—Held, by the majority of the Court (KEATING, J., BRETT, J., and GROVE, J.), that the true construction of the declaration was that the defendant promised if he did not return the drafts to pay their amount, which was therefore recoverable; but per BOVILL, C.J., the contract alleged was only alternative, to return the drafts or pay their amount, and that only the nominal damages arising from the least burdensome alternative were recoverable.

The declaration alleged that the plaintiff had caused certain goods to be shipped in London on board ship, to be carried, subject to certain bills of lading, to Rosario, in South America, in order

that they might be delivered to one C. W. Bollaert there, on his accepting certain drafts drawn by the plaintiff on him against the said goods, and thereupon the plaintiff delivered to the defendant, and the defendant accepted of and from the plaintiff the said bills of lading and drafts, upon the terms that the defendant should cause the said drafts to be presented at Rosario to the said C. W. Bollaert for acceptance, and that in the event of the said drafts being duly accepted, the defendant should deliver over to the said C. W. Bollaert the said bills of lading, on his accepting the said drafts, and should cause the said drafts to be presented for payment at maturity, and remit to the plaintiff the proceeds of the said drafts if the same should be paid, and that if the said drafts should not be paid, the defendant should either return the same to the plaintiff, or pay him the amount, for reward to the defendant in that behalf. And although the defendant accordingly presented the said drafts for acceptance by the said C. W. Bollaert, and he accepted the same, whereupon the defendant delivered over to him the said bills of lading, and all things were done and happened, and all times elapsed, necessary to entitle the plaintiff to have the said drafts returned to him, or the amount thereof paid by the defendant to him, and to maintain this action: yet the defendant did not nor would return the said drafts, nor did nor would the defendant pay to the plaintiff the amount thereof.

Judgment was allowed to go by default.

At the trial before the sheriff on a writ of inquiry it appeared that the defendant had not returned the drafts, and had paid a portion of their amount, but that the drafts were valueless, and a verdict was found for one farthing damages, with leave to the plaintiff to move to increase such damages to 10*l.*, that portion of the amount of the drafts which remained unpaid. And a rule *nisi* having been obtained pursuant to such leave—

McLeod shewed cause, and contended that the contract in the declaration was alternative, and satisfied by the return of the drafts or their amount at the de-

fendant's option, and that therefore the measure of damages was the least burdensome alternative, and the verdict correct.

Garth, in support of the rule, contended that the contract was to return the drafts, and in case this were not done pay their amount, and that the damages should be increased accordingly.

GROVE, J.—The question to be decided is, what construction we are to put on this declaration, and though I feel very doubtful, I incline to the opinion of the majority of the Court, that the true construction is that really this was not an alternative promise. It seems to me that we ought to construe the promise alleged as we should in ordinary life, and not put a technical construction on it. Suppose the promise were to return a horse within a certain time, or pay a day's hire, the construction would be that there was a promise that the person would return the horse within the time, and if he did not would pay the day's hire. Here the reasonable construction is that the plaintiff elected to have the bills, and stipulated that if he did not get them he was to have their amount; the parties do not estimate the damages as at the time of breach, but say, if the bills are not returned we will take such a sum as the damages. The question is, what do the words mean in ordinary parlance?

BERR, J.—The declaration states facts which shew a business relation between the parties, and then sets out a business contract, and when a business contract is set out, the declaration is to be construed by the ordinary rules; not by the strict grammar, but so as to give a business meaning to all its terms—this is a recognised rule. The promise here alleged is not a mere fanciful stipulation. The promise is either to return the bills or pay their amount, and is to be construed as if it were just made, and we have no right to take into account what occurred afterwards, but are bound to give a business meaning to all its terms. If the promise be only to return the bills, the law implies a promise to pay damages if they be not returned (that is, the amount of the bills or less, according to circum-

stances), but here there is the further promise "or pay their amount," which is the same as if it were "or pay the sum of 200*l.*," assuming that to be the amount of the bills, so that the promise reads to "return the bills or pay 200*l.*" Unless this means that the defendant will return the bills, or if he does not will pay the amount named in them, the promise has no business meaning, and it may well be that the plaintiff for certain reasons may choose to have the bills returned, and this he cannot ensure without such a stipulation. If this be the true construction we have no right to look to the breach alleged by the pleader, and so give a construction to alter the effect of the contract. The construction of the breach is to follow that of the contract, and depends on it, and the business meaning of the contract is that the defendant will return the bills, and if he do not will pay their amount, and if so the plaintiff is entitled to recover that amount.

KEATING, J.—I have had considerable doubt, nor is that doubt entirely removed, nor do I feel altogether clear on the point, but still on the whole I come to the conclusion that the contract is to be read, not as strictly laid in the declaration, but as really being a contract to return the bills, and if this be not done to pay their amount. The difficulty has arisen from the breach in the declaration, where the matter is treated as a pure alternative, the words being "that though all things were done and happened, and all times elapsed necessary to entitle the plaintiff to have the said bills returned to him, or the amount thereof paid by the defendant to him, and to maintain this action, yet the defendant did not nor would return the said drafts, nor did nor would the defendant pay to the plaintiff the amount thereof." It seems to me that the proper way would have been, as in *Lowe v. Peers* (1), to have alleged a promise to return the drafts, and if not pay their amount, and laid the breach accordingly, viz., that a reasonable time for their return had elapsed, that they had not been returned, and that therefore their amount became payable and had

not been paid. This is a mercantile contract, and the one construction contended for makes the contract one which the parties would not probably enter into, whereas the other makes a more likely contract, viz., "I entrust the bills to you; if dishonoured return the bills to me, and, if you do not, pay them yourself." This is a reasonable contract, and it appears to me was the contract intended. Is there then any insuperable obstacle to so construing the declaration? I agree with the majority of the Court that we may read the breach as it ought to have been laid, and as on the whole—though even if there were no difference in the Court I should have doubt, and my doubt is strengthened by the difference of opinion of my Lord—I have come to that conclusion, I am bound by my impression, and therefore think that this rule should be made absolute.

BOVILL, C.J.—I have the misfortune to differ from the rest of the Court. My brother Keating and myself have both felt difficulty, but while on the whole he has come to a conclusion favourable to the plaintiff, I have in the result come to a conclusion in favour of the defendant, though I still feel doubtful and have misgivings. The question, as it seems to me, turns on the construction of the language of the contract in the declaration; if it be simply a contract in the alternative to do one or the other of two things, it is satisfied by the performance of either, and the damages ought to be proportionate to the loss sustained from the breach of the least beneficial alternative; but if the contract be to return the bills, and if not to pay their amount, the damages would be that amount. The rule of law is clear, that if the contract be alternative the person promising has a right to elect; and it is equally clear that if the contract be to do a certain thing, and if not pay certain money, that money is the amount recoverable on default. Which of these is the present contract? This depends on the language, and I conclude it is in the alternative strictly, and satisfied by either alternative, at the defendant's election, and, therefore, that the damages should be nominal, as the bills were clearly value-

(1) 4 Burr. 2229.

In *Cockburn v. Alexander* (2), J., says—"The question upon a contract is what is the condition which the plaintiff would be if the defendant had performed the contract. In other words, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burdensome to the defendant;" and there are many cases in the books of alternative contracts, one of the oldest is set out in *Coke upon Littleton*, 145 a—where a grant were of an annuity or a yearly, &c. . . . there the grantor's election at the day to deliver which would be the least. Suppose a contract that a man will, after a race, deliver a certain sum or pay 1,000*l.*, there the contract is in the alternative, and he might choose to pay; and if an accident occurred it might be advantageous to deliver the sum whilst, if it won, it might be advantageous to pay 1,000*l.*, and the contracting alternative there would be an option to do either, and the damages recoverable would be what would be lost by non-performance of the least beneficial option; and that case may be said to be the present. Again test the matter by singling the alternatives, and suppose the contract to pay 1,000*l.* or deliver a sum by a contract to pay the amount of the sum or deliver them up, could it be said that the contract was more than one? My brothers think that the words "and if not," should be read in; and that alters the contract, and I cannot say we are authorised to insert these words. Another reason why we should sing the contract as if these words were inserted, is that in a preceding line of the declaration we find the words, "if drafts should not be paid," which is not at all where these words were inserted; they were used, and that the alternative in this part of the declaration is that the contract was intended to be alternative. As respects the case put in *other Grove*, I should think it is a case of alternative contract; and, in my suggestion of my brother Brett,

that there is an implication of law as to damages, it appears to me that they are only a consequence of a breach. I feel doubt, but, on the whole, come to the conclusion that the words of the declaration must be construed according to their natural meaning, that the word "or" makes the contract alternative, and that, therefore, the damages are those which arise from the least beneficial alternative, *i.e.*, one farthing, as the bills are valueless. The allegations, both as to the contract and breach, are alternative; and there is this further difficulty, that the declaration alleges the performance of all things entitling the plaintiff to have the drafts returned or their amount paid, not of those entitling him to payment, which justifies my construction. It, therefore, seems to me that we should construe the declaration strictly, and not put for "or" the words "and in event of this not being done then," and that the rule should be discharged.

Rule absolute.

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Attorneys—Poole & Hughes, for plaintiff;
F. A. G. Cotterell, for defendant.

1873. }
June 5, 9, 10. } *PICKEBING v. JAMES.*

Municipal Election—Ballot Act, 1872 (35 & 36 Vict. c. 33)—*Duties of Presiding Officer and Clerks—Action for Breach of Duty—Pleading.*

Under the Ballot Act, 1872, it is the duty of the presiding officer at a polling station, or a clerk deputed by him, whichever of them in fact undertakes it, to deliver to the voters ballot papers bearing the official mark, and to be present, so that each voter, before placing his ballot paper in the box, can shew to him the official mark on its back; but prima facie, and in the absence of it appearing that a clerk has been deputed by such pre-

10m. B. Rep. 791; s. c. 18 Law J. Rep. 74.
REMARKS, 42.—C.P.

siding officer to fulfil it, the duty lies on such officer.—So Held by the whole Court.

But it is doubtful whether there is a similar duty as to ascertaining, before the voters put their ballot papers in the box, whether they are properly marked with the official mark.—KEATING, J., and BRETT, J., holding that there is, and BOVILL, C.J., and GROVE, J., that there is not.

Where the presiding officer or clerk commits a breach of duty, he is liable to an action for damages by the party aggrieved, though the breach be not wilful or malicious.—So Held by the whole Court.

Where the declaration sufficiently states the duty, and breach thereof by the defendant, and after stating facts not sufficiently shewing the plaintiff is aggrieved, alleges that "by reason of such neglect of duty the plaintiff was prevented from being elected," such allegation is one of fact and sufficient to shew the plaintiff is aggrieved.—So Held by KEATING, J., BRETT, J., and GROVE, J., dissentiente BOVILL, C.J.

The first count of the declaration alleged—that before and at the time of the committing of the grievances hereinafter mentioned, a certain election was being held for the election of a councillor to serve in the town council of the borough of Birmingham, for a certain ward in the said borough called St. Martin's Ward, and the defendant had been appointed under and by virtue of rule 21, contained in the first schedule to the Ballot Act, 1872, a presiding officer to preside at one of the polling stations appointed for the said election, and the defendant acted as such presiding officer at the said polling station at and during the said election, and the plaintiff and one Thomas Startin were respectively candidates, at the said station, for the said office of town councillor, and by the said Ballot Act, 1872, it is enacted as follows, that is to say, "In the case of a poll at an election, the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot paper), shewing the names and description of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of voting, the

ballot paper shall be marked on both sides with an official mark and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box, in the presence of the officer presiding at the polling station (in the Act called 'the presiding officer'), after having shewn to him the official mark at the back. Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is written or marked, by which the voter can be identified, shall be void and not counted." And by the above mentioned and other provisions of the said Ballot Act, 1872, it became and was the duty of the defendant, at such election, to deliver to the voters voting at the said polling station, ballot papers bearing the official mark appointed for the said election. And it was also the duty of the defendant to ascertain, before the voters placed their said respective ballot papers in the said closed box, whether the said ballot papers were properly marked with the official mark as aforesaid. And the defendant undertook and entered upon the said respective duties, for performance of which duties aforesaid the defendant received reward. And the defendant, as such presiding officer as aforesaid, neglected his said duties as follows, that is to say, that he delivered to certain of the said voters, at the said polling station, ballot papers not bearing the said official mark, and which said last mentioned ballot papers, after having been duly marked and folded by the said respective voters, were placed by the respective voters in the said closed box, and the defendant did not ascertain that the said last mentioned ballot papers did not bear the said official mark before the same were placed in the said closed box, as aforesaid. And the plaintiff avers that after the close of the polling at the said election, the said Thomas Startin was declared to be elected by a majority of three votes, and the plaintiff afterwards

petitioned against the return of the said Thomas Startin, under the Corrupt Practices (Municipal Elections) Act, 1872, and the said petition came on for hearing before George Morley Dowdeswell, Esq., one of Her Majesty's counsel, and after hearing the evidence and examining the ballot papers and other documents produced before him, the said George Morley Dowdeswell, Esq., determined that from the number of votes polled in favour of the plaintiff, twelve of such votes should be struck off, to wit, two of such votes on the ground that the two persons who gave such votes had personated certain persons entitled to such votes, nine of such votes on the ground that ballot papers used in giving these votes did not bear the said official mark, and one of such votes on the ground that the voter had, contrary to the provisions of the said Ballot Act, 1872, so marked the said ballot paper used by him in giving such vote, that such voter could be identified, and the said George Morley Dowdeswell, Esq., further determined, that from the number of votes given for the said Thomas Startin fourteen of such votes should be struck off, to wit three of such votes on the ground that the voters who gave such votes were, during the said election, the paid canvassers of the said Thomas Startin, ten of such votes, on the ground that the ten persons who gave such votes had personated certain persons entitled to such votes, and one of such votes on the ground that the ballot papers used in giving the said votes did not bear the said official mark, and that two votes which had been rejected by the returning officer at the said election should be added to the number of votes polled in favour of the said Thomas Startin, and in the result the said George Morley Dowdeswell certified that the said Thomas Startin was duly elected and returned to serve as such town councillor as aforesaid, and by reason of the neglect of the respective duties by the defendant committed as hereinbefore described, the plaintiff was prevented from being elected and serving as such town councillor as aforesaid, and lost all the costs and expenses he was put to in endeavouring to procure his said election as aforesaid, and

in prosecuting the said petition, and has been and is otherwise damnified.

The second count alleged—that before and at the time of the committing of the grievances hereinafter mentioned a certain election was being held for the election of a councillor to serve in the town council of the borough of Birmingham for a certain ward in the said borough, called St. Martin's ward, and the defendant had been appointed under and by virtue of rule 21, contained in the first schedule to the Ballot Act, 1872, a presiding officer to preside at one of the polling stations appointed for the said election, and the defendant acted as such presiding officer at the said polling station at and during the said election, and the plaintiff and one Thomas Startin were respectively candidates at the said election for the said office of town councillor, and by the said Ballot Act, 1872, it is enacted as follows, that is to say, "In the case of a poll at an election, the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot paper) shewing the names and descriptions of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of voting, the ballot paper shall be marked on both sides with an official mark and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter having secretly marked his vote on the paper and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station (in this Act called the presiding officer), after having shewn to him the official mark at the back. Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter, is entitled to vote for, or on which anything except the said number on the back is written or marked by which the voter can be identified, shall be void and not counted." And the defendant as such presiding officer became and was by the said above mentioned and other provisions of the said Ballot Act, 1872, at and during the said election, bound to

be present at the said polling station, so that each voter before placing the ballot paper by which he voted in the said closed box at the said polling station, could shew to the defendant as such presiding officer as aforesaid, the official mark appointed for the said election at the back of the said ballot paper, and the defendant neglected his said duty in this that he was not present, so that nine of the said voters who voted for the plaintiff during the said election at the said polling station could shew him the said official mark on the back of the voting paper. The said nine voters last mentioned received ballot papers not bearing the official marks aforesaid, and after having duly marked and folded the same placed the same in the said closed box, and after the close of the polling at the said election, the said Thomas Startin was declared to be elected by a majority of three votes, and the plaintiff afterwards petitioned against the return of the said Thomas Startin, under the Corrupt Practices (Municipal Elections) Act, 1872, and the said petition came on for hearing before George Morley Dowdeswell, Esq., one of Her Majesty's counsel, and after hearing the evidence and examining the ballot papers and other documents produced before him, the said George Morley Dowdeswell, determined that from the number of votes polled in favour of the plaintiff, that twelve of such votes should be struck off, to wit two of such votes on the ground that the two persons who gave such votes had personated certain persons entitled to such votes, nine of such votes on the ground that the ballot papers used in giving these votes did not bear the said official mark as aforesaid, and one of such votes on the ground that the voter had, contrary to the provisions of the said Ballot Act, 1872, so marked the ballot paper used by him in giving such vote that such voter could be identified, and the said George Morley Dowdeswell further determined that from the number of votes given for the said Thomas Startin, fourteen of such votes must be struck off, to wit, three of such votes on the ground that the voters who gave such votes were during the said election the paid canvassers of the said Thomas

Startin, ten of such votes on the ground that the ten persons who gave such votes had personated certain persons entitled to such votes, and one of such votes on the ground that the ballot paper used in giving the said vote did not bear the official mark as aforesaid, and that two votes which had been rejected by the returning officer at the said election should be added to the number of votes polled in favour of the said Thomas Startin, and in the result the said George Morley Dowdeswell certified that the said Thomas Startin was duly elected and returned to serve as such town councillor as aforesaid, and by reason of the neglect of duty by the defendant, committed as hereinbefore described, the plaintiff was prevented from being elected and serving as such town councillor as aforesaid, and lost all the costs and expenses he was put to in endeavouring to procure his said election as aforesaid, and in and about the said petition, and has been otherwise damnified.

The third count alleged—that by the Ballot Act, 1872, it is enacted that every returning officer, presiding officer and clerk, who is guilty of any wilful misfeasance, or any wilful act or omission in contravention of the said Act, shall, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act or omission, a penal sum not exceeding one hundred pounds, and the defendant was appointed and acted in the said election as in the first and second counts mentioned and described, as a presiding officer in manner and for the purposes in the said counts stated, and the plaintiff and the said Thomas Startin were candidates as in the said counts alleged, and the defendant as such presiding officer was bound under and by virtue of the said Ballot Act, 1872, to mark the ballot papers on each side immediately before the same were delivered to and used by the voters, and also to be present when each voter placed his vote in the closed box used for the purpose of receiving the ballot papers, and also to ascertain whether each ballot paper, before each voter placed the same in the said closed box, was marked with the official mark,

and the defendant took upon himself the said respective duties above-mentioned, and entered upon the same for reward to the defendant in respect thereof, and the defendant wilfully omitted to mark a certain number of the ballot papers on each side, immediately before the same were delivered to and used by the voters, and also wilfully omitted to be present, so that each of the said voters could shew him the said official mark on the back of the said ballot papers, before each of the said voters placed his vote in the said closed box used for the aforesaid purpose, and also wilfully omitted to ascertain whether each of the said ballot papers, before the voters placed the same in the said closed box, was marked on the back with the official mark, and by reason of the premises upon a petition to question the return of the said Thomas Startin, the said votes so given as aforesaid for the plaintiff were disallowed, and thereby the plaintiff lost the said petition, was not declared to be duly elected as he would have been but for the omissions in this count alleged, and the plaintiff has lost the costs and expenses he incurred in endeavouring to procure his election to act and serve as such town councillor as aforesaid, and also was put to great cost and expense in and about the said election petition, which he would not have incurred save for the grievances hereinbefore alleged, and the plaintiff has been and is otherwise damnified, and the plaintiff is entitled to the said sum of one hundred pounds for the wilful omission hereinbefore mentioned.

Demurrer to the declaration.

Holl, in support of the demurrer.—The allegations in the declaration as to its being the duty of the defendant to deliver ballot papers officially marked, to be present, and to ascertain that they were so marked before they were put into the box, are merely allegations of law and will not aid to make a cause of action, and the Court must look to the statute itself to see whether such duties are imposed as is alleged in the declaration. The plaintiff must further shew, that the duties imposed are duties absolutely imposed on the defendant personally, because if it be

a duty to be discharged by a clerk, who is not appointed and paid by the defendant, it is not sufficient. On referring to the sections of the statute and the rules in the first schedule, it will be found that the duties imposed are such that it would be impossible for any one person to perform them, and the Act contemplates that most of them may be done by a clerk, and there is nothing either in the Act or rules to shew that the duties, the breach of which is complained of in this action, are duties which must be done by the presiding officer himself, they may be done by a clerk; and, though no doubt the duties are imposed on someone, and it may be that the person is responsible who takes upon himself the duty of doing these things, here the allegations in the declaration do not shew that the defendant, the presiding officer, personally undertook the duty. Further, the provisions of the statute are merely directory, and no action will lie for the omission to do what is only directory. The case of *Schinotti v. Bumpsted* (1) is the only instance in which an action has been held to lie against an officer for an omission to perform a duty, where the omission was not malicious, but there the effect of the statute authorising the lottery was to make it obligatory on the defendant to give the money to the plaintiff, who was the owner of the ticket last taken out of the lottery. In *Ashby v. White* (2), the defendant was acting only as a ministerial officer, and the case depended on malice, as is shewn by the pleadings and the report of Lord Holt's judgment, furnished by Mr. Knowles, in *Tozer v. Child* (3), and that case and *Drewe v. Coulton* (4) establish that an action does not lie against a returning officer for refusing a vote, unless he does so maliciously. In neither the first nor second count is there any allegation of malice or of wilful misconduct, and it is quite consistent with those

(1) 6 Term Rep. 646.

(2) 1 Smith's Lead. Cas. 4th ed. 185; s. c. 2 Ld. Raym. 938.

(3) 7 E. & B. 377; s. c. 26 Law J. Rep. (n.s.) Q.B. 151.

(4) 1 East, 563 n.

counts, that what is charged there against the defendant occurred accidentally. The legislature by the 11th section, in which a penalty is imposed on an officer, "who is guilty of any wilful misfeasance, or any wilful act or omission in contravention of the Act," clearly indicated that the party should not be entitled to any remedy, unless the act complained of was a wilful one. Moreover, that section gives the penalty to the party aggrieved, and therefore, but for the words there, "in addition to any other penalty or liability," there would be no doubt that there could be no other remedy to the party than such penalty—*Couch v. Steel* (5); and the words, "other penalty or liability," in that section, refer to the punishment given by sections 3 and 4 for the wilful acts there mentioned. Again, and this applies to all the counts, the plaintiff is not shewn to be a party aggrieved, so as to be entitled to maintain an action. In *Ashby v. White* (2), the plaintiff was the voter, who had been deprived of the exercise of the franchise, but is a candidate a party aggrieved? and even admitting, that the candidate might maintain the action, if in consequence of the defendant's neglect of duty he lost the election, still as it does not appear that the election was lost by such neglect of duty, and the allegation, "whereby he lost," &c., is nothing by itself, it must be shewn how it occurred. That is not done, and *non constat* but that the votes which were thrown away were given for the plaintiff's opponent at the election; and there is nothing to identify the votes which were struck off, with those voting papers which were not officially marked.

Henry James (*H. T. Atkinson* with him), in support of the declaration.—A duty is cast by the statute on some one to perform certain official acts, and the declaration shews that the defendant accepted that duty, and that the plaintiff was aggrieved by the breach of such duty, and the plaintiff is therefore entitled to maintain this action. The statute requires the ballot paper to be marked with an official mark and shewn to the pre-

siding officer before being put in the box, and makes a ballot paper void which is put in not so marked, therefore the marking it with the official mark, the ascertaining that the paper put in is so marked, and the presence for that purpose, are compulsory. The presiding officer, no doubt, may delegate his duties to a clerk, but the act of the clerk is his act, and admitting therefore that these duties may be performed by a clerk, they are still legally the duties of the presiding officer. But it is not necessary to argue that, even if shewn to be done by a clerk, the presiding officer is liable, for it is averred in the declaration that the defendant undertook the duties, and that consequently negatives the delegation of them to any one else. Then, again, a presiding officer is a ministerial officer only, and, if that be so, he is of course liable to an action for the breach of the duties which are cast on him by the statute. The duties he has to perform under this statute are all only ministerial with the exception of one or two, viz., in the case of personation of a voter, or of a ballot paper having been inadvertently destroyed. The duties are ministerial, and duties which he is bound to perform, and it is not sufficient that he merely exercised due and reasonable care in their performance. *Ashby v. White* (2) was the case of a returning officer, who had to act judicially as to the right of voting, and not merely ministerially; so also was *Cullen v. Morris* (6); but in the present case the acts of the defendant, like those of the collector of customs in *Barry v. Arnaud* (7), were purely ministerial, and he is therefore liable to an action for not performing them. In *Miller v. Seare* (8) trespass was brought against Commissioners of Bankruptcy for imprisoning the plaintiff, the defendants being only mistaken, and the question was whether their office was judicial or ministerial, and it was held to be the latter, and judgment was given for the plaintiff. That case was approved of in *Schinotti v. Bumpsted* (1),

(6) 2 Stark. 577.

(7) 10 Ad. & E. 546; s. c. 9 Law J. Rep. (N.S.) Q.B. 226.

(8) 2 W. Black. 1141.

(5) 3 E. & B. 402; s. c. 23 Law J. Rep. (N.S.) Q.B. 121.

polling station with materials for voters to mark the ballot papers, instruments for stamping thereon the official mark (which is to be kept secret) and copies of the register of voters allotted to the station, and the returning officer is to appoint a presiding officer to preside at each station who shall keep order there, regulate the admission of voters and exclude all other persons except the clerks, agents and constables. And also by sections 9 and 10, persons misconducting themselves at the station or not obeying the lawful orders of the presiding officer may, under his orders, be removed by a constable, and for the purpose of adjournment and every enactment as to the poll the presiding officer is to have the power of deputy returning officer, and he and every clerk appointed by the returning officer have power to ask the authorised questions and administer the authorised oaths, and he and any justice may administer the authorised declarations. Further by section 8 every returning officer is to provide nomination papers, polling stations, ballot boxes, ballot papers, stamping instruments, copies of registers and other things, and appoint and pay officers and do such acts and things as may be necessary for effectually conducting the election. And by rule 50 the presiding officer may, by the clerks appointed to assist him, do any act he is authorised to do at a polling station except ordering the arrest, exclusion or ejection of any person from the polling station. Now we come to what is necessary to be done on the poll. By section 2 the vote is to be by a described ballot paper, which "at the time of voting shall be marked on both sides with an official mark," and delivered at the station to the voter, whose registered number shall be put on the counterfoil, and the voter "having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station (in this Act called the 'presiding officer') after having shewn to him the official mark at the back." And by rules 24, 25, and 26 immediately before the ballot paper is delivered to a voter it is to be marked on both sides with the official mark, either

stamped or perforated, and other matters done, and the voter on receiving it is forthwith to proceed into a compartment, mark it, fold it up so as to conceal his vote, and put it so folded up in the ballot box; and in certain cases the presiding officer may act for the voter in a specified way. It then becomes necessary to refer to the directions given to guide the voters, which are given at the end of schedule 2, and which are to be printed in conspicuous characters and placarded outside every station and compartment; by these the voter is to go into a compartment, and place a mark against the names of the candidates he votes for, he is then to fold up the paper so as to shew the official mark on the back, and leaving the compartment without shewing the front to any one, shew the official mark to the presiding officer, and in his presence put it into the ballot box and leave the station; if a paper be inadvertently spoiled, the presiding officer may give the voter another. The only other section to which it is necessary to refer is section 11, which provides that "every returning officer, presiding officer and clerk who is guilty of any wilful misfeasance, or any wilful act or omission in contravention of this Act shall, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act or omission a penal sum not exceeding one hundred pounds."

In the present action there are three allegations of duty as respects the defendant, the presiding officer. First, to deliver to the voter a ballot paper marked with the official mark; secondly, to be present at the polling station so that each voter might shew the official mark to him; thirdly, to ascertain before the ballot paper is put into the box that it is the properly marked paper. There are no clauses in the statute, rules or directions which directly impose on the presiding officer the duty of delivering the officially-marked paper to the voter; but I am of opinion that it is the duty of some one to do this, some one is to use the stamp, which manifestly is not to be so secret but that the voter may see and recognise it, as it is to be both on the front and back of the paper handed to him, and he is to fold

the paper so as to shew, and shew it to the presiding officer, and the voter is not to stamp it, but it must be provided for use at the station, and the voter on delivery of it to him is to mark his vote on it and put it into the box. Now these being matters which are to be done at the polling station, who is to attend there? The presiding officer is to preside, order and direct, but other officers may be appointed; and whereas sometimes in a small place there may be only a presiding officer, in a large town it would be impossible for the presiding officer alone to conduct matters, and therefore there is a provision as to clerks; and in such a place there would generally be several clerks to do the various acts, and it would only be in cases of difference that the presiding officer would interfere. The duty of delivering the papers lies on some one, and who this is depends on whom the duty is entrusted to. The presiding officer may undertake to do so, or by rule 50 he may depute this to a clerk; but one or the other must do it, this is clear; and the result I arrive at is, that a duty of delivering the officially marked paper exists, and that it rests on the person who undertakes it at the polling station, not on the person undertaking generally the duties of the station, but on the presiding officer or clerk who in fact undertakes the duty of delivery. But though it is true that the clerks may act because they may be deputed, yet as they are appointed and paid by the returning officer, each clerk is independent, and in my opinion the presiding officer is not in law responsible for the acts of a clerk in delivering a paper not properly marked; in such case the clerk would be responsible, but if the presiding officer did in fact deliver, it would be his duty to see that the paper he delivered had the proper mark, and if it were without he would be guilty of a neglect of duty; the matter depends on who personally acted. The next question is, how far the presiding officer is bound to be present at the polling station, so that the voter before placing his ballot paper in the box can shew to him, as presiding officer, the official mark on its back. Now it is clear that the voters are required to shew the

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official mark to the presiding officer, and there must be some one to see it; this may be done by the presiding officer, but in a large place or district where there are many voters, it would be impossible for him to perform this entirely himself, and seeing that it is one of the matters which by Rule 50 may be deputed to a clerk, no doubt, in practice, this matter would be handed over to clerks to whom the voters would exhibit their papers, there could be no objection to this, and matters could hardly be conducted in any other way. Some one is to see that the official mark is on the paper, but here again the duty lies on the presiding officer or clerk, whoever undertakes it. The next question is, as to the duty of ascertaining, before the voters put the ballot papers in the box, whether they are properly marked with the official mark. Now, I do not find any clause in the Act making it imperative on the presiding officer or clerk to do this. The duty is cast on the voter to shew the paper, as appears from the latter part of section 2 and the directions to voters; practically I do not see that any such duty lies on the presiding officer or clerks. What is there to prevent the voter putting the paper in without this? There is no power in the presiding officer to prevent it, nothing in the Act to authorise his interference, and a duty is thrown on the voter, and enforced by the Act and directions to voters. On the whole, I come to the conclusion that no duty such as that alleged in the declaration is thrown on the presiding officer of ascertaining before they are put in the box whether the ballot papers bear the official mark. Those are the three matters of duty which are alleged, and it then becomes necessary for the plaintiff to shew that the duties devolved on the defendant. It therefore seems to me that it is necessary to shew that the presiding officer personally interfered and undertook them, i.e. personally delivered the papers to the voters, and undertook himself the duty of being present, and neglected such duties.

Now I think that the first count sufficiently shews that the defendant was and acted as presiding officer, and in the absence of any statement as to clerks,

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that he was bound to be present. Is it then shewn that the plaintiff was injured by the defendant's neglect of duty? On this point it seems to me that the first count is defective and bad after verdict, for there is an absence of any statement to connect the unmarked votes with those rejected by the barrister, or shew that the majority or election was affected thereby, or that the voters voted for the plaintiff. The only allegation that could be so construed is one (coming after the insufficient allegations) that "and by reason of the neglect of the respective duties by the defendant, committed as hereinbefore described, the plaintiff was prevented from being elected, &c." But such an allegation has always been held to be a conclusion of law. It is necessary to have a statement of the facts on which the allegation rests; the facts must warrant the allegation, and the allegation here is an allegation of matter of law after a statement of facts; and therefore I say that this is not an allegation of fact curing the preceding defective statements. Therefore, I am of opinion, that though in the first count the allegation of duty is good, and the breach alleged is *prima facie* though not altogether good, our judgment on this count should be for the defendant. As respects the second count, I also think that there is a duty sufficiently shewn to rest on the defendant, but not a sufficient allegation in favour of the plaintiff being aggrieved by its breach. As respects the third count, the case falls within sect. 11, and there is a sufficient statement that the votes were given for the plaintiff and disallowed, and therefore that count is a sufficient count in law, though of course I except so much as relates to the duty of ascertaining before they were put in the box whether the papers bore this official mark. It has been said that the first and second counts are not maintainable, and that the plaintiff must rely on the third count only, because of sect. 11, but this is not so, because it is provided by that section that the penalty therein shall be "in addition to any other penalty or liability to which he may be subject;" and if the duties be broken by him, the defendant is liable in addition to

his liability under sect. 11. And as respects the argument that it is necessary to shew malice or negligence, though under sect. 11 this is necessary, if there be a positive duty, as I think there is, this is immaterial, and non-performance thereof is enough.

KEATING, J.—This is an action against the defendant as presiding officer at a municipal election under the Ballot Act, 1872, for the breach of certain duties. The breaches alleged are, first, that he delivered a ballot paper to a voter which was not officially stamped; secondly, that he did not ascertain that it was so stamped before it was put into the ballot box; thirdly, that he was not present, so that he could ascertain this. The first question is, whether the statute creates a duty on the defendant as presiding officer for the breach of which he is liable, and it has been forcibly contended that it was not intended to create a duty in the defendant, or indeed any person, so as to make them liable to an action. It appears clear to me that the Act creates and imposes a duty on some one, and it would be a strange thing if we were driven to such a construction as would make the Act nugatory, as would be the case if it was only matter of discretion. The scheme of the Act is that there should be secret voting, and the voter, on coming to the polling station, is to ask for a ballot paper, which is to be delivered by the officer after the voter's name is called out, his number marked on the counterfoil, and a mark put against his name on the register, so as to ascertain his identity, and his being on the register and entitled to vote, and shew that a voting paper has been delivered to him; and also before delivery an official mark is to be stamped on it by the officer, and as it is important that this should be on the paper delivered to the voter and deposited in the ballot box, accordingly the officer is enjoined to stamp it, and the voter, after marking secretly the name of the candidate for whom he votes, is directed to fold the paper so as to shew the official mark, shew it to the presiding officer, and deposit it in his presence in the ballot box.

returning officer appointed the defendant presiding officer, and it was his to preside and keep the box in his ; but the returning officer can appoint clerks, and the presiding officer delegate to such clerks all his duties certain exceptions, and I own my opinion is that he could delegate to a any duties not so excepted, though I doubtful whether he could delegate the of presiding, as this is peculiarly appropriate to a presiding officer. It appears that a clear duty is imposed on one to deliver the paper officially to the voter, and *prima facie* it is on the presiding officer, the defendant. I do not intend to say that if delegated the delivery to a clerk, who delivered, that, not the clerk, but the presiding officer would be liable, I think the clerk and not the presiding officer would be so; but if the returning officer tries to get rid of his duty he must shew a delegation of the and therefore it seems to me that the duty *prima facie* is on the defendant over the paper. The second duty is ascertaining, before they were put in the box, whether the ballot papers bore the proper official mark, and on this point I differ from my Lord, and think this is equally imposed by the statute on the defendant. Suppose the voter in putting an improper paper into the box, the presiding officer is to have notice, and is directed to remove persons misconducting themselves, so that, really as the box is to be kept in view, is nothing unreasonable in imposing on the duty of ascertaining if the papers bear the proper official which it is the duty of the voter to

As respects the duty thirdly, I think the Act equally imposes *prima facie* on the defendant the duty of presenting so that the voter may be able to shew the official mark; it is an important object to secure that the paper in the box is the stamped paper. I think that a duty is created in all the cases, and that *prima facie* it is imposed on the defendant. Is, then, such a breach of duty shewn that an action lies against the defendant? Now the duty seems to me to be ministerial, and there-

fore there may be a breach without malice, and the case falls within the authorities where it has been held that where a duty is ministerial, and has been omitted or improperly fulfilled, an action lies. I think, therefore, that the duties are duties for the breach of which an action lies, and that, notwithstanding section 11, for though it has been forcibly argued that section 11 is intended to confine the remedy to the penalty, it appears to me that the section is cumulative, and that the action at common law is untouched. The only remaining question, therefore, is whether the declaration discloses a statutory duty and breach thereof. Here I again differ from my Lord, though I do so with distrust, especially as I have had hesitation from being struck with the argument that the action having been given to the party aggrieved, it was necessary to shew the facts precisely. But after consideration I think the first count sufficient, for even assuming it is open to criticism as to the non-identity of the voting papers, and the voting for the plaintiff, there yet remains sufficient, because, there being here clearly a duty and breach thereof shewn, I do not take the same view as my Lord as to the concluding allegation, and think that it is shewn on the count that the plaintiff is aggrieved. That allegation is not strictly or simply a deduction of law (in which case I should agree with my Lord), but in truth a statement of fact not law, it is that, "by reason of the neglect of the respective duties by the defendant committed, as hereinbefore described, the plaintiff was prevented from being elected," &c., which appears to me to be a traversible fact. As respects the second count, I take a similar view as to there being also a sufficient duty and breach, and as to the concluding allegation without the intermediate facts shewing that the plaintiff is aggrieved. And as respects the third count, I agree with my Lord. In my opinion, therefore, there should be judgment for the plaintiff on all three counts.

BRETT, J.—Two classes of questions arise here, the first arising on the Act and being general and important, the second arising on the declaration and

being of little importance. As respects the questions arising on the Act, the first question is whether it is merely directory, or imposes duties. The argument, even on the part of the defendant, shews that a course of conduct is imposed on some one, and it seems to me the Act imposes duties because it gives rules of conduct which are to be observed, provides that the services shall be paid, and deals with these matters for the public protection. The scheme of the Act is contained in its sections, and the rules in the schedules. By this scheme the local authorities are to appoint polling places, and then the returning officer is to act; the local authority by section 5 having in counties to create districts and assign to them polling places, and in boroughs, if they think it desirable, to create districts; and the returning officer, by section 8, having to provide nomination papers, polling stations, ballot boxes, ballot papers, stamping instruments, copies of registers of voters and other things, and appoint and also pay necessary officers, a provision which, taken together with section 10 and rule 48, shews that the returning officer is to appoint the clerks; and then by the rules provisions are made as to the construction of the polling stations. What we have to consider is the polling stations. By rule 21 the returning officer may appoint a presiding officer for each station, but this is not absolute and imperative, because by rule 47 he may preside himself, and, if he does not appoint one, would do so. Rule 48 confirms that he is to appoint the clerks, for it says that in addition to any clerks, he may appoint competent persons to assist him in counting the votes. And the presiding officer being appointed, and also clerks if necessary, then come section 2, rules 23, 24, 25, and the directions to the voter in the schedule, and the scheme is that the presiding officer is to shew that the ballot box is empty, and to place it in his presence, and it is the duty of the presiding officer to deliver to the voter an officially marked voting paper. If that were all, the scheme would be incomplete, but the voter is not to leave the booth, and it being the duty of the presiding officer to stamp the paper,

the voter is to go into a compartment of the station, mark the candidate for whom he votes, fold up the paper so as to shew the official mark on the back without shewing its front, shew the official mark to the presiding officer in whose presence the box is, and put it in his presence into the box. There no doubt is no enactment that the officer is to look out, but the necessary inference is that he is to look, and consequently it is his duty to be there. This is for the protection not of the voter but of the public, and as the officer is to see if the mark be on the paper, to look and see whether it is the proper paper, and prevent a fictitious paper being put in the box and the real one taken away, it therefore seems to me that though it is not expressly enacted, it would make the Act useless unless we said that it really expresses that some one, *i.e.*, he who presides, is to deliver the officially marked paper to the voter, be present and examine the mark, and see that none but the proper paper is put into the box. These are duties and not mere directions to the person who undertakes to perform them for payment. Then comes the question whether the presiding officer alone is to do these things. *Prima facie* he is, and *prima facie* he undertakes this on accepting his office, but by rule 50 he may delegate to the clerks appointed to assist him any act he is required to do with certain exceptions, he may delegate some duties, but those which he does not delegate he is to perform, and if he delegates and does not interfere he is not liable for the clerk, because the clerk is not his servant, he has no choice in his selection, and the clerk is appointed by others. He is only responsible for commissions or omissions in duties which he performs, but *prima facie* he undertakes the duties. Then comes the question whether there is a right of action to the party aggrieved for a commission or omission in respect of a duty, without its being malicious or wilful. I think there is, because the duties are ministerial, and therefore by the general law an action lies if a person be aggrieved. *Schinotti v. Bumpsted* (1), *Tozer v. Child* (3), and *Atkinson v. The Newcastle Waterworks Company* (10) are authorities shewing that

is so, unless the statute prevents it. said that it is prevented here by s. 11, but even if there were no exception therein, I fancy, though I have to that *Couch v. Steele* (5) would; but there is a special exception, that the penalty is to be in addition to other penalty or liability to which officer or clerk may be subject; and for the statute here does not prevent an action, and it is clear that some may be liable for a breach of duty. The remaining question is, is this properly stated? This depends on rules of instruction. It has been urged that we are to construe this declaration more liberally, because it is a hard action; but it is not so. We are bound to give the same construction as in any other case, and if the declaration be certain, to that extent, it is sufficient. It is necessary to state the duties, allege a breach, and shew that the party is aggrieved; that is all; and as respects damages, they are at large, and it is necessary to allege specific damages. In construing this declaration by the ordinary rules applicable on general demurrer, we are to see if a *prima facie* case is made out. As respects the first count, *prima facie*, the defendant's duty to mark the officially marked ballot papers to ascertain they are so marked before they are put in the ballot box, and the facts are alleged sufficiently. And the only point of difficulty is whether the plaintiff is shewn to be aggrieved thereby. Allegations as to what took place at the poll, the barrister may be open to dispute, but this is immaterial because a general allegation is sufficient to shew the plaintiff is aggrieved, for though the court thinks differently and I have no doubt, it seems to me that it is not an action of resulting duty or law. The declaration is "and by reason of the neglect of the respective duties by the defendant committed as hereinbefore described the plaintiff was prevented from being polled, &c.," and the preventing could have occurred unless the votes were taken away, therefore the allegation is one of duty or law but of a fact which is the result of other facts, and so it is a statement that the breach of

duty made the plaintiff aggrieved; whether damages are recoverable for what took place before the barrister it is not necessary to decide. As respects the second count, though there is no express enactment that the presiding officer is to be present, yet by necessary implication it is his duty unless it be delegated, therefore the allegation sets out a duty which lies on some one, and which *prima facie* lies on the defendant, and its breach is also shewn. Consequently the first and second counts disclose a cause of action. As respects the third count, there is no difference of opinion, so I will add nothing on that. All the three counts disclose a cause of action the first and second on the common law, the third on the penalty contained in section 11. As respects the pleading I would add that if on a traverse of the negligence it be shewn that the duties were delegated to a clerk the plaintiff will fail.

GROVE, J.—I am of the same opinion as my Lord as respects the existence of only two out of the three alleged duties. I think that the duty of delivering the paper and being present are duties cast on the presiding officer for the time being, and I say the time being, because the duty of the presiding officer may possibly be performed by clerks; and as respects the third, viz., the ascertaining, before they are put in the box, whether the papers are officially marked, on the whole I agree with my Lord that no duty is imposed on the presiding officer. As to the delivery of the ballot papers, and being present that the voters may shew the official mark, the statute does not expressly provide that this is the duty of the presiding officer, but the sections impliedly shew it is. Section 2 simply shews that the paper is to be officially marked, delivered to the voter in the station, and after being secretly marked placed in the box, in the presence of the officer presiding, therefore some one is to do this, but we must look elsewhere to see who is that person. Now, clearly it is not necessarily the returning officer, unless he assumes the power under rule 47, because, by section 8, the returning officer is to provide such officers as may

be necessary for the conduct of the election, and it is clear some of the other officers are to act, if not the presiding officer the clerks appointed by the returning officer, and if the duty of the presiding officer be thrown on the clerk he is the presiding officer for the time. The presiding officer or clerk so acting is to carry out the provisions, or it may be the returning officer, if he elects to do so. And the duty is important, because the voter cannot vote unless an officially marked paper be delivered to the voter. Secondly, Is the presiding officer necessarily to be present, so that each voter, before putting his voting paper in the box, can shew the official mark on its back? Section 2 is sufficient to answer this, for it says the voter is to place the paper in the box in the presence of the presiding officer, and therefore it is necessary that he should be present, and further, sections 9 and 10, rules 20, 23, and 26, and the directions to voters, are emphatic as to his presence being necessary. The third point is, whether it is the duty of the presiding officer to ascertain that the official mark is on the paper before it is put in the box. This is not directly imposed, and can only be said to be so impliedly because the voter is to shew the mark before he puts the paper in the box. The Act would specify this if it were necessary, but this matter is thrown on the voter, for the directions to voters direct him to shew the mark, and say that if he, the voter, takes a ballot paper out of the station, "or deposits in the ballot box any other paper than the one given him by the officer," he shall be guilty of a misdemeanour, so that there is a strong guarantee by punishment that the paper shall be the same, and if it be, there is no necessity for the presiding officer to look out. It would be hard, therefore, to imply a duty on the presiding officer of afterwards scrutinizing a paper which he has just given, and as to which a duty is cast on the voter. There is nothing to compel this construction, and the duty is cast on the voter. The next question is, whether the breach of duty is a subject of action, and the cases satisfy me that it is. If there were only *Miller v. Seare* (8), there would be a

satisfactory answer, because that was a case of false imprisonment, but the other cases which have been cited shew there is a liability for a breach of duty under a statute, though not malicious or wilful. Even without the express words of section 11, I should doubt whether a penal section as to wilful acts takes away a cause of action as to what is not wilful, but when we look to the clause, the matter becomes clear, for the penalty is to be in addition to other penalties and liabilities. As respects the next question, I agree with my brothers Keating and Brett, that there is a sufficient allegation of a breach to bring the matter home to the defendant, and that the plaintiff is shewn to be aggrieved, and I think that the difficulty is cured by the allegation, "by reason of the neglect of the respective duties by the defendant, committed as hereinbefore described, the plaintiff was prevented from being elected." The duties alleged are as to three things, there are specific allegations of the duties and breach thereof, and then it is said that by reason of the defendant's neglect of the *respective duties* the plaintiff was not elected; that is, the defendant has broken his duty in three respects, and the result is, that the plaintiff has been prevented from being elected. The allegation here is not a legal inference, and hardly a mixed one of law and fact, but is a traversable fact, and is sufficient within the rule laid down in *Stephen on Pleading*. I am therefore of opinion that the first and second counts are good, and as to the goodness of the third there is no difference of opinion.

Judgment for the plaintiff.

Attorneys—Fearon, Clabon & Fearon, agents for Henry Hawkes, Birmingham, for plaintiff; Cowdell, Grundy & Browne, agents for G. F. James, Birmingham, for defendant.

3. }
), 20. } RANSFORD v. MAULE.

*ruptcy—Declaration of Inability
—When Filing complete—Bank-
Act, 1869 (32 & 33 Vict. c. 71),
subs. 4.*

*claration of a debtor's inability to
debts is filed, within the meaning
bankruptcy Act, 1869, s. 6. subs. 4,
constitute an act of bankruptcy,
is delivered to the proper officer at
er office for that purpose with the
that it should be filed.*

was an interpleader issue, tried
Martin, B., at the late Hunting-
Spring Assizes, as to whether
goods seized in execution at the
the defendant were at the time
seizure the property of the
as trustee of the estate of
Stocker and Charles Henry
bankrupts, as against the de-

The execution was on a judg-
ained against Stocker and Harris
m under 50*l.*, and the seizure
er by the sheriff was on the
of Monday, the 14th of October,
a quarter before ten o'clock, and
dant was entitled to the verdict if
sure was before the act of bank-

The act of bankruptcy was the
the debtors of a declaration of
to pay as required by the
toy Act, 1869 (32 & 33 Vict.
6), and the question was when
aration was in fact filed. The

on was sent by the debtor's
, Messrs. Wallingford and Day,
es, to Mr. Gaches, a solicitor at
ough, to be filed in the Peter-
County Court. Mr. Gaches went
or that purpose to the office of
rar of that Court, on the morning
lay, the 12th of October, and
to the clerk there, when the
that there was already a decla-
the file by Stocker and Harris.
trar was not then in, and Gaches
eclaration saying that he would
and see the registrar. He
ly returned in about an hour and
en he saw the registrar, who told
it was no use filing two declara-

tions, and that he had better telegraph to
his clients that there was already one on
the file. Gaches thereupon took away
the declaration he had so brought, and
telegraphed accordingly to Messrs. Wal-
lingford & Day. They sent a telegram
in reply asking by whom the former de-
claration was signed, and learning that it
was signed by Stocker only they for-
warded a written authority signed by
Stocker, authorising the registrar to take
it off the file. Mr. Gaches attended at
the registrar's office on Monday morning,
the 14th of October, at half-past ten
o'clock, with this authority and the de-
claration he had taken away on the 12th,
and left them both with the registrar's
clerk there. The declaration when pro-
duced at the trial bore the endorsement,
"filed the 14th of October, 1872, 10.30
a.m." The file as used in the Peter-
borough County Court for bankruptcy
cases appeared to be a pasteboard case
into which are placed the papers relating
to the particular bankruptcy for which the
case is kept, the papers being generally,
though not always, fastened by a cord or
tape annexed to the case.

The learned Judge thought that the
declaration was not filed until after the
seizure, and he directed a verdict for the
defendant, with leave to the plaintiff to
move to set it aside and enter instead a
verdict for the plaintiff.

A rule *nisi* to that effect was obtained
by *O'Malley* for the plaintiff on the ground
that the declaration was sufficiently filed
on the 12th of October, against which—

Metcalf shewed cause.—The Bank-
ruptcy Act, 1869 (32 & 33 Vict. c. 71), in
sect. 6, subsect. 4 enacts as an act of
bankruptcy, "that the debtor has filed
in the prescribed manner in the Court a
declaration admitting his inability to pay
his debts." "Prescribed" means, as
explained in section 4, as prescribed by the
rules, and the only rule which relates to
this is rule 16 of the general rules made
in pursuance of the Act, and that is as
follows—"A declaration by a debtor ad-
mitting his inability to pay his debts
shall be dated, signed and witnessed
according to the form in the schedule, and
shall be filed in the London Bankruptcy

Court if the debtor shall reside or carry on business within the district of that Court, and where the debtor neither resides nor carries on business within the district of that Court it shall be filed in the Court within the district of which the debtor resides or carries on business." There is nothing which exactly says what "filing" means, but though, perhaps, it may not be necessary that the tape should be passed through the document in order to constitute filing, it must be received by the registrar or his officer for that purpose and that did not take place in this case before the 14th of October.

O'Malley, in support of the rule.—Filing would be performed by taking the document to the office and leaving it there for the purpose of being filed. The Act says *the debtor* is to file the declaration, and it is clear he cannot himself put it in the proper case and pass the tape through it, but he must leave that to be done by the proper person for that purpose at the office. Therefore, filing must necessarily be completed by handing over the document to the officer to file, and that was done here on the 12th of October. When once filed neither the debtor nor his solicitor have any right to take the document away.

Joseph Brown, as *amicus curiæ*, referred to *Garlich v. Sangster* (1).

Cur. adv. vult.

The following judgment of the Court (2) was (on June 20) delivered by—

KEATING, J.—This was a rule to enter a verdict for the plaintiff, and the question was as to the date of the title of the plaintiff as trustee in bankruptcy of *Stocker & Harris* which dated from the filing of a declaration of inability to pay, and it became important to ascertain whether such filing took place on the 12th or 14th of October. The statute (32 & 33 Vict. c. 71) has provided that the filing by the debtor of a declaration of inability to pay shall constitute an act of bankruptcy from that time. Now it appears that the bankrupts in the present case sent a solicitor to file

a declaration signed by them of their inability to pay. The solicitor took it to the proper office for that purpose and delivered it to the proper officer there for filing. Being told by such officer that there was a prior declaration on the file which might create a difficulty in the filing he left the declaration there and returned to the office in an hour and a half, and saw then the registrar who was not present when he first went there. The registrar informed him that there was an objection to filing two declarations, and the solicitor thereupon took back the declaration he had brought in order to remove such objection which was by getting an authority to take the previous declaration off the file. That authority was got and the objection removed, and the filing of the declaration was complete on the 14th of October. The question is whether it had been filed on the 12th or only on the 14th of October. On the whole we are of opinion that the filing took place on the 12th of October. We think that the filing contemplated by the statute is the delivering of the declaration to the proper officer at the proper office for that purpose with the intention that it should be filed. We doubted at first whether there had been such intention in the present case, but we have come to the conclusion that the facts shew that the solicitor always intended that the declaration should be filed, and that he left it at the office for that purpose, and although at the end of an hour and a half he took it away for the purpose of removing an objection erroneously raised by the officer, he never abandoned the intention that it should be filed, and the erroneous objection which was made never prevented its being left at the proper office for the purpose of being filed which in our opinion is a filing within the meaning of the Act.

Rule absolute.

Attorneys—*Smith, Fawdon & Low*, for plaintiff;
Walter, Moojen & Son, for defendant.

(1) 9 Bing. 46; s. c. 1 Law J. Rep. (N.S.) C.P. 155.

(2) *Keating, J.*; *Brett, J.*; and *Denman, J.*

3. }
24. } SOWERBY v. SMITH.
13. }

Inclosure Act of Right of Sporting.

An Inclosure Act, passed in 1798, by which the Commissioners were directed to allot in fee simple to the said Margaret W., who was recited to be lady of the manor of M., a certain part of the waste lands to be enclosed "in lieu of and as a compensation for the right and interest of the said Margaret W., her heirs and assigns, in and to the soil of the said common waste grounds by that Act directed to be divided and enclosed." The residue of the waste lands were to be allotted amongst the other persons entitled to rights of common, and it was provided that the several allotments should be made in the allottees respectively "in full of and satisfaction for all rights of common and other rights and interests whatsoever, in, over and upon the said lands and premises, and the same were directed to be divided and enclosed,

such manorial rights as thereafter should be reserved to the said Margaret W., her heirs and assigns," and that all rights of common, and all other rights and interests whatsoever, should cease over the said lands except such manorial rights as last aforesaid. The Inclosure Act enacted that nothing in the said Act should prejudice the right of the lord or ladies of the said manor "of, in, or under the said manor, or lordship, or either of them, but that the said Margaret W. and all succeeding lords and ladies of the said manor should and might, from time to time, and at all times, hold and enjoy all quit rents, and other rents, reliefs, and services, and all courts, sites and profits of courts, rights of way, and liberty of hawking, hunting, fishing, and fowling within the manor, and all tolls, fairs," &c., and all liberties, jurisdictions, franchises, matters and things whatsoever to the said manor, or lord or lady thereof incident . . . other than such common right as or might be claimed by the said Margaret W. as owner of the soil and inheritance of the said commons or waste grounds:"

And (HONYMAN, J., dissentiente), that the reservation clause reserved to the lord or lady of the manor, or lord or lady thereof, should extend to his territorial right as

SERIES, 42.—C.P.

owner of the soil of shooting over the allotted lands, and that the case was therefore with- in Bruce v. Halliwell (5 Hurl. & N. 609; s. c. nom. Bruce v. Holliwell, 29 Law J. Rep. (N.S.) Exch. 297), and was distinguishable from Ewart v. Graham (7 H. L. Cas. 331; s. c. 29 Law J. Rep. (N.S.) Exch. 88).

This was an action of trespass brought to try the extent of the right of the Lord of the Manor of Messingham, in the county of Lincoln, under whom the defendant justified the trespass, to shoot game within the manor. It was tried before Brett, J., at the Lincolnshire Spring Assizes, 1871, when a verdict was found for the plaintiff, subject to the opinion of the Court upon a Special Case.

The question turned on the construction of an Inclosure Act under which the waste lands within the said manor had been inclosed, and the rights of the lord over the same extinguished, except such as were reserved to him by the reservation clause in such Inclosure Act, and the question was whether the lord's territorial right, arising from the ownership of the soil, of shooting over the waste lands inclosed under such Act had been reserved, it being admitted that there was no evidence to support a claim to the right of free warren.

The material facts of the Special Case, and the words of the Inclosure Act on which the question turned, are so fully set out in the judgments of the Judges that to state them here would be only an unnecessary repetition. The case was argued in last Easter term by—

Mellor, for the plaintiff; and

Field, for the defendant.

Cur. adv. vult.

The following judgments were delivered on June 13.

KRATING, J.—This was an action of trespass brought to try the right of the defendant to shoot game over the land of the plaintiff. The case stated between the parties was argued in Easter Term last before my brothers Grove, Honyman, and myself, and we took time to consider our judgment. There is a difference of

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opinion on the bench, and the present is the judgment of my brother Grove and myself.

In the year 1798 an Act of Parliament was passed, intituled "An Act for dividing, inclosing, allotting and improving the several open and common fields, inges, meadows, pastures, moors, commons, wastes, and other uninclosed lands and grounds within the township of Messingham, and that part of the hamlet of East Butterwick in the parish of Messingham, in the county of Lincoln." The Act recited that there were within the township of Messingham, and that part of the hamlet of East Butterwick within the parish of Messingham, several open and uninclosed common fields, wastes, commons, &c., containing together 5,000 acres or thereabouts. That Margaret Walker, spinster, was Lady of the Manor of Messingham, which comprised that part of the said hamlet which lies within the parish of Messingham, and as such was interested in the soil of the waste grounds within the said manor, and was also proprietor of divers messuages and rights of common, &c., within the said township, and part of the said hamlet, and that several persons named were entitled to rights of common, and that the said Margaret Walker and several other persons named were the owners and proprietors of the residue of the uninclosed fields, wastes, &c., in the said township, and part of the said hamlet, and were also entitled to rights of common in different proportions. Commissioners were then appointed, who were directed to allot to the said Margaret, her heirs and assigns, as lady of the said manor (exclusive of all other allotments to the said Margaret in respect of her other property) such part of the lands to be enclosed as should be equal in value to one-twentieth part of the said commons and waste grounds "in lieu of and as a full compensation for the right and interest of the said Margaret Walker, her heirs and assigns, in and to the soil of the said common and waste grounds by that Act directed to be divided and inclosed." The residue was to be allotted amongst the other persons entitled to rights of common, and it was enacted that the several allotments should be vested

in the allottees respectively, "*in full bar of and satisfaction for all rights of common and other rights and interests whatsoever in, over and upon the said lands and grounds hereby directed to be divided and inclosed (except such manorial rights as are hereafter reserved to the said Margaret Walker, her heirs and assigns)*", and that all rights of common, &c., should cease over the said lands (*except such manorial rights as last aforesaid*). Then the reservation clause was as follows—"And be it further enacted that nothing herein contained shall prejudice, lessen or defeat the right, title or interest of the the said Margaret Walker, her heirs or assigns, or of any other person or persons who shall respectively for the time being be lady or ladies, lord or lords of any manor or manors, lordship, lordships or reputed manors or lordships within the jurisdiction or limits whereof the said township of Messingham, or the said part of the said hamlet of East Butterwick, or the said fields, inges, meadows, pastures, moors and other commonable lands and waste grounds hereby directed to be inclosed or exonerated from tithes, or any part thereof, respectively, are comprised, of, in or to the seignory or royalties incident or belonging to such manor or lordship, or either or any of them; but that the said Margaret Walker, and all succeeding lords or ladies of the said manor, shall and may from time to time, and at all times, hold and enjoy all rents, quit rents, and other rents, reliefs, duties, customs and services, and all courts, perquisites and profits of courts, rights of fishery, and liberty of hawking, hunting, coursing, fishing and fowling within the said manor, and all tolls, fairs, marts, markets, stallage, goods and chattels of felons and fugitives, felons of themselves, and put in exigent, deodands, treasure trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises, matters and things whatsoever to the said manor or to the lord or lady thereof incident or belonging, or which have been heretofore held and enjoyed by the said Margaret Walker or any of her ancestors (other than and except such common right as could or might be claimed by the said Margaret Walker as owner of the soil

heritance of the said commons or grounds) in as full, ample, extended and beneficial a manner to all intents and purposes as they respectively could have held and enjoyed the same if this Act had not been made."

The question in the case is whether the right of shooting over the wastes of the manor belonging to the lord as owner of the soil is preserved by the clause of reservation referred to, so as to give him an exclusive right to shoot over the lands, or whether it is extinguished by virtue of the Act.

There are several cases wherein similar questions have arisen upon Acts of Parliament, more or less varying in their terms, but the case most relied on by the defendant's counsel was that of *v. Graham* (1). In that case the plaintiff was lord of the manor of Forest and owner of a certain uninclosed pasture called Bailey Hope, of the said manor. An Act was passed for dividing and allotting Bailey Hope and one-twelfth was directed to be allotted to the defendant as lord of the manor of Nichol Forest, in satisfaction for the right and interest as such lord in the soil of the stinted pasture.

Inclosures, &c., however, were reserved *with the right of shooting, &c., in the stinted pasture and every part and parcel thereof.*" The House of Lords held that the reservation was not of the right of shooting over the waste, but of the right of shooting over the pasture to which it was expressly reserved, and upon that ground gave judgment in favour of the right. Wherefore, in the subsequent case of *Bruce v. Halliwell* (2) the reservation extended to the right of shooting over the waste, so confined to the wastes to be allotted, but extended throughout the townland manor, the Court of Exchequer held the case distinguishable from *Ewart v. Graham* (1) and decided against the plaintiff, claiming, being of opinion that the reservation was only intended to

preserve any manorial rights the lord might have, if any such existed, and not his territorial right as owner of the soil. Indeed, the result of all the cases seems to be that in each case the question, in the absence of any right of free warren before the inclosure, is whether the Act intended to preserve the territorial right of the lord as owner of the soil of the waste to be inclosed, or merely such manorial rights as the lord might be able to shew he possessed before the passing of the Act.

Now in the present case, the claim of the defendant was rested solely on the territorial right arising from the ownership of the soil which it was said still existed, having been reserved to the lord under whom he claimed by the Act of Parliament, but we are of opinion that the statute never contemplated the preservation of that territorial right, but intended to extinguish it altogether. It was admitted that it was so extinguished unless preserved by the reservation clause, but it appears to us that the rights reserved by that clause were merely manorial rights, for not only are those rights as thereafter to be reserved expressly described in the Act as manorial rights, but all the rights specified in the clause itself are manorial rights, and the right of shooting specified therein is not confined to the lands to be inclosed, but is extended generally throughout the manor, thereby bringing the case within *Bruce v. Halliwell* (2) and distinguishing it from *Ewart v. Graham* (1). It was argued indeed that even if the terms of the reservation clause included the right claimed, that the exception in that clause would still have excluded it under the words "other than and except such common right as could or might be claimed by the said Margaret Walker as owner of the soil and inheritance of the said common or waste grounds," as although the word "common" here is in any view inaccurately used, it could only be an exception arising out of the reservation, and the reservation does not include mere commonable user such as depasturing, &c. It is, however, unnecessary further to consider that point in favour of which much might be urged, inasmuch as in our opinion the clause of reservation does not

H. L. Cas. 331; s. c. 29 Law J. Rep. Ch. 88; and in Ex. Ch., 1 Hurl. & N. 26 Law J. Rep. (N.S.) Exch. 97. Hurl. & N. 609; s. c. *nom. Bruce v. Halliwell*, 29 Law J. Rep. (N.S.) Exch. 297.

include the right as claimed. We think, therefore, our judgment ought to be in favour of the plaintiff.

HONYMAN, J.—This was an action of trespass for breaking and entering two freehold closes, formerly parcel of the wastes of the manor of Messingham.

The defendant justified the trespass under an alleged right of shooting over the *locus in quo* in William Smith, by whose authority he shot there. The case was tried before Brett, J., at the Lincoln Spring Assizes, 1871, when a verdict was found for the plaintiff subject to a Special Case.

By this case, it appears that prior to and in the year 1798, a Miss Walker was lady of the manor of Messingham, and also the proprietor of messuages and lands within the manor, as more fully mentioned in the recitals of the Inclosure Act set out in the case. In the year 1798 an Act of Parliament was passed, intituled "an Act for dividing, inclosing, allotting and improving the several open and common fields, inges, meadows, pastures, moors, commons, wastes and other uninclosed lands and grounds within the township of Messingham, and that part of the hamlet of East Butterwick in the parish of Messingham in the county of Lincoln."

By that Act,—after reciting as follows, viz., "Whereas there are within the township of Messingham, and that part of the hamlet of East Butterwick which lies within the parish of Messingham in the county of Lincoln, several open and uninclosed commons, fields, inges, meadows, pastures, moors, commons, wastes and uninclosed lands and grounds which are distinguished by several names and which contain together five thousand acres or thereabouts:

"And whereas Margaret Walker, spinster, is lady of the manor of Messingham aforesaid, which comprises that part of the said hamlet of East Butterwick, which lies within the said parish of Messingham, and as such is interested in the soil of the waste grounds within the same manor, and the said Margaret Walker is also proprietor of divers messuages and rights of common, and of

several inclosures and open and uninclosed lands and grounds within the said township and part of the said hamlet:

"And whereas the Right Rev. the Lord Bishop of Lincoln is impropiator of the rectory and grange of Messingham aforesaid, and Mary Sanderson, of Hammer-smith, in the county of Middlesex, widow, is lessee thereof, and the said bishop and the said Mary Sanderson, as his lessee, are entitled to all the great tithes growing, renewing or arising within the tithable places of and part of the said hamlet and to certain glebe lands and right of common in the said open common fields, inges, meadows, pastures, moors, commons, wastes and uninclosed grounds:

"And whereas the said Bishop of Lincoln and the right worshipful the dean and chapter of the cathedral church of the blessed virgin Mary of Lincoln, are alternate patrons of the united vicarage of Messingham with Bottesford, and the Rev. Edward Jordan, clerk, is the present vicar, and as such is entitled to certain glebe lands and rights of common, and all vicarial tithes yearly arising and increasing within the said parish of Messingham:

"And whereas the said Margaret Walker, John Henry Maw and Francis Edward Morley, Esquires, Thomas Raven, Richard Roadly, and several other persons are the owners and proprietors of the residue of all the said open common, fields, inges, meadows, pastures, moors, commons, wastes and other uninclosed lands and grounds in the said township of Messingham, and that part of the said hamlet of East Butterwick in the said parish of Messingham, and are respectively entitled to right of common, and other rights therein in different proportions:

"And whereas the several lands of the said proprietor in the said open fields, inges, meadows and pastures lie intermixed and dispersed in small parcels and inconveniently situated for the several owners and proprietors thereof, and the same, as also the said commons and waste grounds, are capable of great improvement by an inclosure, and it would be also very beneficial to the said owners and proprietors in general if the said fields, inges, meadows, pastures, moors, commons,

as and other uninclosed lands and meadows were divided and inclosed, drained, improved and specific parts allotted to several persons interested therein in proportion to their respective property, shares of common, and other interests therein, and satisfaction made for all the same within the said township and said hamlet of the said hamlet in manner herein-mentioned,"—commissioners were directed for allotting and inclosing the common fields, wastes and other inclosed lands and grounds, and were directed, after making allotments for the uses of roads and other purposes, to set out and allot to Miss Walker, her heirs and assigns, as lady of the said manor (exclusive of all other allotments to Miss Walker in respect of her other property), such part of the residue of the commons and waste grounds as should be in the judgment of the commissioners in value one-twentieth of the said commons and waste grounds in lieu of as a full compensation for the right of interest of Miss Walker, her heirs and assigns, in and to the soil of the said commons and waste grounds. The commissioners were also required to sign, allot, set out and divide the use of the said commons and waste lands within the township and hamlet amongst the persons having rights of property therein, and it was provided by the Act that the allotments to be made in respect of the lands in respect of which allotments were made. The Act went on to provide that the lands and grounds so set out and allotted to the persons by the Act were entitled to the same, and should be vested in them respectively in full and satisfaction for all rights of common, and other rights and interests whatsoever, in, over and upon the said commons and grounds directed to be divided and inclosed (except such manorial rights which were thereafter reserved to Miss Walker, her heirs and assigns), and that immediately after the making of the division and allotments, all rights of common, in, over and upon all the lands and meadows thereby intended to be inclosed, all tithes and other ecclesiastical payments arising out of the said commons

and waste grounds, and all other lands and grounds lying within the said township and hamlet (except such manorial rights as last aforesaid, mortmain, Easter offerings and surplice fees), should cease, determine and for ever be extinguished.

The Act also contained the following clause—"And be it further enacted that nothing herein contained shall prejudice, lessen or defeat the right, title or interest of the said Margaret Walker, her heirs or assigns, or of any other person or persons who shall respectively for the time being be lady or ladies, lord or lords of any manor or manors, lordship or lordships, or reputed manors or lordships, within the jurisdiction or limits whereof the said township of Messingham, or the said part of the said hamlet of East Butterwick, or the said fields, inges, meadows, pastures, moors and other commonable lands and waste grounds hereby directed to be inclosed or exonerated from tithes, or any part thereof respectively, are comprised of, in or to the seignory or royalties incident or belonging to such manor or lordship, or either or any of them; but that the said Margaret Walker and all succeeding lords and ladies of the said manor shall and may from time to time and at all times hold and enjoy all rents, quit rents and other rents, reliefs, duties, customs and services and all Courts, perquisites and profits of Courts, *rights of fishery and liberty of hawking, hunting, coursing, fishing and fowling within the said manor*, and all tolls, fairs, marts, markets, stallage, goods and chattels of felons and fugitives, felons of themselves, and put in exigent, deodands, treasure trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises, matters and things whatsoever to the said manor, or to the lord or lady thereof, incident or belonging, or which have been heretofore held and enjoyed by the said Margaret Walker, or any of her ancestors (other than and except such common right as could or might be claimed by the said Margaret Walker as owner of the soil and inheritance of the said commons or waste grounds), in as full, ample, extensive and beneficial a manner to all intents and purposes as they respectively could or might have held and enjoyed the same in case this Act had not been made."

On the 15th of October, 1804, the commissioners made their award, and thereby, after stating that the ancient inclosed lands contained 488 acres, and that the fields, inges, meadows, pastures, moors, commons, wastes and uninclosed lands directed to be divided and inclosed contained 5,660 acres, allotted and awarded to the Misses Walker (the devises of the Miss Walker mentioned in the Act, and the then ladies of the manor and owners of Miss Walker's freehold property), four allotments, containing 170 acres, and in their judgment equal in value to one-twentieth of the wastes, &c., in lieu of and as a full compensation and satisfaction for the right and interest of the then ladies of the manor, in and to the soil of the said commons and waste grounds.

The commissioners by their award also assigned, allotted and divided the residue of the open commons, fields, inges, meadows, pastures, moors, commons, wastes and other uninclosed lands and grounds to the several persons therein mentioned, to be vested in them in full bar and satisfaction for all commons, rights and other interests of the said persons therein, and also in lieu of and as compensation for such closes or parcels of ancient inclosures as were therein directed to be exchanged. To the Misses Walker were awarded 757 acres, of which between one and two acres were in respect of old inclosures taken in exchange. The William Smith, under whom the defendant justified, is the now lord of the manor of Messingham, and the owner of the property formerly belonging to Miss Walker. The Special Case set out a quantity of evidence as to the persons who had since the award shot over the ancient freehold within the manor, and also over the allotments which had formerly been parcel of the wastes and commons of the manor, but it is unnecessary to refer to this evidence, as Mr. Field, who argued the case for the defendant, admitted that he could not support a claim put forward by Mr. William Smith to a right of free warren over the lands within the ambit of the manor, or to a prescriptive right to shoot over the whole of the manor; and that the only ground on which the defendant could justify the trespass in question was, that before the

Inclosure Act the lord of the manor had, by virtue of his ownership of the soil, a right to shoot over the wastes of the manor, and that this right was not taken away by the provisions of the Inclosure Act. I may, however, observe that there appeared to have been constant disputes as to the right to shoot over the allotments since the inclosure, and there was consequently no such usage so as to amount to an exposition of the intention of the legislature, supposing such usage to be admissible for that purpose. Mr. Mellor, who appeared for the plaintiff, contended that the allotment of one-twentieth of the wastes, &c., was intended to be in full satisfaction of all the lord's rights as owner of the soil, including the right to sport over the wastes, and that after the inclosure the sole right of sporting over the various allotments of the wastes was in the respective owners of such allotments.

For the plaintiff the cases of *Bruce v. Halliwell* (2) and *Robinson v. Wray* (3) were cited, and for the defendant those of *Ewart v. Graham* (1), affirming the judgment of the Exchequer Chamber, which had reversed the judgment of the Court of Exchequer, and *Lord Leconfield v. Dixon* (4). It is not very easy to reconcile all the decisions, and unfortunately the language of the Act of Parliament in this case differs from that of all the Acts which formed the subject of discussion in the cases already decided. It is not necessary to consider whether, if this had been *res integra*, the right of the lord to shoot over the wastes of the manor would be included in a reservation such as that contained in the Act now under consideration, for the case of *Ewart v. Graham* (1) is a decision of the House of Lords by which this Court is bound, and unless this case be distinguishable from that, the defendant is entitled to our judgment.

It seems to me that that case is a direct authority that, notwithstanding the enactment that one-twentieth of the wastes should be allotted to the lord in full of all rights as owner of the soil, the

(3) Law Rep. 1 C.P. 490.

(4) 36 Law J. Rep. (N.S.) Exch. 102; s. c. Law Rep. 2 Exch. 202; and in Exch. Ch. 37 Law J. Rep. (N.S.) Exch. 33; s. c. Law Rep. 3 Exch. 30,

reservation clause would reserve to him the territorial rights he had, as lord of the manor, of shooting over the wastes, unless the words, "other and except such common right as could or might be claimed by Miss Walker as owner of the soil, and inheritance of the said common or waste grounds," can be read as applying to the exclusive right which the lord as owner of the soil had. Both in that case and in the present it seems to me, as pointed out by Coleridge, J., in the Exchequer Chamber, and by Wightman, J., in the House of Lords, that it was the intention of the legislature to preserve to the lord all the rights of sporting (if any) which he *de facto* enjoyed before the inclosure, although such rights could not any longer be enjoyed by him in the same character after the ownership of the soil was taken from him.

It has been suggested that this view is inconsistent with the language of earlier sections, "except such manorial rights as hereinafter reserved," but I think this short mode of referring to the subsequent reservation may well refer to a right of shooting which the lord enjoyed, only because he was lord of the manor, and as such owner of the soil of the wastes of the manor. If I am right in this view, it only remains to consider whether the words of the exception to the reservation clause, to which I have already alluded, are sufficient to distinguish this case from that of *Ewart v. Graham* (1), and I am of opinion they are not.

It is difficult to put a technical legal meaning on the words in question, but I think that they may fairly be construed as applying to rights which the lord of the manor exercised conjointly with the persons entitled to rights of common; such as the right of turning out cattle and the right to cut turf, although the right in this respect of the lord may not be, legally speaking, a right of common, and may be greater than that of the commoners, as he was not limited in the exercise of the right, provided he left a sufficiency of common for the commoners, and that they ought not to be construed as applying to rights to which the lord was entitled to the exclusion of all others, such as the right of sporting over the wastes.

For instances of a meaning, not strictly the legal one, being given to similar words, see the cases of *Askew v. Wilkinson* (5), *Lloyd v. Lord Powis* (6) and *Greathead v. Morley* (7). It has been suggested that these words are to be construed as "rights over the commons," but in my opinion this is not their proper construction, and I think we ought not to cut down the operation given to the reservation clause by the House of Lords, by attributing this effect to words of such ambiguous meaning. The case of *Bruce v. Halliwell* (2) was decided in the year 1860, after the decision of *Ewart v. Graham* (1), and it was there held that the exclusive right of the lord to kill game on the inclosed lands was taken away, but there the Act expressly excepted from the reservation to the lord "such right" (not saying "common") "as might be claimed by him as owner of the soil," and there were no words as in this case and in *Ewart v. Graham* (1) sufficient to preserve to the person, who was lord of the manor at the time of inclosure, the right of shooting after he ceased to fill the character of owner of the soil of the wastes. In that case, too, the words of the clause which it was contended gave the lord the right to the game, applied to lands not within the manor, and, as remarked by Bramwell, B., it could not be contended that the intention was to confer on the lord the right to sport on lands over which he had no such right before; whereas here, as in *Ewart v. Graham* (1), the reservation is only over the wastes proposed to be inclosed, over which the lord before the inclosure had the right of sporting. The other case relied on by Mr. Mellor—*Robinson v. Wray* (3)—was decided on an Act of Parliament, the language of which is so different from that before us, that it has no bearing upon the present case. Neither do I think that *Lord Leconfield v. Dixon* (4) is an authority bearing on this case. There the 20th section of the Inclosure Act directed an allotment to the lord in satisfaction of his rights as owner

(5) 3 B. & Ad. 152.

(6) 4 E. & B. 485; s. c. 24 Law J. Rep. (N.S.) Q.B. 145.

(7) 3 Man. & G. 139; s. c. 10 Law J. Rep. (N.S.) C.P. 246.

of the soil (except as thereafter excepted), and the reservation clause reserved all rights (except such as were expressly taken away by the Act), and it is therefore, in my opinion, no authority in favour of the present defendant. Under these circumstances, I think that this case falls within the authority of *Ewart v. Graham* (1), by which we are bound, and that our judgment ought consequently to be for the defendant. But the case is to my mind by no means a clear one, depending as it does on language to which it is very difficult to give a clear or satisfactory meaning, and I need hardly say that the doubts which I cannot but feel as to the soundness of the conclusion at which I have arrived, are considerably increased by the fact of my two learned brothers, for whose opinion I entertain the highest respect, having arrived at a different conclusion.

Judgment for the plaintiff.

Attorneys—Scott & Co., for plaintiff; Pilgrim & Phillips, for defendant.

(In the Second Division of the Court.)

1873.	} TULLY AND ANOTHER (appellants) v. TERRY (respondent).
May 5;	
June 13.	

Charter-Party—Freight—Delivery of Damaged Cargo—Invoice Quantity as per Bill of Lading—"Quantity and Quality unknown."

A charter-party, under which a ship was chartered for a grain cargo from the Danube to the United Kingdom for certain freight, "per imperial quarter delivered," contained a provision that in the event of the cargo, or any part thereof, being delivered in a damaged or heated condition, the freight should be payable on the invoice quantity taken on board, as per bill of lading, or half-freight upon the damaged or heated portion, at the captain's option. The bill of lading stated that 1,021 kilos. were shipped on board; but the master added at the end of the bill of lading, before signing it, the words, "quantity and quality unknown." The cargo

having become heated on the voyage, the master claimed to exercise his option, and to be paid freight upon the invoice quantity, as per bill of lading:—Held, that the addition of the words "quantity and quality unknown" to the bill of lading by the master did not take away his right to be paid freight upon the invoiced quantity in the bill of lading, and that the object and effect of that memorandum was merely to protect the captain against any mistake that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery or deterioration not caused by his default.

Appeal from the County Court of Kent.

The appellants were the plaintiffs in the County Court, and owners of the British barque *Avoca*, and the respondent was the defendant in the County Court, and a cornfactor at Ramsgate.

The plaint was issued to recover 36l. 8s. 11d., for balance of freight on 2,368 quarters of barley, ex *Avoca*, as per bill of lading. The defendant paid 6l. into Court. The cause was heard by the County Court Judge without a jury, and he found the facts to be, that in September, 1872, the *Avoca* was at Ibraila, on the Danube, and M. & Co., merchants at that port, shipped on board the *Avoca* a cargo of barley, for which the master of the *Avoca* signed bills of lading as follows—"M. & Co., Galatz and Ibraila. Shipped in good order and condition, by Messrs. M. & Co., in and upon the good ship called the *Avoca*, British flag, whereof is master for the present voyage John Coates, and now riding at anchor in this port of Ibraila, and bound for Queens-town or Falmouth for orders, as per charter-party dated Galatz, 2nd of September, 1872. Kilos. 1,021, one thousand and twenty-one kilos., Ibraila measure, barley, Danubian produce, of the crop 1872, sound, dry, sifted, and well-conditioned, which are to be delivered in the like good order and condition at the aforesaid port of discharge (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever excepted), unto the order of Messrs. F. M. & Co., of London, on being paid freight, and all other

tions for the said goods, according to charter-party as above. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, this tenor and date, the one of which is accomplished, the others to stand.

Dated in Ibraila, 14th of September, 1872. The captain declares he received all his full and complete bill of lading, Ten days expended in loading, to remain for discharging. *Quantity quality unknown.* John Coates." The words "quantity and quality unknown" were in the hand-writing of John Coates, and were added by him to the bill of lading presented to him by the charterers just before he signed it. It is almost an invariable custom with the charterers of cargoes for the masters of vessels to insert these words before their signature to the bill of lading for their own protection, and, as in this case, they have not kept out of the quantity of cargo shipped on their vessels. The charter-party referred to in the bill of lading was, as far as material to this case, as follows—
 Memorandum for charter. Galatz, 2nd September, 1872. It is this day mutually agreed between Captain Coates, of good ship or vessel called the *Avoca*, red, of Newcastle, of the burthen of 1000 tons register, whereof himself is master, and Messrs. M. & Co. merchants, the said ship being tight, staunch, strong, shall load here or at Ibraila, in the usual and customary manner, a full complete cargo of wheat or grain, at the option of the freighters, not exceeding 1000 tons, she can reasonably stow and carry, shall therewith proceed to a safe port in the United Kingdom of Great Britain or Ireland, calling at Queenstown or Southampton for orders, and deliver the same being paid freight as follows—For 1000 lbs. per imperial quarter delivered, together with 14l. gratuity to Master. For grain, if any, in proportion, according to the London Baltic printed rates. The cargo to be brought to and taken alongside at the charterer's expense at risk (the act of God, the Queen's lies, restraint of princes, fire, and all every other dangers and accidents of seas, rivers and navigation, of what nature and kind soever during the voyage always mutually excepted). Freight to be paid in cash on unloading and right delivery of the cargo. It is further agreed that should the cargo consist of wheat or any other kind of grain, in the event of the cargo, or any part thereof, being delivered in a damaged or heated condition the freight shall be payable upon the invoice quantity taken on board, as per the bill of lading; or half-freight upon the damaged or heated portion, at the captain's option, provided no part of the cargo be thrown overboard or otherwise disposed of on the voyage. The charterer's liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge." The *Avoca* sailed from Ibraila with the cargo on board, and on arrival at Falmouth received orders for Ramsgate, to which port she proceeded in due course. No part of the cargo was thrown overboard or otherwise disposed of on the voyage. F. M. & Co., the consignees mentioned in the bill of lading, were the London house of M. & Co. The cargo was sold by the said consignees upon the London market, and ultimately bought by the defendant Terry at a rate per quarter, cost, freight and insurance, and the bill of lading of the cargo was indorsed to him in due course. He also received a copy of the charter and the documents and invoices of the cargo usual upon such a sale. On the arrival of the *Avoca* at Ramsgate Terry presented the said indorsed bill of lading, and required delivery of the cargo. The *Avoca* had experienced bad weather upon the voyage, and the master had reason to believe that some of the cargo would be heated, and he gave notice to the defendant that he exercised his option in that behalf, and required freight to be paid upon the invoice quantity taken on board, as per the bill of lading, according to the provision contained in the charter-party.

The *Avoca* discharged her cargo at Ramsgate. The said cargo was not measured on the delivery thereof, but was weighed by a servant of the defendant. Another meter, who acted on behalf of the sellers of the cargo, was present at the discharge, and measured certain

portions of the cargo to ascertain by an average what were the number of imperial quarters delivered. The latter meter was not called at the hearing.

The master, relying on the provisions of his bill of lading and charter party, kept no check upon the delivery. About eighty quarters of the cargo were damaged by heat. No suggestion of fraud on the part of the plaintiff was made by the defendant. 1,021 kilos., Ibraila measure, of barley, are equivalent to 2,368 imperial quarters. The freight and gratuity upon that quantity of barley, under the provisions of the above charter-party, amounted to 718*l.* 11*s.* 11*d.*

The defendant delivered a freight account to the master of the *Avoca*, in which he admitted his liability for the sum of 688*l.* 3*s.*, being the amount of freight upon what he alleged to be the quantity delivered, viz., 2,266 imperial quarters at 7*s.* per quarter, less 15 per cent. for barley, with the gratuity stipulated in the charter, and at the trial contended that it was open to him to pay freight upon the quantity of barley delivered. No proof was given of what was the quantity of barley delivered by measure, except as aforesaid. The sum paid into Court in this action, and all advances, &c., made by the defendant under the charter amounted to 688*l.* 3*s.* The balance claimed was therefore the difference between 688*l.* 3*s.* and 718*l.* 11*s.* 11*d.*

The learned Judge of the County Court decided that the master of the *Avoca* had under the circumstances a right to exercise the option given by the charter, and that the plaintiffs were entitled to be paid by the defendant freight upon the invoice quantity of barley taken on board the *Avoca*, as per the bill of lading, but he held that by reason of the master having added to the bill of lading the words, "quantity and quality unknown," the bill of lading ceased to indicate any particular invoice quantity of barley to have been taken on board, and thereupon a judgment of nonsuit was entered. And the question for the Court was whether the judgment of nonsuit which was entered was right.

Gibson, for the appellants.—The provision in the charter-party is in conse-

quence of, and in order to carry out the principle upon which *Gibson v. Sturge* (1) was decided, and which made the freight payable on the quantity delivered. By taking the invoice quantity in the bill of lading the captain gets rid of the necessity and trouble and expense of sending to the port of shipment for proof of the quantity put on board. Then the addition of the words, "quantity and quality unknown," is merely to guard against his being bound by the quantity inserted in case of short delivery. The term invoice quantity is applicable as between shipper and charterer, and the bill of lading is the contract between shipper and shipowner, and the effect of the addition is to say that the shipper may be bound by the invoice quantity mentioned, but he is not to make the bill of lading evidence for himself as against the captain. It has therefore no effect upon the provision as to the captain's option in case of damaged or heated cargo, but remains in the bill of lading for various purposes. He cited *Jessel v. Bath* (2), *Haddow v. Parry* (3), *Lebeaux v. The General Steam Navigation Company* (4).

Lanyon, for the respondent.—The provision was introduced for the benefit of the charterer. It can be waived by him, and he may pay on the larger quantity if he chooses. The addition of "quantity and quality unknown" has the effect of striking out of the bill of lading the statement of the quantity shipped.

Gibson in reply.

Our. adv. vult.

The judgment of the Court (5) was (on June 13) delivered by—

KEATING, J.—This was an action brought in the County Court of Kent, to recover a balance of freight alleged to be due to the plaintiffs, who were owners of the barque *Avoca*, in respect of a cargo of barley, shipped at Ibraila in September,

(1) 10 Exch. Rep. 622; s. c. 24 Law J. Rep. (N.S.) Exch. 121.

(2) 36 Law J. Rep. (N.S.) Exch. 149; s. c. Law Rep. 2 Exch. 267.

(3) 3 Taunt. 303.

(4) 42 Law J. Rep. (N.S.) C.P. 1.

(5) Keating, J.; and Honyman, J.

The County Court Judge non-he plaintiffs, but referred to this question whether such nonsuit at. The case was heard in Easter before my brother Honyman and

Avoca was chartered by charter-ated the 2nd of September, 1872, a cargo of grain at Ibraila, and er it at a port in the United n, on being paid freight "7s. per quarter delivered;" and it was l that, "in the event of the cargo art thereof being delivered in a l or heated condition, the freight e payable on the "invoice quantity board, as per bill of lading, or half pon the damaged or heated portion, aptain's option, provided no part cargo be thrown overboard or e disposed of on the voyage." go of barley was accordingly at Ibraila under bills of lading, ig the quantity 1,021 kilos., which ain signed, but, before doing added the memorandum usually cases of grain cargoes, "Quantity unknown."

Avoca experienced bad weather on eward voyage, and the captain, eason to believe that some of the ould be heated, gave notice on o the defendant, who had become of the bill of lading, that he to exercise the option given him harter, and required payment of pon the invoice quantity, as per ding.

Avoca discharged her cargo at e. The quantity of barley act-ured did not clearly appear; but greed that eighty quarters were l by heating. There was no on of fraud on the part of the l.

efendant paid into Court a sum d upon the quantity he alleged been delivered; but the plaintiffs to be paid upon the invoice quan-er bill of lading, according to the the charter-party.

County Court Judge was of that, in consequence of the entioned addition by the captain bill of lading, that document

ceased to indicate any particular invoice quantity of barley to have been taken on board, and nonsuited the plaintiffs. We do not concur in that opinion.

The liability of grain cargoes to heat during the voyage, thereby causing an increase, often considerable, in its bulk, doubtless suggested the insertion in charter-parties of the clause referred to, and which is now so common in the case of cargoes shipped from the Danube, the object being to protect the merchant from having to pay full freight on the larger quantity caused by the heating (the freight having, in consequence of the decision in *Gibson v. Sturge* (1), been made payable on the quantity delivered); and the provision seems in such cases the more necessary from the fact that those cargoes are sold as floating cargoes, passing from hand to hand by transfer of the shipping documents or reference to them, so that the arrangement by which it may become unnecessary to ascertain the quantity of the damaged portion of the cargo becomes one of great mercantile convenience; nor do we think this at all affected by the addition made by the captain at the foot of the bill of lading, the object of that memorandum being merely to protect the captain against any mistake that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery, or deterioration not caused by his default.

It was argued, in conformity with the decision of the Court below, that the effect of the memorandum was to strike out the invoice quantity from the bill of lading; but we think no such effect can be given to it, and we are fortified in that opinion by the case of *Covas v. Bingham* (6), where, in a contract of sale of a cargo afloat, the quantity stated in the bill of lading was construed to be the quantity to be paid for, notwithstanding a similar memorandum in the bill of lading.

Upon the whole, therefore, we are of opinion that the event having happened by reason of which the captain, according to the terms of the charter, had the right to be paid freight upon the invoice quantity in the bill of lading, he did not lose

(6) 2 E. & B. 836; s. c. 23 Law J. Rep. (N.S.) Q.B. 26.

that right by the addition of the memorandum referred to, and consequently that the appellants are entitled to our judgment.

We think the costs of the appeal ought to follow the event, and be paid by the respondent.

Judgment for the appellants.

Attorneys—Mercer & Mercer, agents for Edwards & Son, Ramsgate, for appellants; Hillyer, Fenwick & Co., for respondent.

1873. }
Jan. 13. } GOURLEY v. PLIMSOLL.

Practice—Interrogatories before Plea—Libel—Particulars under Plea of Justification.

Though there is no rule to preclude a defendant from being allowed to deliver interrogatories to the plaintiff before he has pleaded, yet if he seeks to be allowed to deliver them before plea, he must first disclose the nature of his defence, in order to shew that the interrogatories are for the purpose of supporting such defence.

Where, therefore, in an action for libel the defendant pleaded a justification in a general form he was not allowed to deliver interrogatories to the plaintiff until, either by affidavit or by particulars, he had first disclosed the matters on which his justification was founded.

Action for libel in respect of alleged libels contained in a printed work published by the defendant, entitled "Our Seamen: An Appeal." The declaration set out several passages from this work which, when pointed to the plaintiff, as they were by the declaration, imputed that he was a shipowner who habitually overloaded his ships to the danger of the lives of their crews, in order that by such overloading he might enhance his own profits, whilst he was secure from loss by over insurance. One of the passages so set out in the declaration contained, *inter alia*, the following—"There was one shipowner, whose name was often mentioned to me in the course of the years 1869 and

1870. During my enquiries in the north and east I heard his name wherever I went as that of a shipowner who was notorious for the practice of overloading and for a reckless disregard of human life. I therefore made enquiry as to the ships belonging to him which had been lost, with the number of lives lost in each case, and the reply I received I will shew you. It is incomplete, you see, but sufficient is shewn to demonstrate the necessity of Government interference." The passage afterwards concluded with a copy of the following letter received by the defendant from his informant in reply to one asking for a more complete list—"My dear Sir,—Annexed I forward a more complete list of Mr. —'s losses, together with the number of lives sacrificed. I think I shall be able to send you a further list of sailing vessels, but a melancholy list of 105 lives lost will be almost enough evidence to produce against him." The annexed list to this letter contained the initial and final letter of twelve vessels lost, with the year in which the loss of each occurred and the number of lives lost in each, as for example—

Date.	Ships lost.	Lives lost.
1868	V—e	29.

The defendant pleaded two pleas of justification in a general form that the alleged words and matters concerning the plaintiff were true in substance and fact.

The defendant was allowed by the Court to plead these pleas in this general form, the plaintiff being at liberty to obtain particulars, if necessary. (See the case reported *ante*, C.P. 121.) Accordingly an order was afterwards obtained from one of the masters ordering the defendant within a certain time to deliver particulars of the matters on which he intended to rely, "stating the substance of each case, with the dates of the several matters relied on," and that in default, the said pleas should be struck out. Before complying with this order the defendant applied by a Judge's summons for liberty to administer interrogatories in writing to the plaintiff, and this summons came before Cleasby, B., at Chambers, when that learned Judge refused to make an order. The defendant thereupon appealed to the Court, and a rule *nisi* was obtained

ble the defendant to administer the interrogatories to the plaintiff. The *nisi* was obtained on the supposition Cleasby, B., had refused to allow the interrogatories only on the ground that could not be allowed before plea, and as no particulars had been given, it was the same as if there had been no plea but there was a conflict of evidence as to what had actually occurred in this case at Chambers; and the Court on the plea being against the rule *nisi* refused therefore to treat such rule as a substantive application. In support of the plea there was an affidavit of the defendant in which he gave the full names of twelve ships which were referred to in the passage set out in the declaration as above mentioned, and he stated with reference to these ships it was necessary to have the discovery sought by the interrogatories, "especially as to the names and causes of the said ships being lost, and the dates of the losses, and the extent for which the plaintiff's interest in the said several ships was insured on their voyages;" and he also stated that the discovery was sought for the purpose of enabling him to comply properly with the order for particulars, and that without such discovery any particulars required by him would necessarily be incomplete.

Every James and Philbrick now shewed against the rule, and contended that the general practice was not to allow interrogatories until after issue joined, but if applied for before declaration a plea pleaded (which substantially was it was in the present case) the party has no right to have it granted without special circumstances, which the defendant failed to do in this case (1).

It and *W. A. Lewis* argued in support of the rule that the defendant could comply with the order for particulars,

especially as to that part of the libel which related to over insuring, without he had first the plaintiff's answers to the interrogatories, and that such answers were not merely to ascertain if he could justify, but to enable him to give the particulars required by the order.

BOVILL, C.J.—The Judge or Court to whom an application is made for interrogatories is to exercise a discretion in granting or refusing it. There is no peremptory rule as to the time of making the application, and if the whole matter depended on whether there was such rule, and therefore that this application should on that sole ground be dismissed as being premature, I should have thought that the order of my brother Cleasby refusing the application should be set aside. There is some uncertainty as to what actually occurred before my brother Cleasby, but it is unnecessary to go into that, as we consider this matter quite independently of any objection as to time. The Judges generally do not entertain applications for interrogatories until after issue joined, but that is with the view of knowing what are the points in issue to which the interrogatories are to be directed. The case of libel is peculiar, and where the plea is pleaded, as it is here, in the general form, it is not perfected until particulars have been delivered. Now the defendant in the present case has made statements which the plaintiff says are libellous and contain charges against him in his business as a shipowner. The defendant undertakes to justify his statements, and he must be presumed to have some knowledge on the subject, and to have some means by which he may be able to clearly identify the ships to which he has referred in his statements as ships belonging to the plaintiff, and I do not find that he is likely to have any difficulty on this subject, for in the affidavit he has made in support of this application, he gives the names of the ships referred to in the statements complained of, and there would be no difficulty in his giving also the dates and other particulars he obtained when he made these statements. What he is endeavouring to do here is, not to rely on the in-

Reference was made to *Edmunds v. Green* (38 Law J. Rep. (N.S.) C.P. 115), *Villesbois-Tobin* (38 Law J. Rep. (N.S.) C.P. 146), and *v. Jenkins* (39 Law J. Rep. (N.S.) C.P. 258), and that the Court will not in such cases interfere with the discretion of the Judge, but this is immaterial, as the Court dealt with the case as a substantive application.

formation he received when he published his book, but to obtain further information as to whether he can make out his justification, and also whether his statements as to the vessels named can be supported. Now, I think he is not entitled to do this, and that we ought not in a case of this kind to compel the plaintiff to give him information of which he may possibly now have no notion.

All that the defendant is required to do by the order for particulars, is to state the substance of the matters on which he relies, and when he has delivered these particulars, the question will arise whether they are sufficient or not, and the plaintiff will be entitled to have some statement as to the inability of the defendant to give further or better particulars, when it will be for a Judge at Chambers to exercise his discretion as to allowing the particulars to stand which had been delivered. After that will be the time for the defendant, if he is entitled to interrogatories, to apply for them; but it is contrary to practice to allow an application of this sort in order to enable the defendant to see what is the plaintiff's case, and whether he, the defendant, can make out the particulars or not of his own case. Upon this ground I think this application ought to be refused, but under the circumstances I think the costs should abide the event of the cause.

KEATING, J.—I am of the same opinion. Had the disposal of the rule rested altogether upon a decision of my brother Cleasby, that interrogatories could not be delivered before plea, I should have thought that the rule ought to have been made absolute, but the Court has entertained this matter as a substantive application, and I think that to compel the plaintiff to answer interrogatories at this stage of the case would be a hardship on him, and would give the defendant an undue advantage. The defendant nowhere in his affidavit states that he is not able to give particulars to satisfy the order. I am clear that the defendant should give such particulars as he is able to give, and if they are reasonably sufficient they will be allowed. If they are not sufficient, then if he satisfy a Judge that he cannot do more, the Judge will not order further

particulars. I think that that is the general course to be taken. Under these circumstances, I agree with my Lord that the defendant should deliver particulars in compliance with the order, and that the costs of both sides should be costs in the cause.

BRETT, J.—The fundamental rule is that interrogatories are not to be allowed to enable a party to look for a case, but to enable a party to support a case or to see if it can be supported. To carry out this rule it is not required that a plaintiff should declare before he can administer interrogatories, but that if he applies for interrogatories before declaration, he must by affidavit disclose what is the cause of action on which he means to rely; so as to a defendant, it is not necessary that he should plead first before he can have interrogatories allowed, but that if he seeks to have interrogatories before he pleads, he must by affidavit disclose what his defence is. If the rule in the present case had had to be decided upon the ground that my brother Cleasby had ruled at Chambers that interrogatories could in no case be allowed before plea, he would have been wrong, but if what he ruled meant that interrogatories should not be allowed without the defendant's disclosing what his defence was, I should have thought that he was right. But it becomes unnecessary to determine whether my brother Cleasby was right or not, because the matter now comes before the Court as a substantive application.

Now, the action is for libel, and the defendant has not in reality disclosed his defence, under the plea of justification he has been allowed to plead, so that the case ought to be treated as if he had not pleaded at all. It is, therefore, necessary for the defendant to disclose what the defence is upon which his justification is founded, and he ought either to do so by affidavit or by the particulars which he has been ordered to deliver. He has not disclosed it by either. The affidavit he has brought before us has disclosed a part of his justification, that is to say, that which relates to the libel in respect of certain ships, but there is a further libel alleged, viz., as to the plaintiff's general habits as to overloading ships, and as to

insurances. If the interrogatories were now to be allowed, it seems they would be to enable the defendant to look for these cases, and not to support his own case. The defendant ought to disclose the ships, and the cases upon which he intends to rely in support of the allegation of habitually overloading. When he has done so by the particulars so far as he can, then will come the question in which the Court or Judge at Chambers will have to exercise a discretion whether the interrogatories are for the purpose of supporting the defendant's case, or to see if it can be supported. I think that the defendant should not now be allowed to administer interrogatories, because he has not yet disclosed what his defence is, and therefore I think that this rule should be discharged.

GROVE, J.—I am of the same opinion. [After reading the passage of the alleged libel set out, as already mentioned in the declaration, and which begins with the words, "there was one shipowner," and ends with the words, "but a melancholy list of 105 lives lost will be almost enough to produce against him," the learned Judge proceeded as follows]—It may be a question whether the annexed list there referred to contains all the ships that the defendant intends to rely on, or whether it is incomplete, since a further list is alluded to in the letter of the defendant's informant. If the defendant intends to justify only as to these twelve ships, he can have no difficulty in giving their names, and it seems reasonable that the defendant should give the information he possesses as to these matters, so that the plaintiff may know whether it is in respect of these ships only, or whether there are any other ships in respect of which the defendant is prepared to support the charge in the alleged libel. It is not necessary that he should give the exact dates when the ships left or were lost, or the exact amount of overloading or of over insurance, but he should state the ships and about the time they sailed, and that they were lost under circumstances which would support the charge he has made. It seems to me that the person who has made such statements as are in this book, and of which the plaintiff complains, must be presumed

to have had certain information on which he made them, and to be able to give the plaintiff all the particulars that can fairly be required. If he gives them and they are reasonably sufficient, he may then say, now that I have stated my case, I wish to put interrogatories to the plaintiff to support that case. That would be acting according to the general rule. This, on the contrary, seems to be inverting the order of things, and to be asking for interrogatories which may well be called fishing, and which the plaintiff ought not to be called upon to answer until he knows in support of what case they are asked for. On these grounds I think that this rule should be discharged.

Rule discharged.

Attorneys—Nelson, Lowless & Jones, for plaintiff;
Lewis, Munns & Longden, for defendants.

1873. }
May 29. } RODOCANACHI AND OTHERS v.
June 2. } ELLIOTT.

Marine Insurance—Policy—Risk during Land Transit—Restraint of Princes—Goods in a besieged Town.

By an ordinary Lloyd's policy goods were insured from Shanghai to London, via Marseilles, and whilst remaining there for transit, including all risks of craft to and from the steamers, and the risks insured included "arrests, restraints and detentions of princes." Goods sent from Shanghai to London, via Marseilles, are always sent overland through France, and this was well known to underwriters. The goods insured having arrived at Marseilles were in the usual course forwarded by railway to Paris to go from thence to Boulogne, but soon after they reached Paris, that city was so completely surrounded and invested by the German armies, who were then besieging it, that it was impossible to remove the goods from it, and accordingly the assured gave notice of abandonment to the underwriters of the policy:—Held, that the policy covered

the risk during the land transit of the goods through France, and also that there was a loss by "a restraint of princes" within the terms of the policy, which justified the notice of abandonment.

This was an action on two policies of insurance; and by the consent of the parties, and by a Judge's order, a Special Case was stated for the decision of the Court without any pleadings, the material facts in which were the following.—

The plaintiffs effected insurances on silks by two policies in the ordinary form of Lloyd's policies. By one, dated the 24th of March, 1870, which was for 15,000*l.*, they caused themselves, in the words of the policy, to be insured as follows, that is to say—"Lost or not lost at and from Japan ^{and} _{or} Shanghai to Marseilles, ^{and} _{or} Leghorn ^{and} _{or} London, via Marseilles ^{and} _{or} Southampton, and whilst remaining there for transit, with leave to call at any ports or places in or out of the way for all purposes, including all risks of craft to and from the steamers, each lighter or craft to be considered as separately insured."

The subject-matter insured was described as—"silks to be hereafter valued and declared." The risks insured, which were the usual printed ones, included, *inter alia*, "Arrests, restraints and detentions of all kings, princes and people of what nation, condition or quality soever."

In the margin of this policy was a memorandum in the following words—"It is hereby agreed that the silks insured by this policy shall be shipped by the Peninsular and Oriental Company, Messageries Imperiales steamers ^{and} _{or} the steamers of the Mercantile Trading Company of Liverpool only, and it is further agreed that on shipments by the last mentioned company's steamers, 20*s.* additional shall be charged."

In the other policy, dated the 8th of April, 1870, which was for 10,000*l.*, the voyage and the subject-matter insured,

and the risks insured against were described in terms nearly the same as in the first-mentioned policy.

The defendant underwrote each policy for 200*l.* Sixty-five bales of silk, the subject of this action, were shipped at Shanghai on board the Messageries Imperiales steamer *Phase*, and consigned to the plaintiffs under a bill of lading dated the 7th of July, 1870.

The silks were duly declared on the before mentioned policies, and valued at 11,220*l.*, and 3,625*l.*, part of the said sum of 11,220*l.*, was declared on the first policy, and 7,595*l.*, the residue of the said sum of 11,220*l.*, was declared on the second policy, and these declarations were endorsed on the policies respectively.

The silks were carried in the said steamer *Phase* from Shanghai to Hongkong. They were there transhipped to the steamer *Peiho* of the same company—Messageries Imperiales—and they were carried on board the said steamer *Peiho*, through the Suez Canal, direct to Marseilles. This is the ordinary course of business of the Messageries Imperiales in carrying goods from Shanghai to Marseilles. Goods from Shanghai for Marseilles are carried by that company from Shanghai to Hong Kong by a branch line of steamers, and the steamers for Marseilles start from Hong Kong. The silks arrived at Marseilles on board the said steamer *Peiho* on the 27th of August, 1870. The Messageries Imperiales carry goods at through rates from Shanghai to London. Before and at the time of the insurances, the steamers of the Messageries Imperiales ran from the east to Marseilles and no further. Of those of the Peninsular and Oriental Company, one line ran to Marseilles and no further; another ran direct to Southampton. Those of the Mercantile Trading Company ran direct to Liverpool. Goods were never in the ordinary course of business carried from China, Japan or India to London via Marseilles except by the Messageries Imperiales, and that company always sent such goods overland through France, that is to say, by the Lyons railway from Marseilles to Paris, and thence by the northern railway to Boulogne, and thence to London. Silk is usually but not invariably sent by

Vitesse. It was well known by underwriters that goods sent from Japan or India to London *via* Marseilles were always sent overland through France.

At the time when the silks reached Marseilles there was, and had been from the 15th of July previously, war between France and Germany.

Goods sent from Marseilles to Paris, carried by the Northern Railway from Paris to Boulogne for London, continued to come to Paris regularly till the 6th of November, 1870, and to arrive in London regularly till the 7th of that month. On the 15th of September, 1870, carriage by the said railway from Paris to Boulogne ceased, and thence until after action commenced to be impossible, and ceased altogether, in consequence of the German forces having taken possession of parts of the said railway, and intercepted all communication by such railway between Paris and Boulogne. The silks having been ordered by the plaintiffs to be forwarded to London, were delivered to the

Railway Company on the 2nd of November, 1870, and arrived on or before the 15th of that month at Bercy, which is a railway station in Paris at which the goods sent by the Lyons railway arrive. At the time of the arrival of the silks at Marseilles, and thence until and after the 15th of the silks at Bercy, the German forces had invaded and occupied a large part of France, and were advancing upon Paris, gradually surrounding Paris, which was the case of things continued until the 19th of September, 1870, on which day the German armies completely invested Paris. On the last mentioned day until the 15th of the notice of abandonment, and until the commencement of this case, they completely surrounded and invested Paris, and held military possession of all the roads leading out of Paris, prevented communication between Paris and all other places, by reason of which it was during all such time impossible to remove the silks from Paris. On the 7th of October, 1870, the plaintiffs gave notice of abandonment of the silks to the defendant.

On questions for the opinion of the Court, which was to be at liberty to draw inferences, 42.—C.P.

of fact, were, first, whether the silks were covered by the policies at the time of the alleged loss, and, secondly, whether the plaintiffs were entitled to recover as for a total loss (1).

Field (The *Siger* with him), for the plaintiffs.—In the first place, the policies are not confined to maritime risks, but cover the risk attending the transit of the goods through France. One of the journeys insured is stated to be from Shanghai to London *via* Marseilles, and it is made part of the contract that the silks insured may be shipped by the Messageries Imperiales steamers. Then the case finds that goods carried by these steamers are always sent overland through France, namely, by the Lyons Railway from Marseilles to Paris, and thence by the Northern Railway to Boulogne and thence to London, and that it was well known amongst underwriters that goods sent from China to London, *via* Marseilles, were always sent overland through France. Under these circumstances, therefore, the insurance was on the goods during the whole of that journey as well when the goods were on land as when they were on sea. Secondly, the loss was caused by one of the perils insured against. The detention of the goods at Paris whilst surrounded by the German forces, was a peril within the insurance against "arrests, restraints and detentions of princes." There are no English authorities which are direct on the subject. In *Barker v. Blakes* (2), though there was no decision whether a blockade was a peril within the policy, as the abandonment was not in time, the Court considered the prolonged detention of the vessel might be considered as a loss of the voyage. The cases of *Hadkinson v. Robinson* (3) and *Lubbock v. Rowcroft* (4) were only where the ship was prevented from entering the port of destination, because of a blockade,

(1) There was also a question as to the plaintiffs being entitled to recover as for a partial loss, the silks having in fact arrived in London on the 21st of March, 1871, which was after action, but this became unnecessary to consider.

(2) 9 East 283.

(3) 3 Bos. & P. 388.

(4) 5 Esp. 50.

and therefore there was no "restraint of princes" within the policy. The American authority of *Olivera v. The Union Insurance Company* (5) is a strong authority in point. There the vessel was within the blockade port, and was prevented from leaving it by reason of such blockade, and that was held to be "a restraint" within the policy, and Marshall, C.J., in delivering judgment, puts this very case of a town besieged, saying, "If for example a town be besieged, and the inhabitants confined within its walls by the besieging army, if in attempting to come out they are forced back, would it be inaccurate to say that they are restrained within those limits? The Court believes it would not; and if it would not, then with equal propriety may it be said when a port is blockaded that the vessels within are confined or restrained from coming out." *Schmidt v. The United Insurance Company* (6) and *Saltus v. The United Insurance Company* (7), also shew that a blockade which prevents a vessel coming out of port is a restraint of princes within the risks insured. In *Geipel v. Smith* (8) it was held a good excuse for not performing a charter-party that the shipowner was prevented by a blockade from proceeding to the port of loading, a blockade being "a restraint of princes." The American authorities draw a distinction between arrest and restraint, and *Bird v. Jones* (9) shews that a person may be prevented from going the way he desires without arrest. Then the goods in the present case were no longer under the control of the assured by reason of the siege of Paris, and there was therefore a total loss of them—*Roux v. Salvador* (10).

Day (J. O. Matthew with him), for the defendant.—The policies are marine policies, and only cover risks to the goods whilst they are water borne. "The general rule in fact is clear that the under-

writer in a sea policy insures only against sea risks; the risk on goods therefore ends directly they are put on *terra firma* unless they are placed there only for a temporary purpose, or under such circumstances as to be protected by the usages of trade"—1 *Arnould on Insurance*, 4th ed. 369, citing *Harrison v. Ellis* (11) contrasted with *Pelly v. The Royal Exchange Assurance Company* (12) and *Brough v. Whitmore* (13). There was the case last year in the Court of Common Pleas, *The Australian Company v. Saunders* (not reported) in which a policy similar to the present one was held not to cover the land risk. There is nothing in the present policies to shew that the land risk was intended to be covered by it; on the contrary, there are many parts which shew that the land risk was not intended to be insured. Thus these words, "including all risk of craft to and from the steamers," which would not be required if the whole journey was covered. Again there is no similar provision for insuring the goods whilst on the railway, or in carts, &c., to and from the railway. What is said in the case as to sending the goods overland only amounts to its not being a deviation if they are so sent, and not to their being insured during the land transit. Secondly, there has been no loss of the goods. They arrived at Paris in charge of the plaintiff's carriers, and they were never captured nor put under requisition by the French or German forces. They were only in the same condition as they might be if the vessel carrying them remained in port, wind bound, and so unable to get out. It was nothing but a retardation of the voyage—*Hunt v. The Royal Exchange Assurance* (14). It is said, however, that this was a "restraint of princes." There is no authority to that effect. *Geipel v. Smith* (8) was the case of a charter-party, and there is a great distinction between such and an insurance. The insurer only insures against proximate risks, not remote

(5) 3 Wheaton 183.

(6) 1 Johns. (Amer.) 249.

(7) 15 Johns. (Amer.) 523.

(8) 41 Law J. Rep. (N.S.) Q.B. 153; a. c. Law Rep. 7 Q.B. 404.

(9) 7 Q.B. Rep. 742; a. c. 15 Law J. Rep. (N.S.) Q.B. 82.

(10) 3 Bing. N.C. 266; a. c. 7 Law J. Rep. (N.S.) C.P. 328.

(11) 7 E. & B. 465; a. c. 26 Law J. Rep. (N.S.) Q.B. 239.

(12) 1 Burr. 341.

(13) 4 Term Rep. 206.

(14) 5 M. & S. 47.

ones. *Taylor v. Dunbar* (15) shews that the insurer is not liable for damage to goods by delay though the delay is caused by the perils insured against. *Barker v. Blakes* (2) is no authority that a blockade is "a restraint of princes." In *Forster v. Christie* (16) a ship was retarded by the act of a king's officer, but that was held not to be a detention within the meaning of the clause, "against the arrest and detainment of kings." A mere detention is not within such clause. There is, moreover, a difference between a naval blockade and a land siege. There is no substantial analogy between them, and no such law of nations as governs a blockade applies to the case of a siege.

Field, in reply, cited *Boehm v. Combe* (17) to shew that the insurance included the transit by land and water, and *Wheaton's International Law*, 2nd edit., 819, where a besieged town is treated as in the same position as a blockaded port, and a passage is cited from *Grotius de Jur. Bell. ac Pac. lib. 111, cap. 1 sec. 5, note 3*, as to its not being lawful to carry anything to a town besieged or a port blockaded, making no distinction between the two.

BOVILL, C.J.—I have not the least doubt but that the object of the plaintiffs in effecting these insurances was to cover the goods insured from the time of their departure from Shanghai until their arrival at London, and that the intention was that the insurances should cover all the risks of such transit during the journey as well by land as by water, and the question is only whether such intention has been expressed in the policies. That must depend not alone on the terms used in the policies, but also on the course of business to which such terms were intended to apply. Now the course of business (as it appears from the Special Case) was, as to goods sent from China to London, *via* Marseilles, to send them by the Messageries Imperiales, which company always sent them overland

through France, and it also appears that this was well known amongst underwriters. Mr. Day moreover admitted, though there is no statement to that effect in the case, that goods sent to London, *via* Southampton, would pass by railway from Southampton to London in the ordinary course of business, and it must be assumed that that also was known to underwriters. Now, what are the terms of these policies? The insurance is therein stated to be from Shanghai to, *inter alia*, London *via* Marseilles or Southampton. According to usage the transit to London *via* Marseilles includes necessarily the passage overland through France, and the statement in the policies is therefore the same as if the insurance had been said to have been whilst the goods were being carried by railway through France from Marseilles to Paris, and from Paris to Boulogne. Then follow the words, "or Southampton," which would refer to the journey overland by railway from Southampton to London. Therefore the description of the journey given in the policies, is one which clearly includes a passage by land as well as by water, and the policies say that the goods insured are intended to be so insured during the whole of their transit, whether by land or water, from Shanghai to London. It has been argued for the defendant that the words, "whilst remaining there for transit," shew that the insurance was only intended to cover the goods on land when waiting, whether at Marseilles or Southampton, and not when in course of transit, but I cannot adopt that construction. The policies are to attach on the shipping of the goods and are to continue until their arrival at London. I see no reason why they should not have the effect of covering the risk during the whole of the transit, and, in my opinion, the risk during the transit of the goods through France was covered by these policies. Then comes the question, whether by reason of what occurred after the arrival of the goods in Paris, there has been a loss within the terms of the policies. The policies contain the usual words describing amongst the risks insured, "arrests, restraints and detainments of all kings, princes and people." The

(15) 38 LAW J. Rep. (N.S.) C.P. 178; s. c. LAW REP. 4 C.P. 206.

(16) 11 East 205.

(17) 2 M. & S. 172.

goods in question having been sent on from Marseilles to Paris, arrived there about the 13th of September. On the 10th of September, carriage by the railway from Paris to Boulogne is stated in the Case to have become impossible, in consequence of the German armies having taken possession of parts of the railway, and intercepted all communication by the railway between Paris and Boulogne; and it appears from another part of the case that the German armies were gradually surrounding Paris until the 19th of September, when they completely invested it, and from that time until after notice of abandonment by the plaintiffs and the bringing of this action, the German armies completely surrounded and besieged Paris, and prevented communication between it and all other places, so that it was impossible to remove the goods from Paris. On the 7th of October the plaintiffs gave notice of abandonment to the defendant, and the question is, whether under these circumstances there was a loss of the goods within the meaning of the policies. It has been contended on behalf of the plaintiffs, that there was such a constructive total loss as entitled them to give notice of abandonment, and so claim for a total loss. It is clear, that the goods existed in specie, and it is also clear, according to English law, that if there was only delay in their delivery, it would not give a claim against the underwriter. It is different, however, if a loss be caused by any of the perils insured against, and here it was said that there was such a loss caused by a restraint within the terms of the policies, by the German armies surrounding Paris and making it impossible to remove the goods. Mere delay will not do. There must be a loss, and the question is, whether such loss was made out in this case. Now it is said on the part of the defendant, that the case of a siege is not like that of a blockade, and that the same principle of law does not apply to the one as to the other. It appears that the judges of the American Courts have treated the case of a vessel kept within a blockaded port upon the same principle as persons or things kept within a besieged town, and have considered the

latter as being *a fortiori* a restraint of princes; blockade and siege are treated as standing on the same ground by Grotius and Wheaton, and I certainly see no difference in principle between them, nor between the case of a blockade and that of an embargo. With respect to how far a blockade is "a restraint of princes," no doubt there are cases in which it has been held that there is no such restraint, where the ships have been prevented from entering the port, but in those cases the immediate cause of their not entering was the desire not to run the risk of the blockade, and there was no restraint of princes, because the ship never came within the blockade. The case of *Gaipel v. Smith* (8) is, I think, a distinct authority on the subject. The question there, no doubt, arose as to the defendant being justified in putting an end to a charter-party by reason of the blockade of the port of discharge, but it was assumed that, if the blockade continued and was effective, it amounted to a "restraint of princes." It is true that in *Forster v. Christie* (16) it was held, that there had not been a restraint of princes, where the ship had been prevented from entering the port by fear of the blockade; but the argument seemed to admit, that if she had been detained whilst within the blockade, there would have been a "restraint of princes." Mr. Day has contended that there is a difference as to the meaning of these terms in a charter-party and in a policy of insurance, but I do not see the slightest difference in principle. There is also the important case of *Olivera v. The Union Insurance Company* (5), which has been relied on by the counsel for the plaintiff, and in the course of the judgment of Marshall, C.J., in that case, there occurs the following passage—"What then, according to common understanding, is the meaning of the term, 'restraint'? Does it imply that the limitation, restriction or confinement, must be imposed by those who are in possession of the person or thing, which is limited, restricted or confined, or is the term satisfied by a restriction created by the application of external force? If, for example, a town be besieged and the inhabitants confined within

its walls by the besieging army, if, in attempting to come out, they are forced back, would it be inaccurate to say that they are restrained within those limits? The Court believes it would not." That observation of the Chief Justice may properly I think be applied to this case. Here a force was brought to bear upon the goods in question which prevented their further progress. Was the owner then entitled to give notice of abandonment to the assurers? No doubt it is not a case of capture, where the property has been taken possession of by the captors, but it seems to me to be in the nature of an embargo laid on a vessel when in port, and to be if not an actual arrest to be a restraint of princes. Then what is the law as to the right of an assured in such a case as that? In *Goss v. Withers* (18), Lord Mansfield said, "I cannot find a single book, ancient or modern, which does not say, 'that in case of the ship being taken, the insured may demand as for a total loss and abandon.' And what proves the proposition most strongly is, that by the general law, he may abandon in the case merely of an *arrest* or an *embargo* by a prince not an enemy." *Rotch v. Edie* (19) is to the same effect. We have no fixed time in our law when notice of abandonment is to be given, but I take it that it must always be given in a reasonable time according to the nature of the case; subject to that and to there being a "restraint of princes," it seems to me, that the assured has a right to abandon the goods to the underwriters, and if he does so in proper time, the underwriters are liable. Here no question is raised as to the abandonment being too late or not being in proper time, and the detention having taken place, as it seems to me, by a restraint of princes, and the risk being covered by the policies, I am of opinion that our judgment should be for the plaintiffs.

KEATING, J.—I am of the same opinion. If this case had rested exclusively on the terms of the policies I should have taken time to consider whether they covered only a marine risk, but coupled as these are with the facts of this case, I think that

(18) 2 Burr. 696.

(19) 6 Term Rep. 413.

they were intended to cover and do cover risks on land as well as on sea. Two out of the three modes of carrying goods from China to London necessarily involved a transit by land, and therefore I think that the meaning of the policies, when coupled with the findings of the facts in the case, was to cover the risk of transit by land, especially as such transit was the usual and ordinary mode of carriage, and was known to both parties. Then was there such a loss as justified the plaintiff giving notice of abandonment? I entirely agree with what my Lord has said as to the analogy between a blockade of a port and the siege of a town. There are not many English cases on this subject but it seems to me to stand to reason that goods within a blockaded port are analogous to goods on which an embargo has been laid. It is true that an embargo is the exercise of a sovereign power upon things within his country, and a blockade is the exercise of power outside by a foreign sovereign, but in principle there is no difference, and in each case it is the interposition of power by a strong party and by a prince. Here it is found by the case to have been impossible to have got the goods out of Paris by reason of Paris being surrounded by the German armies, and I confess I have never had the slightest doubt but that that was a "restraint of princes." I have also no doubt that under these circumstances the owners had a right to abandon the goods, and that as they did so in proper time, they are now entitled to recover from the underwriters.

BRETT, J.—I am of opinion that the policies covered the land risk from Marseilles to Boulogne, because by the finding of the facts in this case the land journey is made part of the risk insured. The first thing in a policy is to describe the voyage, and afterwards it is usual to describe the risk and make that applicable to the voyage before described. Now here one of the voyages described is from Shanghai to London, *via* Marseilles. By itself you cannot tell what that is, but whenever a voyage is described in a policy you must look to the well-known mode of performing that voyage in order to see what it is. In this case it appears that a voyage so described as this, is by a

land transit from Marseilles to Boulogne, therefore that is here made part of the voyage. It is said that there are other parts of these policies which shew that that is not so, and for this purpose Mr. Day relies on the words, "whilst remaining there for transit." But the voyage insured necessarily involved several transshipments and, therefore, if it had not been for these words in the policies the period between the landing and transshipment of the goods would not have been covered by the policies. Mr. Day also relied on the words, "risks of craft to and from the steamers." The peculiarity in these policies is that several steamers would be employed during this voyage, and the goods would have to be covered by the insurance whilst on each steamer. Construing these policies according to the way ordinary policies would be construed they would not cover the risk after the goods had been placed on board the first steamer if these words, "all risks of crafts to and from the steamers" had not been introduced, and they were put into the policies in order to include in the insurance the risk during the time the goods were being carried to and from the different steamers. It seems to me that they do not interfere with the transit from Marseilles to Boulogne which is included in the voyage from Marseilles to London. The cases of *Pelly v. The Royal Exchange Assurance Company* (12), and *Brough v. Whitmore* (13) shew that if by general usage land is made part of the voyage land is to be so treated as part of the voyage. In that last case the island was by usage made part of the voyage insured. Therefore, on these authorities and according to the true construction of the policies in the present case, it seems to me that the transit through France was part of the voyage, and if so the risk must be made applicable to it, and though, as argued by Mr. Day, the words of the policies must be altered to adapt them to such risk, I see no more difficulty in doing so than there was in doing so in *Pelly v. The Royal Exchange Assurance Company* (12). The next question is, was there a loss? I think there was by reason of a restraint of princes. It has been said that the case here was similar to that of a block-

ade of a port, and that that has been held to be a restraint of princes. The American authorities do not, I think, much assist one, because they have gone to this great extent, that a retardation of the voyage, as where the vessel is prevented from entering a port during a blockade, is a restraint of princes. Now I apprehend that that would not be so held in any English Court. If, as in *Foster v. Christie* (16), a vessel is prevented from entering a port by the command of an officer, it is caused by the act of that officer, and not by the restraint of princes; but there has been no case in England in which where goods have been kept within a blockaded port it has not been held to have been a restraint of princes. We have to consider, then, what is the state of goods in a ship within a blockaded port. It is clear that it is not that of a capture nor of an arrest, because there has been no taking possession of the goods, and they are left in the possession of their owners. Then there is in the policies the other word "restraint," and applying the general rule, that where there are different words in a mercantile contract a meaning to each of them is to be given if possible, it appears to me that "restraint" is when the goods are not taken possession of. It applies to goods when the ship is in a blockaded port, or when an embargo is laid, and it seems to me that in either of these cases there is as much a restraint as there well can be, and the authority of Marshall, C.J., in *Olivera v. The Union Assurance Company* (5) is a strong authority that it is a restraint. At one time I thought that in the present case there might be a distinction between a blockaded port and a besieged town, especially as the goods were not confiscated; but it seems to me that, inasmuch as if any attempt had been made to carry them out of the town, the army would have stopped them, and obviously they would then have been lost to their owners, or at all events would have been in great danger of being so lost, they were as much restrained as they would have been in a blockaded port. There is then the authority of Wheaton in his work on International Law, at page 819, which treats a

sieged town and a blockaded port as analogous, and of Marshall, C.J., in *Oli-via v. The Union Insurance Company* (5), who thinks that goods within a besieged town are restrained within the meaning "restraint" in the policy. The only other question is, whether there was such a danger of a total loss as to entitle the plaintiffs to give notice of abandonment, and I am of opinion that there was, and that the notice was given in proper time, and that the plaintiffs are therefore entitled to our judgment.

BROVE, J.—I am of the same opinion. At the first point, and which appeared to me to be the most arguable, was, whether conveyance of the goods from Shanghai to London *via* Marseilles, might be fulfilled by a carriage of them by sea only;

I think that the ordinary mode of conveyance must be taken to have been intended, and therefore it would involve a delay of passage during a portion of the journey.

Mr. Day contended that there were no goods used throughout the policies which affected the risk insured with only a maritime one, such as the "risk of craft and from the steamers," which would not point to the landing from a ship,

not to the taking the goods from railway carriage; but probably the reason for this is that the parties have kept the old form of a Lloyd's policy instead of remodelling it to suit their particular case. It is found that the goods were conveyed by land from Marseilles to Boulogne, and that that was the usual mode of conveying goods coming from London to Marseilles.

If, therefore, it was intended to limit the policies to marine risks, it should have been done so, and I agree with the rest of the Court that it was not so intended, but that it was intended that the insurance should include the whole journey from Shanghai to London. Then comes the other question, namely, whether what occurred whilst the goods were at Paris was a "restraint of princes." One can well see why the case of a vessel, which has been prevented from entering a port because it is blockaded, has been held not to fall within the clause as to "restraint of princes," for that is more in the nature of a junction than a restraint; but I can-

not see why, when a person or thing is shut up within the stone walls of a town or place, so that such person or thing cannot get out, that said person or thing is not then restrained. A man who is in prison is as much restrained as he would be if fastened by an iron chain. Here it appears, from the findings in this case, that it was impossible to get the silk out of Paris by reason of that place being completely surrounded and besieged by the German armies, so that the siege was more effective and the case stronger than that of a blockade. Then I can hardly conceive a restraint of princes which does not involve a loss of the goods restrained, and the plaintiffs were, I think, justified in the abandonment.

Judgment for plaintiffs.

Attorneys—Markby & Tarry, for plaintiffs;
Waltons, Bubb & Walton, for defendants.

1873. { LORD BOLINGBROKE v. TOWNSEND,
May 30. { Clerk to the Local Board of
Health of Swindon New Town.

Practice—Amendment—Writ of Summons—Defendant's Name.

A plaintiff sued a local board in the name of their clerk instead of their own name, as he should have done:—Held, that the writ of summons might be amended by substituting the name of the board for that of their clerk.

The plaintiff having a cause of action against the Local Board of Health of Swindon New Town, took out a writ of summons directed to one "Townsend, clerk to the Local Board of Health of Swindon New Town." It turned out, however, that the board should have been sued in their own name, and not in that of their clerk, and the plaintiff therefore applied to Blackburn, J., to be allowed to amend the writ by substituting the name of the board for that of their clerk, and an order was granted to that effect.

Collins now moved to rescind that order on the ground that the amendment

amounted to a substitution of a new defendant, and therefore could not be made, citing *Clay v. Oxford* (1) and *Prior v. The Local Board of Westham* (2).

BOVILL, C.J.—There was power to make this amendment entirely apart from the Common Law Procedure Act. The amendment was merely an alteration of description, enabling the plaintiff to sue the corporation in their correct name, and not a substitution of a new defendant, and even if there were no authority on the point I should hold that the order was good; but looking to the authorities, *Galloway v. Bleadon* (3) shews that there is power to make such an amendment, and *La Banca Nazionale v. Hamburger* (4) is on all fours with the present case.

The rest of the Court agreed.

Rule refused.

Attorneys—Moon, agent for Townsend & Ormond, of Swindon.

1873. { THE NOTTINGHAM HIDE, SKIN
June 18. { AND FAT MARKET COMPANY v.
BOTTELL AND ANOTHER.

Guarantee—Construction of—Continuing Guarantee.

The plaintiffs (of whom D. had been in the habit of buying goods) having heard of a bill of sale given by D. to the defendants declined to let D. have certain goods he had then bought of them without a telegram from the defendants that the defendants would be answerable for them. The defendants sent such telegram, and D. had the goods, and in due time paid for them. By the post of the same day on which the telegram was despatched, the defendants sent to the plaintiffs a letter, in which, after referring to the telegram, and stating that they had done business with D. for five

years, and had never known anything dishonest in his transactions, they wrote as follows: "What you have heard was done to protect him from a dishonest tradesman, and will in no way we hope be to the injury of his creditors. Having every confidence in him he has but to call upon us for a cheque, and have it with pleasure, for any account he may have with you. When to the contrary we will write you:"—Held, that this letter was a continuing guarantee for the amount of goods D. should buy of the plaintiffs until the plaintiffs should hear from the defendants to the contrary.

The first, second and third counts were on a guarantee given to the plaintiffs by the defendants guaranteeing the payment of goods to be supplied to one William Dyson. The fourth count was for false representations as to the credit of the said William Dyson, by which the plaintiffs were induced to sell goods to him on credit. The defendants pleaded the general issue, and to the first, second and third counts, payment.

The cause was tried before Martin, B., at the last Spring Assizes for the county of Leicester, when it was admitted that the amount of the guarantee, on which the first count was framed, had been paid, and the material question depended on whether a letter, dated 1st of January, 1872, written by the defendants to the plaintiffs, and on which the second, third and fourth counts were framed, amounted to a continuing guarantee. The plaintiffs were in the habit of holding weekly sales of skins, the skins being sold on one week and paid for on the next. They had for about a year sold skins in this way to the said W. Dyson, who had paid for them regularly up to December, 1871, but on the 29th of that month, the plaintiffs' manager having heard reports as to a bill of sale, given by Dyson to the defendants, declined to let him have the skins he had then bought to the value of 34*l.* 7*s.* 6*d.* without the defendants' guarantee, and accordingly he sent the following letter to that effect to Mr. Dyson—

"December 29, 1871.

"Dear Sir,—From reports we have heard, we feel we shall not be doing ourselves justice in sending you the skins

(1) 36 *Law J. Rep.* (N.S.) *Exch.* 15.

(2) 15 *Law Times*, N.S. 250.

(3) 1 *Man. & G.* 247.

(4) 2 *Hurl. & C.* 330.

bought by you to-day without an engagement on the part of Messrs. Bottrill & Son to become responsible for their value.

"We must, therefore, request the favour of a telegram from them (Bottrill & Son) by, say twelve or one o'clock, to-morrow morning, to the above effect, when we will forward the skins."

Dyson communicated this to the defendants, who were woolstaplers at Leicester, with whom Dyson had had dealings for a considerable time, and the defendants thereupon dispatched a telegram to the plaintiffs in these words: "We agree to be answerable for the skins with pleasure, January 1st, seventy-two." On the same day they posted to the plaintiffs the letter of the 1st of January, 1872, which was as follows—

"Leicester, January 1, 1872.

"The Nottingham Hide and Skin Company.

"Gentlemen,—You would receive our telegram to-day in reference to the letter received from you by Mr. Dyson. We beg to say with reference to Dyson we have done business with him for five years, and have never known anything dishonourable or dishonest in any of his transactions.

"What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors.

"Having every confidence in him, he has but to call upon us for a cheque, and have it with pleasure, for any account he may have with you. When to the contrary we will write you. Should you require any further explanation we shall be most happy to give it.

"Yours, &c.,

"Jno. Bottrill & Son."

The plaintiffs sent the skins to Dyson on the receipt of the telegram, and the amount of these was paid for the following week. The plaintiffs also, on the 2nd of January, 1872, sent the following reply to the defendants' letter of the 1st of that month—

"January 2, 1872.

"Gentlemen,—Your letter is quite satisfactory, as was also your telegram, on receipt of which we immediately dis-

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patched the skins. We had always thought Mr. Dyson what you state."

The plaintiffs continued to supply Dyson with skins up to the following May without having received any notice from the defendants according to their letter of the 1st of January, and on the 6th of May there was a balance due to the plaintiffs of 92*l.* 1*s.* 10*d.*, which, by a letter of that date, they communicated to the defendants, stating that goods to that amount had been had by Dyson on the strength of the defendants' guarantee. To this the defendants replied, expressing their surprise that the plaintiffs had trusted Dyson to such an extent without security, and repudiating their liability.

At the trial the learned Judge held that the letter of the 1st of January, 1872, was a continuing guarantee. He also held that there was no evidence of fraud to support the fourth count. A verdict was accordingly entered for the plaintiffs on the second and third counts for 92*l.* 1*s.* 10*d.*, and for the defendants on the first and fourth counts, with leave to the defendants to move to set aside the verdict on the second and third counts, and to enter a nonsuit or verdict for the defendants.

A rule *nisi* to that effect was accordingly obtained in last Easter Term, on the ground that the defendants did not guarantee any credits beyond that mentioned in plaintiffs' letter to Dyson of the 29th of December, 1871 (1).

Bulwer and *A. K. Lloyd* shewed cause against this rule, and contended that the letter of the 1st of January amounted to a continuing guarantee.

(1) There was a cross rule *nisi* obtained by counsel for the plaintiffs, for a new trial on the ground of misdirection in telling the jury that there was no evidence in support of the fourth count. This rule was argued at the same time that cause was shewn against the first rule, but it is unnecessary to notice this in the above report as no opinion was expressed on it by the Court, because it was agreed between the parties that if the Court gave judgment for the plaintiffs on the first rule, which they did, the second rule should stand over until after proceedings in error (if any) were had on that judgment, and if there were no such proceedings, or the judgment should be affirmed, the second rule was to be abandoned without costs, otherwise it was to be heard in the Court of Error.

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O'Malley and *Merewether* argued, in support of this rule, that it was not a guarantee beyond that of confirming the guarantee given by the telegram, which related to that particular debt of 34*l.* 7*s.* 6*d.*; for it contained no promise that, if credit was given to Dyson, the plaintiffs would pay the defendants if Dyson did not—*M'Ivor v. Richardson* (2).

KEATING, J.—The plaintiffs in this case have declared on a guarantee by the defendants, and on a false representation by them as to the solvency of Dyson. It appears that the plaintiffs' company, with whom Dyson had been in the habit of transacting business, had received an order from Dyson for skins, which the plaintiffs' manager, having heard rumours reflecting on Dyson's solvency, refused to execute, unless a guarantee was given by the defendants for its payment. Thereupon, Dyson communicated this to the defendants, and, no doubt, also, all the circumstances connected with the plaintiffs' doubts as to his solvency, for the defendants sent a telegram to the plaintiffs agreeing to guarantee the payment of the skins which the plaintiffs had refused to deliver without they had such guarantee, and they further sent a covering letter to the telegram, and it is on that letter that the present question arises. It is in these terms.

[The learned Judge here read the letter of January 1, 1872, down to the end of the words "what you have heard was done to protect him from a dishonest tradesman."]

Now, what the plaintiffs had heard was with reference to Dyson giving the defendants a bill of sale.

[The learned Judge then read the rest of the letter.]

It has been contended on the part of the plaintiffs that that letter amounts not merely to a guarantee of the payment of the skins which the plaintiffs had refused to deliver without a guarantee, but to a continuing guarantee with reference to future transactions; and I am of opinion, that the plaintiffs' contention is right. These kind of matters depend always on

the circumstances under which they take place. What did the writers of this letter intend should be understood by the plaintiffs. They were aware that the plaintiffs had got an impression which was unfavourable to the solvency of Dyson, and they wished to remove it; and, accordingly, they do not stop at the guarantee of the payment of the skins which they had been asked to guarantee, but they go on to say, that Dyson has but to call on them for a cheque "and have it with pleasure, for any account he may have with you; when to the contrary we will write you." Now, what would any one understand by this? Why, that our opinion of Dyson's credit is so high, that we are ready to undertake the payment of any account which you may enter into with him, and if it should ever be to the contrary, we will let you know. That, I think, is a guarantee, and a continuing one. With reference to the count for a false representation it is not necessary to give any judgment.

I may add, that my brother Grove who heard the argument, but is now absent, concurs in the opinion I have expressed, though he does not entertain it so strongly as I do.

BRETT, J.—As to the rule which has been obtained, to enter a nonsuit on the ground that the Judge was bound to construe the letter of January 1 as not amounting to a guarantee, I think the letter was to be construed with reference to the circumstances under which it was written. Now, a material circumstance was this: Dyson was a customer of the plaintiffs, whose credit they considered doubtful, but who might continue to be a customer if the plaintiffs had something more to satisfy them than the opinion they then had of his credit. They said, with reference to particular goods he then wanted, that they would not supply him with them without a guarantee, which of course shewed that they would not let him have goods for the future without security. This is intimated to Dyson and by him communicated to the defendants, who thereupon send the telegram and letter covering the telegram to the plaintiffs. Both the telegram and letter are matters of business, and given with reference to the

btful character of Dyson, and to the
attiffs supplying him with goods. The
part of that letter is only as to the
gram, but the latter afterwards goes on
ake statements which I agree the de-
ants were not asked to make, but which
do make, in order that the plaintiffs
be satisfied into giving credit to
n. The language used is inaccurate
wholly inartificial, but giving it, as it
t to have, a business sense, it is
ient, I think, to shew that the
adants contemplated an original con-
between the plaintiffs and Dyson,
he supply of goods to him on his
t, and that in the part which states
"he has but to call upon us for a
ie for any account he may have with
the defendants contemplated that,
son failed to pay, they would. I
ler that the terms are such, that
laintiffs might reasonably suppose
atter to mean a guarantee, and if
lid so act upon its being a guarantee,
would be evidence to go to the jury,
ie defendants would not be entitled
nonsuit. Then, if the letter be a
ntee, the only question is, whether
continuing one. But if a guar-
for how long is it to go on? Until
fendants have given the plaintiffs
to the contrary. Therefore, the
lants' rule which is the first rule,
, I think, be discharged. As to
er rule (1), it is not necessary to
ay opinion.

Defendants' rule discharged.

ys—Eyre & Co., for plaintiffs; Vizard,
ler & Anstie, agents for H. A. Owston,
ster, for defendants.

THE EXCHEQUER CHAMBER.]
l from the Court of Common Pleas.)

8. } JOHNSON v. BARNES.

non—Exclusive Right of Pasture—
re.

re an exclusive right of pasturage had
joyed for a long series of years, but
scribed in various documents as a
common, the Court held as a con-

clusion of fact that such description did not
cut down the exclusive right so established
by user.

This was an appeal from a decision of
the Court of Common Pleas, reported
41 Law J. Rep. (N.S.) O.P. 250; which
appeal turned on a mere conclusion of
fact, and requires only the following brief
notice.

The corporation of Colchester for a
very long series of years had exercised a
right of exclusive pasture during part of
the year over certain lands, which how-
ever was described in many documents as
a right of common. The defendant, who
was owner of a portion of this land,
resisted the exercise of the right on the
ground that on the evidence the proper
conclusion was that the right was a right
of common and not exclusive, and that
therefore such right was extinguished,
because the Corporation had released
their right as respects a portion of the
lands affected by it. The Court below
had decided in favour of the plaintiff, who
had acted under the right claimed by the
corporation, on the grounds stated in
their judgment.

*Joshua Williams (Prentice and Thesiger
with him), for the appellant, now con-
tended that such judgment was wrong,
solely on the ground that the proper con-
clusion of fact was that the right was not
exclusive.*

*R. E. Turner, for the respondent, was
not called on.*

THE COURT held that the evidence
shewed a user of a right of exclusive pas-
turage for a very long series of years, and
that such right was not cut down by its
being described as a right of common, a
description perhaps inaccurate, but used as
respects such a right, both by Willes, J.,
in the Court below, and Bayley, J., in *The
King v. Churchill* (1).

Judgment affirmed.

Attorneys—A. R. Steele, for respondent;
H. I. & T. Child, agents for J. S. Barnes,
Colchester, for appellant.

(1) 4 B. & C. 750.

1873. } HUTCHINSON AND OTHERS v.
June 7. } TATHAM AND ANOTHER.

Principal and Agent—Contracting and Signing “as Agent”—Admissibility of Evidence of Custom making Agent liable.

Where a person contracts in the body of a charter-party and signs “as agent,” his principal being undisclosed, evidence is admissible to shew a custom that he shall be personally liable if he does not disclose his principal’s name within a reasonable time.

This was an action on a charter-party. The charter-party was made between the plaintiffs, as owners of the ship, and the defendants, “as agents for merchants,” and also signed by the defendants, “as agents for merchants.” At the trial the plaintiffs called several witnesses, who, though differing in certain details, all agreed that it was the custom, if the principals were not disclosed within a reasonable time, that the agents should become liable (as to which custom, as will be seen from the judgments a question was raised as to whether it applied universally or only to particular trades), and a verdict was found for the plaintiffs with leave to the defendants to move. A rule *nisi* having been granted (amongst other things) to enter the verdict for the defendants, on the ground that they contracted as agents, and so evidence of the usage was inadmissible, and if admissible, there was no evidence thereof, and for a new trial on the ground that the learned Judge, Keating, J., misdirected the jury in not telling them that the evidence was not sufficient, and leaving it to them,

H. James (Philbrick with him) shewed cause, and contended that though there was no case in which exactly the same words had been used, yet the authorities shewed conclusively that the evidence was admissible, that it was sufficient to go to the jury, and that the custom would not be too broad even if it applied to all charter-parties, citing *Humphrey v. Dale* (1), *Fleet v. Murton* (2), *Fairlie v. Fenton*

(1) 7 E. & B. 266; s. c. 26 Law J. Rep. (N.S.) Q.B. 137. In error, E. B. & E. 1004; s. c. 27 Law J. Rep. (N.S.) Q.B. 390.

(2) 41 Law J. Rep. (N.S.) Q.B. 49.

(3), *Deslandes v. Gregory* (4), 2 *Taylor on Evidence*, 6th ed., 1015, *Story on Agency*, s. 267, and 2 *Kent’s Commentaries*, s. 631.

[BOVILL, O.J., referred to *Green v. Kopke* (5).]

Day and Lumley Smith, in support of the rule, contended that no case went so far as the present, as adding the word “broker” to a signature was very different to contracting and signing “as agent;” that the evidence was therefore not admissible; that it was also not sufficiently certain to go to the jury, and that (though this was little pressed) the alleged custom was too broad, citing in addition to *Fleet v. Murton* (2), *Humphrey v. Dale* (1), *Deslandes v. Gregory* (4), the case of *Lewis v. Marshall* (6).

BOVILL, O.J.—The charter-party is made between the plaintiffs, owners of the ship, and the defendants (who really were agents duly authorised), “as agents to merchants,” and the defendants’ signature is “as agents to merchants.” Such a contract is analogous to one made by a broker, stating he sells on account, and adding the word “broker” to his signature, as was the case in *Fleet v. Murton* (2) and *Fairlie v. Fenton* (3), where it was held that the broker was not liable on the contract itself, and therefore, looking to those authorities, and especially to what was said by Blackburn, J., in the former, and by Martin, B., in the latter case, I am of opinion that here the defendants were not bound personally on the contract standing alone. The question then arises, whether evidence was admissible to add a term to this written contract, viz., a custom that if the principal be not disclosed within a reasonable time, the agent is personally liable. And after *Humphrey v. Dale* (1) and *Fleet v. Murton* (2), this matter must be taken to be settled, those cases being distinct authorities that the evidence is admissible. It is objected here that the evidence was

(3) 39 Law J. Rep. (N.S.) Exch. 107; s. c. Law Rep. 5 Exch. 169.

(4) 2 E. & E. 610; s. c. 29 Law J. Rep. (N.S.) Q.B. 93; 30 Law J. Rep. (N.S.) Q.B. 36.

(5) 18 Com. B. Rep. 549; s. c. 25 Law J. Rep. (N.S.) C.P. 297.

(6) 7 Man. & Gr. 744; s. c. 13 Law J. Rep. (N.S.) C.P. 193.

general, but in *Fleet v. Murton* (2) evidence was not confined to the particular trade; and as respects there being evidence to go to the jury, there is abundance, for though the witnesses differed as to details, they all agreed as to a substantial point.

ERR, J.—There are three questions: what is the meaning of the contract? secondly, was evidence admissible to vary the contract? thirdly, was the evidence sufficient amount to be left to the jury? There is no considerable doubt. The words "agent" are used in the body of the contract and in the signature, and the signature is a stronger one than *Humfrey v. Dale* (1) and *Fleet v. Murton* (2), and it is a strong thing to say that when a person says he does not contract as principal but as agent, evidence may be given to make him personally liable. It is said by Cockburn, C.J., in *Fleet v. Murton* (2) and by Hill, J., in *Desborough v. Gregory* (4) seems to shew that without evidence of custom, the defendants would not be liable, and so I do I think this, that if the evidence offered had been evidence to shew the agent also was liable *ab initio* I have thought it inadmissible; but in these cases go very far, and though no evidence is admissible to contradict the document, so that evidence of *ab initio* would be inadmissible, it has been decided that, though evidence is inadmissible to contradict, it is admissible to add a term not inconsistent with the document.

What was attempted here was to shew that though the agent was liable as agent generally, yet if he failed to shew his principal within a reasonable time this made him liable; this was consistent with the document, and rests on the authority of *Fleet v. Murton* (2), though the words here used are strong, I think (though I have thought the evidence was admissible). The evidence then amount to what was left to the jury? If the usage had been universal it would not, I think the witnesses did not go this far but confined it to certain trades, *et v. Murton* (2) shews it need not be confined to the particular trade necessary and even if it is to be taken to

apply to all charter-parties I think it is no infringement of the rule of law on this point. It has been said that the custom cannot be left to the jury if the witnesses disagree; and no doubt what was said by Tindal, C.J., in *Lewis v. Marshall* (6), favours this, and the old rule was stringent; but in later years the rule has been different, and we cannot overrule it, and indeed if it were otherwise a custom could never be proved.

GROVE, J.—I also think that the rule should be discharged. I cannot see any substantial distinction between *Humfrey v. Dale* (1) and *Fleet v. Murton* (2) and the present case, and those cases are express authorities, one being in the Exchequer Chamber, establishing that evidence of the custom was admissible, and implying that without it the agent is not personally liable. It is difficult to lay down the broad rule, but it is clear that the custom must not contradict the written contract, and unless the contract is made so peremptorily as agent only that he cannot be made in any way liable, it does not contradict the document to shew that under certain circumstances and in certain events he may become so. The custom must be inconsistent and irreconcilable with the document, and to shew that the agent under certain circumstances is liable adds terms to but does not contradict it. Though the contract be made as agent so that *prima facie* there is no liability, it is yet consistent that he should become liable if he does not act in a particular way. Irrespective of the authorities I should think so, but after them the matter seems unarguable. As to the contention that the evidence must be unvarying, if we had to wait for this, a custom could never be proved, and here on the one great point all the witnesses agree; and as to the custom proved being too extensive, it seems to me it was limited particularly.

KEATING, J.—I am of opinion that the evidence was admissible, for although, as my brother Brett has pointed out, this case goes somewhat farther than, yet it is within *Humfrey v. Dale* (1) and *Fleet v. Murton* (2), and if so, though the witnesses varied yet all agreed that if the

principal were not disclosed the agent was liable if he did not give the name of his principal within a reasonable time.

Rule discharged.

Attorneys—Lowless, Nelson & Jones, for plaintiffs; Thomas Cooper, for defendants.

1873. { THE CARMARTHEN AND CARDIGAN
June 6. { RAILWAY COMPANY v. THE
 { MANCHESTER AND MILFORD
 { RAILWAY COMPANY.

Evidence—Payment to Third Party—Receipt—Res inter alios acta.

The defendants being bound to repay the plaintiffs what the plaintiffs paid F. for certain work, the plaintiffs in order to prove what they had so paid, proved that having received F.'s bill for doing such work amounting to a certain sum, they sent a cheque by post to F., and F. proved that he received the cheque, and sent in return a receipt, which the plaintiffs produced, and the Judge at the trial allowed it to be put in evidence:—Held (BOVILL, C.J., *dissentiente*), that the receipt was admissible as one of the facts connected with the payment, though it would not have been admissible by itself to have proved the payment.

The defendants' company had under their private Act of Parliament, obtained in 1865, made a junction with the plaintiffs' company at Pencador, and the traffic was worked for some time, but for the prevention of accident it afterwards became necessary to use at the Pencador junction Messrs. Saxby & Farmer's system for interlocking the points of the rails and the signals. The defendants' company having declined to make the alterations for that purpose at the Pencador junction, the plaintiffs' company employed Messrs. Saxby & Farmer to fix their patent locking apparatus at the junction of the two companies. Their bill for doing this amounted to 97l. 15s. 11d., and the plaintiffs' company under the powers of the Railways Clauses Act, 1868 (26 & 27 Vict. c. 92), s. 12, sued the defendants' company for this sum, and the only question for the purpose of this report turned

on the proof of the payment of this sum by the plaintiffs' company to Messrs. Saxby & Farmer. At the trial before Brett, J., at the Middlesex sittings in Easter Term last, evidence was given of the account sent to the plaintiffs' company by Messrs. Saxby & Farmer for making the alterations at the Pencador Junction, and such account, amounting to 97l. 15s. 11d., was put in, and the secretary of the plaintiffs' company proved that after such account had been received he sent, on the 25th of February last, a cheque by post from Carmarthen to Messrs. Saxby & Farmer, at Kilburn. The cashier of Messrs. Saxby & Farmer proved that on the 26th of February he received a cheque from the plaintiffs' secretary, and that the same was in due course paid into the bank, and that he sent by the return post a receipt to the plaintiffs' company. This receipt was produced at the trial, and its admissibility in evidence was objected to by the defendants' counsel, but the learned Judge allowed it to be put in and read. It purported to be a receipt for 97l. 15s. 11d. received by Messrs. Saxby & Farmer of the plaintiffs for doing the work in question.

A verdict was found for the plaintiffs for the amount claimed.

Morgan Lloyd, for the defendants, obtained in last Easter Term a rule *nisi* for a new trial on the ground of the improper reception of such receipt and other evidence of payment of the money claimed.

Charles Russell and Hopwood shewed cause.—As between the plaintiffs and Messrs. Saxby & Farmer, the receipt was clearly admissible, being an admission of payment by one of the parties; the objection to its admissibility in this action is that it is *res inter alios acta*, but it is a step in the case; it is a fact shewing that after Messrs. Saxby & Farmer had made a claim they had admitted they had no claim. It was, therefore, evidence of payment. It was evidence that the cheque or money sent for the account which had been rendered reached Messrs. Saxby & Farmer, the parties to whom it was sent, consequently, even if the cheque and receipt be treated as mere pieces of paper there was still evidence of payment.

gan Lloyd and Lewis, in support of it.—The receipt was not admissible in evidence. If evidence had been given Messrs. Saxby & Farmer had said or written to any one that they had been that would not have been admissible, the receipt in effect amounts to no more.

BERR, J.—Would the cheque have been admissible in evidence?]

It might have been admissible as evidence of the fact, and had it been shewn to have been honoured it probably would have been admissible as evidence of payment. Had Messrs. Saxby or their cashier at the trial that they had received the money either in coin or by cheque which had been honoured it would have been evidence of the fact of it, but if instead of giving such evidence they had written anything to that effect, and such writing was produced at the trial such writing would not have been admissible as being only an admission by a third party, not party to the transaction.

It is no answer to the objection that from the receipt there was evidence of the payment, for, as stated in *Evidence*, 5th ed. p. 1,598, "The admissibility of evidence will not be less available ground for a new verdict although the jury accompany the verdict with a distinct and positive opinion that they have arrived at it in spite of the obnoxious evidence;" this is cited *Bailey v. Haines* (1).

BERR, J.—I so far agree with Mr. Lloyd that I think that the receipt is *inter alios acta*, and therefore that to retain the verdict had rested on the receipt, I should have thought that Morgan Lloyd had made out his case that he was entitled to a new verdict, however, that there was evidence of payment without production of the receipt, and that the receipt had nothing to do with the case.

I therefore think that the case should be discharged, but I own I am in opinion with considerable doubt.

BERR, J.—I agree in holding that

there ought to be no new trial. The issue which was raised between the parties was whether the plaintiffs had paid a certain sum claimed as expended by them on signals at the Pencador Junction, as if they had they were entitled to recover the same from the defendants. I agree that it was incumbent on the plaintiffs to prove that they had paid this sum before they could recover it from the defendants, and the question is whether at the trial they did prove such payment, and I think they did. I agree with my brother Grove that if the receipt was produced for the purpose of making its contents alone evidence of payment it was not admissible, because it would be only the declaration of a third person as to the evidence of a fact. But in considering the question whether there was evidence of payment we must take the whole of the evidence. Now it appears that on the 25th of February last the plaintiffs sent to Messrs. Saxby & Farmer a cheque, and that before that cheque was sent they received a written claim from Messrs. Saxby & Farmer amounting to 97*l.* 15*s.* 11*d.* The admission in evidence of that written claim was not objected to at the trial by the defendants. The cashier and proper representative of Messrs. Saxby & Farmer was called, and he said, "I received that cheque, and thereupon I sent a receipt to the plaintiffs." Then the plaintiffs produced the receipt and said, "That is what we so received from Messrs. Saxby & Farmer." It appears to me that these are all so many mercantile facts connected with the payment, and that as such they might be given in evidence, and that it was not necessary to give the contents of the receipt. The receipt was put in evidence, and in the way the payment had been proved was by the contents of such receipt it might have been open to objection, but that was not so. There was, I think, abundant evidence to go to the jury of payment and the verdict was right.

BERR, J.—The question raised here is whether the receipt was properly received in evidence, and further, as it was said, whether as evidence of payment. I apprehend, however, that it was not offered or received in evidence as the sole evidence of payment, but only as evidence

in conjunction with other facts. If this receipt had been offered in evidence as a receipt *simpliciter*, I should have thought it was offered as the admission of the party who had signed the receipt, and therefore no more admissible in evidence than the admission would have been of any third party not a party to the cause. But the fact which had to be proved was the payment by the plaintiffs to Messrs. Saxby & Farmer of a certain sum at a certain day. That is an ordinary mercantile transaction, and would consist of certain facts. Supposing the payment was between persons not parties to the cause, the proof of such payment would be given by calling as witnesses the persons who paid or received the money, and they would prove that fact, and the objection that this was *res inter alios acta* would be equally applicable to the admissibility of such evidence as to the evidence now in question, but it would not prevail and such evidence would be receivable because it would be evidence of a fact. In mercantile transactions the mode of payment is more commonly otherwise than by the passing of hard money from one to the other, and it is more frequently by a cheque. Here the mode of payment was not by the parties meeting and the one then paying to the other, for that did not happen, but by one sending a cheque to the other, and by the other returning a receipt. The fact of payment consisted, therefore, of two facts, namely, the sending of the cheque and the sending of the receipt. The sending of the cheque was proved by the secretary of the plaintiffs who proved he sent it by post on the 25th of February. Then the person who received it, the cashier of Messrs. Saxby & Farmer, was called and said he received the cheque and did the other mercantile fact, acknowledged the payment, and accordingly he sent the receipt. If the cheque had been put in, so equally might the receipt have been put in, and the receipt cannot be the less admissible in evidence because the cheque not being produced was not put in. In my judgment both the cheque and receipt were admissible to prove the facts, the persons who sent and received them being in Court and examined as witnesses. The receipt was in my opinion admissible,

not as the sole evidence of payment, but as one of the facts that constituted the payment.

BOVILL, C.J.—I regret that I am compelled to differ from the opinion formed by my learned brothers in this case. It is quite clear that a receipt by a third person would not ordinarily be admissible as evidence of payment. The familiar cases as to this are those in actions against sureties in which it has been sought to prove admissions by the principal of the receipt of the moneys for which the surety is sued, and such admissions have been always held inadmissible as against the defendants in such actions. For this I refer to *Evans v. Beattie* (2), and *Smith v. Whittingham* (3), and without citing other authorities I may add the results of my own experience that a receipt signed by a principal would not be evidence in an action against the surety; that being so the receipt in the present case was, as it seems to me, offered and received at the trial as evidence of payment, and was therefore not admissible. Then if it was not properly admissible according to the ordinary rule, the defendants are entitled to a new trial, and the plaintiffs must take the consequence of producing evidence which is not admissible. No doubt there was other evidence of payment, but the plaintiffs were not content to rely on that. There was no evidence of the amount of the cheque, and the receipt was produced to shew that, and I cannot conceive on what other principle it was received. Assuming there was other evidence of payment, still the jury having found their verdict as to the payment on that evidence it must follow the ordinary rule when inadmissible evidence has been received, and the defendants are, I think, entitled to a new trial, but I do not regret the result will be otherwise, as the point is one which has nothing to do with the merits.

Rule discharged.

Attorneys—Woodroffe & Plaskitt, for plaintiff;
G. E. Spencer, for defendants.

(2) 5 Esp. 26.
(3) 6 Car. & P. 78.

[THE EXCHEQUER CHAMBER.]

real from the Court of Common Pleas.)

3. } WARD v. THE GENERAL OMNIBUS
20. } COMPANY.

Master and Servant—Evidence of Negligence of Servant in his Employment.

The fact that a passenger in an omnibus struck by the driver's whip is *prima facie* evidence of negligence by the driver in the course of his employment; and even if it is shown that the blow was struck at the service of another omnibus with whom there had been a dispute, and who had jumped out of the omnibus step to get its number, it is still evidence for the jury whether the blow was struck by the driver in private spite or in the furtherance of his employer's interests.

There was an appeal from a decision of the Court of Common Pleas in refusing to set aside a verdict for the plaintiff on the ground of there being no evidence of negligence by the defendants' servant striking them liable.

The case was very loosely stated but the result (as will appear from the judgments) seemed to be this. The plaintiff, a passenger in the defendants' omnibus, and whilst sitting near the door was struck by the driver's whip in his hand injured, and a letter was set out which suggested that there had been a quarrel between the servants of the defendants' omnibus and those of a tram-car, that one of the latter had jumped out of the step of the defendants' omnibus to get its number, and that the blow was struck at him, but it was not shown whether the letter was in evidence or not.

Talfourd Salter with him), for the appellants.—There was no evidence of an act of the servant in the course of his employment. The case of *Limpus v. The London General Omnibus Company* (1) governs the present case. Here the facts were so uncertain that there was no definite evidence for the jury, and

it was consistent with it that the driver struck in a private quarrel, and if so the master is not responsible. The act was wilful and the Court cannot make a distinction because the wrong person was struck, and the act cannot be wilful as respects one person, and only negligent as to another. Unlike *Limpus' Case* (1) here the act was not done to further the master's interests.

Holker (*Udall* with him), was not called on for the respondent.

KELLY, C.B.—The facts are so loosely stated that it is difficult to get a definite view of them. But I think there was evidence of negligence by a servant connected with his duty. The facts on which I rely, for I take the letter to be in evidence, are that the omnibus was before the tramway car, that a quarrel arose between the officials of the tramway car and omnibus, and that one belonging to the tramway car got on the steps of the omnibus to get the number. If the omnibus driver thereupon whipped at him to drive him down, this opens a question for the jury whether he did so to protect himself or his employers against a charge being brought, and though the former is more probable, still the other conclusion is possible and reasonably probable, and if the latter were the case and the driver was so negligent as to hurt a passenger I think he was guilty of negligence in the performance of his duty. Under these circumstances, if it were left to the jury to say whether the driver was acting as well for his employers as himself, this would be unobjectionable and the jury might find he was.

MARTIN, B.—I am of the same opinion. I agree with *Limpus v. The London General Omnibus Company* (1), but that was a pure case of tort, whilst here there was a contract to carry the plaintiff safely (and in such case it is the same whether the action be in tort or contract), and I think that an injury from the driver whipping behind is one within the contract.

BLACKBURN, J.—The question comes before us in a form most unfavourable for the defendants, because the verdict must stand if it be possible to find evidence of negligence in the employment to go to the

1 Hurl. & C. 526 ; s. c. 32 Law J. Rep. Exch. 34.

W SERIES, 42.—C.P.

jury, and the question is if there be sufficient for the jury. A master is responsible for his servant's act in his business though the servant be excited by drink or passion, but if the servant act for private spite (and I agree with my brother Martin it does not matter whether the action be in contract or tort), if the act be done so as to divest him of his character as servant, the master is not responsible. In the present case there was a quarrel and the servant was irritated, but the jury might find he was acting in the course of his duty, or entirely for his own purposes and in the former case find one way, viz., for the plaintiff, in the latter case the other way, viz., for the defendants.

CLEASBY, B.—The question is whether it is a necessary conclusion that the act was not done by the driver in his character of servant. If the quarrelling had been at the side of the omnibus it might appear to be wholly apart from his service, but here the tram car servant was on the steps of the omnibus, and we cannot say it is impossible that the driver availed himself of this to justify his act, and if so the verdict should be clearly for the plaintiff.

QUAIN, J.—I am of the same opinion. Take it that there was no letter, then the fact of the plaintiff being struck was *prima facie* evidence of negligence; that cannot be denied. Now take it that the letter was true, it is said this qualifies the *prima facie* evidence, and makes it no evidence for the jury, but the contention fails because, taking it to be true, it is not such a clear explanation of the *prima facie* evidence, shewing that the blow was struck only in a private quarrel and not to drive the tram-car servant from the step, as to prevent there being evidence for the jury. What the proper conclusion ought to be is another matter.

ARCHIBALD, J.—The case is meagre, and the question is if there was evidence of negligence by the driver in the course of his employment. The mere fact of the injury if unexplained would be evidence of such negligence, and if it stood alone would be some evidence for the jury. Is it then cut down by the letter, and does the letter shew that this was only a private quarrel?

We cannot so conclude absolutely, and therefore there was reasonable evidence for the jury.

Judgment affirmed.

Attorneys—Stephens & Co., for appellants.

1873.
Jan. 22 & 23. } CATER AND OTHERS v. THE
July 7. } GREAT WESTERN INSURANCE
COMPANY OF NEW YORK.

Marine Insurance—Separate Packages
—Damage to some Packages by Sea water
—Damage to others from Suspicion and Prejudice.

By a marine policy of insurance the insurance was described to be "on 1,711 packages teas," valued at one sum, on a voyage from New York to London, by a certain ship warranted by the assured free from damage from dampness, change of flavour, or being spotted, or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils." In case of partial loss by sea damage to certain goods, not including tea, "the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, as far as practicable." The ship met with very bad weather during the voyage, and 449 of the 1,711 packages of the tea were seriously damaged by actual contact of sea water. The rest of the packages arrived sound and in good condition, except by the injury to their reputation from having formed part of a shipment of which 449 packages had been damaged by sea water, and which was the cause, as was usual in such cases, of these packages, though sound and uninjured, not realising so high prices as they would have done if the 449 packages had not been damaged by sea water:—Held, that the packages insured by the above policy were divisible, and that the assured was entitled to recover only in respect of the 449 packages which were actually damaged.

Held also, that the loss in value of the goods depended on their value at the time

ir arrival at the port of destination, at the time of sale, and the under- were therefore not liable for a fall market price between such arrival and time of sale.

on upon a policy of insurance. The first count of the declaration set out was effected by the plaintiffs with the agents at New York, which was in the usual American form, and different from that of a Lloyd's policy. By this the insurance was described to be for not lost at and from New York London, on 1,711 packages teas, upon goods of lawful goods and merchandise or to be laden on board the ship *Eurydice*." The said goods were valued at the sum insured, viz., 5,000 dollars, which was equal to 6,255*l*. and the perils insured were described to be "of the seas, winds, waves, storms, shoals and coasts, collisions with other vessels, fires, jettisons, loss by thieves, robbers or assailing thieves, barratry of the master and mariners, and all losses and misfortunes that have or may come to the hurt, detriment or damage of the said goods or merchandise in any part thereof, occasioned by the perils, subject, however, to such terms and rates of averages as may be contained in the memorandum in this behalf made." There was the following warranty: "Warranted by the assured free from damage or injury from dampness, rot, or mould, of flavour or being spotted, discoloured, musty or mouldy, except caused by actual contact of sea water with the goods, damaged, occasioned by sea perils. In the event of partial loss by sea damage to the goods, cutlery or other hardware, the loss shall be ascertained by a separation of the portion only of the contents of the packages so damaged and otherwise, and the same practice shall be observed as to all other merchandise, as far as practicable."

There was also a memorandum as to the specified goods, but not including any warranted free from average, in general, "On risks from China on packages of silk or other dry goods in the order of invoice, subject to

separate average. Each interest of 5,000 dollars insured value or less subject to separate average. If over 5,000 dollars value, each of the following kinds of teas — imperial, gunpowder, hyson, hyson skin, young hyson, and black teas, and each 5,000 dollars value thereof, in the order of invoice, subject to separate average, and the different excesses over 5,000 dollars subject to average if the damage amount to 250 dollars. The count alleged that the goods insured were loaded on the said *Eurydice*, and that that vessel departed upon the said insured voyage with the said goods, and that during such voyage the said goods were by the perils insured against damaged, injured and lost. General performance of all conditions to entitle the plaintiffs to be paid a sum of money on account of such loss, and breach nonpayment of such sum. There was a count on the suing and labouring clause, and lastly the common money counts.

The defendants paid into Court 660*l*., and pleaded that the same was enough to satisfy the plaintiffs' claim.

The facts are shortly these—

The plaintiffs, who are merchants in London, and who also carry on the business of merchants at New York, under the firm of Aymar & Co., purchased and shipped at New York, in January, 1871, a parcel of Oolong tea, consisting of 1,711 packages by the *Eurydice*, and consigned to their house in London. The policy on such tea, which is the subject of the action, was effected in New York, but was made payable in England. The *Eurydice* was a general ship, and the tea in question formed only a portion of her cargo. She sailed from New York on the 17th of January, and met with such bad and stormy weather that her hatches were knocked off, and very considerable damage was done to her cargo by a quantity of sea water which she took in. She however arrived at London with her cargo on the 10th of February. The tea was duly discharged and taken to St. Katherine's Docks, when it was ascertained that out of the 1,711 packages or chests, 449 were seriously damaged by actual contact with sea water, and that the remaining 1,262 chests were in sound and good con-

dition, though 123 of them were said to have lost their aroma or flavour, owing to the dampness to which they had been exposed; but as no part of such 123 were affected by actual contact of sea water, they were not excepted from the warranty by the assured against injury from dampness or change of flavour. Still, owing to the 123 being so affected, the proportion of what was damaged was considered by the plaintiffs' brokers to exceed a third of the whole 1,711 packages; and therefore, according to the usage of the trade in such case, the whole 1,711 were sold by auction, with all faults, instead of separating the damaged from the undamaged, and selling them accordingly separately. This usage is adopted as the best practical mode of selling the tea in such a case, inasmuch as the chests in which the tea is brought are usually marked with consecutive numbers, and if in the sale any intermediate number be left out, or if some of the chests be described as damaged, it prejudices the sale of the rest, which, though perfectly sound and good, does not realise so great a price as it would otherwise; and therefore in the result there is not much difference between so selling the whole with all faults, and selling separately the damaged and undamaged, which would necessitate the examination of each chest minutely, and be a work of great difficulty and time.

It appeared, moreover, in the present case, that the tea covered by the policy, besides being in chests consecutively numbered, was divided into chops, the 1,711 chests consisting in fact of 10 chops, each of which had its distinguishing name and mark, indicating the particular kind of tea of which it was composed. The tea was sold on the 7th of March, 1871, for 4,156*l.* 17*s.* 1*d.* If the tea had not been damaged, it could have been sold on the arrival of the vessel for about 6,000*l.* The loss of the difference between this and what it in fact was sold for was sought to be recovered in this action. The sum paid into Court by the defendants covered the loss sustained by the damage to the 449 packages. The loss which the rest of the tea sustained was partly owing to the prejudice arising from its

having formed part of a shipment in which some of the chests were damaged by the sea water, and partly from a fall in the market between the day of the arrival of the vessel and the day of sale.

The cause was tried before Bovill, C.J., at the London Sittings after Trinity Term, 1872, when a verdict was directed to be entered for the defendants, with leave to the plaintiffs to move to set it aside, and to enter a verdict for the plaintiffs, the Court having power to draw all proper inferences from the evidence, and to send any question of damages to an arbitrator. A rule *nisi* to that effect was accordingly obtained, on the ground that the plaintiffs sustained damage beyond the amount paid into Court by reason of depreciation and injury to the whole parcel of tea by actual contact of part with sea water.

O. Russell, Benjamin and Cohen shewed cause.—The policy of insurance in terms excludes the present claim and narrows the risk to sea damage from actual contact of the sea water with each of the parcels which are separable, and indeed separated. *Montoya v. The London Assurance Company* (1), *Thompson v. Hopper* (2), 1 *Parsons on Insurance*, 546; 2 *Arnould on Insurance*, 2nd ed., 830; 2 *Phillips on Insurance*, s. 1,466. No doubt *Ralli v. Janson* (3) and *Entwistle v. Ellis* (4) shew that the goods in a case as this cannot be separated where there is a memorandum article, but the decisions depend upon that, and do not apply here, and for measuring damages the goods may be divisible. Even under an ordinary policy, if "tea" only had been insured the goods would be separable, though something might be urged the other way, but certainly they would if the term "packages" were used; and this is the case here, for the policy is express and clear, and though the warranty is not

(1) 6 Exch. Rep. 451; s. c. 20 Law J. Rep. (N.S.) Exch. 254.

(2) 1 E. B. & E. 1038; s. c. 27 Law J. Rep. (N.S.) Q.B. 441.

(3) 6 E. & B. 422; s. c. *nom. Janson v. Ralli*, 25 Law J. Rep. (N.S.) Q.B. 300.

(4) 2 Hurl. & N. 549; s. c. 27 Law J. Rep. (N.S.) Exch. 105.

tly applicable, it throws a light
he rest of the policy, and affects its
pretation.

J. Karlake and Watkin Williams,
upport of the rule.—The goods are
separable—*Ralli v. Janson* (3), *Ste-*
son Insurance, 338, s. 8. The ques-
is, what was insured, and here the
ct matter was the whole, and damage
done to the whole, which became of
commercial value. Even under an
ary Lloyd's policy this damage
d be recoverable. And as respects
resent policy the argument on the
side is that a special clause which
not apply, is to affect the policy.
only part of the warranty which
es is the first part, which was in-
l to prevent liability for dampness
had passed through another article,
he word "article" means the sub-
natter insured, which was the tea
e parcel; and this had here been
ntact with the water and received
nmercial damage in its entirety,
was within the exception to the
nty. It is really a question of fact
er the injury to the part did not
viate the value of the whole. It
be a wrong prejudice, but if it does
preciate the value of the whole the
d is entitled to recover, for the
d is to be put in the same condition
would have been in if the goods had
d free from damage—*Lewis v. Rucker*

Then the proper time for esti-
g the loss, in the present case, was
ne when the teas were sold, and not
the vessel arrived, because the delay
from the damage which the pack-
ad received from the sea water,
necessitated an unpacking and re-
g of some of the teas.

Curr. adv. vult.

judgment of the Court (6) was
ly 7th) delivered by
LL, C.J.—The policy in this case
on 1,711 packages teas," by the
ce, at and from New York to
a, valued at the sum insured, viz.,
dollars, and after enumerating the

usual perils covered by the insurance,
contained the words, "and all other losses
and misfortunes that have or shall come
to the hurt, detriment or damage of the
said goods and merchandises, or any part
thereof, occasioned by sea perils." There
was a special warranty in the following
terms—"Warranted by the assured free
from damage or injury from dampness,
change of flavour, or being spotted, dis-
coloured, musty, or mouldy, *except caused
by actual contact of sea water with the
articles damaged occasioned by sea perils.*
In case of partial loss by sea damage to
dry goods, cutlery, or other hardware, the
loss shall be ascertained by a separation
and sale of the portion only of the contents
of the packages so damaged, and not other-
wise; and the same practice shall obtain as
to all other merchandise, as far as prac-
ticable."

The term "dry goods," it was agreed
on the argument, would not include or
apply to tea.

There were also special warranties
against partial loss or particular average
under 5 per cent., and other special
warranties against average as to different
goods, unless general or over a certain
rate per cent.; and then came the follow-
ing clauses: "On risks from China, each
ten packages of silk or other dry goods in
the order of invoice subject to separate
average. Each interest of 5,000 dollars
insured value, or less, subject to separate
average. If over 5,000 dollars value, each
of the following kinds of teas, imperial
gunpowder, hyson skin, young hyson, and
black teas, and each 5,000 dollars, value
thereof in the order of invoice, subject to
separate average; and the different ex-
cesses over 5,000 dollars, subject to
average if the damage amount to 250
dollars."

The declaration averred that the goods
were damaged, injured and lost by the
perils insured against.

This tea formed a portion only of the
cargo of the *Eurydice*, which was loaded
as a general ship.

In the course of the voyage the vessel
met with bad weather, and shipped large
quantities of sea water, by which various
portions of the cargo were damaged, and
amongst others 449 packages of this tea,

Burr. 1167.

ovill, C.J.; Keating, J.; and Brett, J.

which were stowed in different parts of the ship, were greatly injured by contact with sea water; the remainder of the teas, viz., 1,262 packages, arrived in a perfectly sound and good condition, and uninjured, except by the injury to their reputation from having formed part of a shipment of which 449 packages had been damaged by sea water. The full amount of the damage to the 449 packages was paid into Court.

The shipment consisted of several different kinds of tea, each of which was distinguished as a chop of a certain name and mark; and all the chests were numbered consecutively. There were altogether ten different chops, and which at the sale were divided into thirty-five breaks. The 449 packages that were damaged by sea water were portions of different chops, and formed parts of the series of consecutive numbers on the chests.

When teas are sold, they are usually sold in the order of the consecutive numbers marked on the packages; and, if the numbers be broken by some being omitted, or if some of the chests are marked as damaged, a suspicion is created that the other packages may be affected, and those other packages, though perfectly sound and uninjured, do not realise so high prices as they would have done if none of the packages had been damaged.

In the present instance the teas were sold in the usual way; but, in consequence of the suspicion created by the damage to so large a number as 449 packages, and the prejudice arising from that circumstance to the rest of the teas, the 1,262 sound chests did not fetch so much as they would have done if the 449 had not been damaged by sea water; and the difference in price upon the 1,262 sound chests from this cause amounted to a very considerable sum, which was to be settled by an arbitrator, if necessary. The plaintiffs sought to recover this sum as a loss which was caused by the perils insured against, and contended that the whole shipment was to be considered and treated as one entire subject-matter.

The defendants, on the other hand, contended that they were liable only for such of the packages, viz., the 449, as

were in fact damaged by sea perils; that, for the purpose of ascertaining such damage, the packages must be considered as divisible; and that injury to the reputation of the teas from suspicion only, when the teas were in fact sound and had not been injured, was not a matter covered by the policy.

There were other questions raised at the trial, but which from the findings of the jury have now become immaterial. The Court were to draw such inferences of fact as the jury should have drawn.

The case was argued very elaborately, and with considerable ability; but the plaintiffs failed to produce any authority to shew that goods which arrived perfectly sound and uninjured could be deemed to be damaged or injured by sea perils. The strongest case in their favour was *Montoya v. The Royal Exchange Insurance Company* (1), where hides and tobacco having been insured, and shipped in the same vessel, which sustained damage, the sea water had affected the hides, and caused them to ferment and decompose, and the stench which was thus created had affected the flavour, and consequently the value, of the tobacco. In that case, the tobacco itself was actually injured; and the only question was whether the injury arose proximately from the sea water; and it was held that it did, and that the underwriters were therefore liable for the actual damage to the tobacco. But the present case seems to us to be distinguishable, on the ground that here there was no damage whatever to the 1,262 packages of tea, which arrived perfectly sound and untouched, and altogether unaffected by the sea water.

The insurance is against damage to the goods, and not against loss to the assured otherwise than by reason of damage to the goods themselves. The plaintiffs, however, contended that the whole 1,711 packages must be treated as one indivisible and entire subject-matter, so that a damage by the perils insured against to any part of them would be an injury to the whole, if it affected the value of the whole. It seems to us that this contention is not borne out. A shipment of this kind is not like an entire article, such as a machine, where, one part being injured

stroyed by sea perils, the machine becomes changed in character and comparatively useless. The writers insure against damage to goods by the perils insured against; they do not, in our opinion, insure against damage by prejudice or suspicion, but such prejudice or suspicion be able and be general in fact in cases, when there is no damage in fact to the goods themselves; and, if this were to be so construed, it would leave them insurers, not only against damage to the goods insured, but also damage to other goods in the ship, affecting the credit and therefore the value of the goods insured, and create indirect and collateral and potential liabilities from suspicion or prejudice which it would be almost impossible for the underwriters to estimate, fixing a premium proportionate to the risk.

Huff v. Mackenzie (7), it was held under a policy on "master's effects at 100*l.*, free from all average," insurance must be treated as divisible, so that the master might recover for a loss of part of his effects, although the whole were included under the term "effects." So, in *Wilkinson v. Smith* (8), where the insurance was for goods so valued, against total loss only, the goods were considered as one, and the assured was held entitled to recover for a total loss of part of the goods.

In the case of *Ralli v. Janson* (3) was relied upon by the defendants; but the decision there turned entirely upon the terms and effect of the warranty in the policy, and not against average unless so stated; and it was held that the memorandum was intended to include the effect of the particular species of goods, and, whether shipped in bulk or in parcels; that decision does not, in our opinion, govern the present case.

The insurance here is on 1,711 packages valued at one sum; and, if each package had been separately enumerated,

it would scarcely have made them more distinct. Even if they had been insured simply as "tea," or as "goods," if they were in fact contained in separate packages, we should still have thought that, for the purpose of calculating or ascertaining the extent of the sea damage, they would be divisible, and that the plaintiffs could have recovered only in respect of the damage done to those packages which were actually damaged by sea perils.

The special terms of the present policy, however, seem to us to be still more favourable for the underwriters than the terms of an ordinary policy. It expressly excludes direct actual damage or injury from dampness or change of flavour, &c., except caused by actual contact of seawater with the article damaged, occasioned by sea perils; and it could scarcely, therefore, have been intended that the underwriters should be liable for what was not actual damage, but mere suspicion, and so indirectly an injury, not to the goods, but to the pecuniary interests of the assured. After providing that in case of partial loss by sea damage to dry goods (which does not include tea), cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise, the policy goes on to provide that the same practice shall obtain as to "all other merchandise as far as practicable." These last terms would, in our opinion, include the tea in question, and tend strongly to shew that the intention was that the subject-matter of the insurance was not to be treated as entire and indivisible. It might well be contended that the language of the policy would seem to indicate that not only each package was to be treated separately, but that even the contents of each package might be separated so as to confine the loss to the exact portions of tea that were actually damaged by sea perils. The defendants, however, have not relied upon this last construction of the warranty, but have paid into Court the full loss upon the 449 packages, without attempting to separate the contents of each of these packages. The special average warranties, at different rates, on different kinds of goods, and the differ-

Com. B. Rep. N.S. 16; s. c. 26 Law J. C.P. 312.

Com. B. Rep. N.S. 30; s. c. 27 Law J. C.P. 116.

ences of classification and average in this policy, seem also to shew that it was never intended that the 1,711 packages should be treated as one entire and indivisible subject-matter of insurance; and, if not, then there is no practicable division of the packages, except by treating each package as a separate article.

The whole shipment consisted of several different kinds or chops of tea; and, could it have been successfully contended that if only half the chests in any particular chop had been damaged or lost, and the consecutive numbers of the chests in that chop thereby interfered with, each chop could be considered as a separate subject-matter of insurance, and that the plaintiffs could have recovered for the injury to the reputation and consequent loss in price of the rest of the chests in that chop? Or, suppose the policy had been on 1,711 packages of tea at one valuation "by ship or ships," and part had come in one vessel and part in another, could it have been said that sea damage to the packages in one ship, whereby the continuity of the numbers was destroyed, was an injury to the packages in another ship, which sustained no damage? and yet there would be an injury by suspicion and to the reputation of the teas by the numbers not being consecutive, and caused remotely by sea perils.

If such a claim as this could be supported, it might next be contended that the underwriters would be responsible if the reputation and value of sound teas were affected by a serious damage to the ship, or to other persons' goods in the same ship which were damaged by seawater, or for the loss of markets by delay through the perils of navigation.

It appears to us that the underwriters insure against actual damage, and do not in any sense guarantee that the goods shall arrive free from suspicion of damage. In like manner a shipowner was held to guarantee only the fitness of his vessel for a cargo of tea, but not that the ship should be free from *suspicion* of unfitness for such a cargo.—See *Towse v. Henderson* (9).

Each package of this shipment was separate, and in fact as distinct and separate from the others as if it had contained a different article—each might and would be subjected to different risks according to its position and stowage in the vessel; and, where the packages are severable, they ought to be severed. As far as we are aware, the practice in such cases has been to separate the sound packages of goods from those which are damaged, and to allow the claim for damage upon those only which are actually damaged by sea perils. That practice is supported by the passages which were cited from Mr. Arnould's valuable work on Insurance, 3rd ed. p. 836, and the authorities to which he refers; and Mr. Stevens, in his book upon Averages, at pp. 157, 158, clearly considered that a consequential loss upon goods which arrived sound, by reason of the breaking of an assortment, was not a loss for which underwriters were responsible, there being no actual damage done to the goods themselves. In our opinion that is the correct view of the law.

A further point was raised by Mr. Williams at the close of the case as to the fall in the market-price after the arrival of the vessel and the valuation of the damaged teas, and before the actual sale of them. But the underwriters have nothing to do with the mode or time of sale, and are not responsible for a fall in the market-prices; their liability depends on the value of the goods upon arrival; and the defendants have paid into Court the full amount for which they are liable upon that footing.

Upon the true construction of the policy we think the plaintiffs are entitled to recover only in respect of the 449 packages which were actually damaged; and as the amount of that damage has been paid into Court, our judgment is in favour of the defendants.

Judgment for the defendants.

Attorneys—Thomas & Hollams, for plaintiffs;
Field, Roscoe, & Co., agents for Bateson & Co.,
Liverpool, for defendants.

(9) 4 Exch. Rep. 896; s. c. 19 Law J. Rep. (N.S.) Exch. 168.

3. } GIBBS v. CRUIKSHANK AND
27. } OTHERS.

*Replevin—Recovery in, a Bar to Action
in taking—Mortgagor—Tenant
at Sufferance.—Trespass.*

*Judgment for the plaintiff in replevin
in an action for damages for the
taking of the goods in respect of
the replevin was brought.*

*Tenant of a mortgagor, whose tenancy
terminated after the mortgage, and has
been recognised by the mortgagee,
maintain trespass against the mort-
gagor for entering and distraining on the
premises under the powers of the mortgage.*

The first count of the declaration was
for taking and entering a shop and
dwelling-house of the plaintiff, and re-
moving and carrying away the fixtures
and goods of the plaintiff therein, and ex-
posing the plaintiff and his family from
possession of the said dwelling-house;
alleged, by way of special damage,
thereby the plaintiff was hindered
in carrying on his trade of a baker,
and was believed to be insolvent, and was
incurred expenses in and about replevying
the goods, and in obtaining bail for the
plaintiff and in and about endeavouring to
recover possession of the same. The second
count was for seizing and taking the
plaintiff's goods, and impounding and
detaining them impounded.

The defendants pleaded, *inter alia*, not
guilty, that the plaintiff was not pos-
sessed of the said shop and dwelling-
house, and fourthly, to the declaration,
as relates to the goods mentioned
in the first count and the goods mentioned
in the second count, that the plaintiff,
before the accruing of the said causes of
action, brought an action of replevin
against the now defendants in the County
of Middlesex, holden at Brentford,
obtaining jurisdiction in that behalf,
and therein claimed 50*l.* for damages sus-
tained by the plaintiff, and such proceed-
ings were had in the said action, that
before and before this suit, on the
10th of August, 1872, by the judgment of
the Court, the plaintiff recovered
of the defendants 2*l.* 8*s.* 6*d.* for da-
mages adjudged by the said Court in the
said action, 42.—C.P.

said action to the plaintiff, as by the said
record thereof yet remaining in the said
County Court more fully appears, which
said judgment still remains in force, and
not reversed or annulled, and which said
action was so brought, and which said
judgment was so recovered, and which
said damages were so awarded and ad-
judged to the plaintiff for and in respect
of the same identical causes of action
herein pleaded to.

The plaintiff both demurred and took
issue on this fourth plea, and the cause
was tried before Denman, J., at the Mid-
dlesex Sittings in last Hilary Term, when
it appeared that the defendants were the
trustees of a building society, to whom
one Thomas Parsons had mortgaged the
dwelling-house and premises mentioned
in the declaration for 490*l.*, which he was
to repay to the society by monthly pay-
ments, and the society was to have the
right to enter and distrain, as upon a
common demise, for the nonpayment of
these payments. Subsequently to such
mortgage Parsons let the premises to the
plaintiff, and 38*l.* 11*s.* 10*d.* being after-
wards due from Parsons to the society
under the mortgage, the defendants en-
tered upon the premises, and distrained
thereon for the amount so due, claiming
for that purpose the same rights as land-
lords. The plaintiff thereupon reple-
vied, and the replevin suit was tried in
the Brentford County Court, when the
Judge of that Court decided that the
defendants had no such right to distrain
as claimed, since Parsons was no tenant,
but simply in the position of mortgagor in
possession, and the mortgage deed only
authorised the seizure of Parsons' goods;
and the Judge accordingly gave judg-
ment for the plaintiff in the replevin suit
for 2*l.* 8*s.* 6*d.*, the amount of the Court
fees in respect of the replevin bond.

It was contended that the plaintiff had
recovered no damages, and that there-
fore the judgment in replevin was
no bar to the present action, in which
there was a claim for damage both in
respect of the seizure of the goods and
also in respect of the trespass to the land.
By the direction of the learned Judge, a
verdict was entered for the defendants,
with leave to the plaintiff to move to

enter a verdict for 20*l.*, the agreed amount of damage in respect of the taking of the goods, and 20*l.*, the agreed damage in respect of the entry on the land. Pursuant to such leave a rule *nisi* to that effect was obtained on the ground that the plaintiff was entitled to damages in respect of the goods, although he had recovered in replevin, and in respect of the trespass to the land on the ground that the plaintiff was in lawful possession, and his right thereto was undetermined. The Court was to be at liberty to draw inferences, and the demurrer was to be argued with the rule.

Herschell and *Murphy*, for the defendants.—The rule should be discharged, and judgment should be given for the defendants on the demurrer. With respect to the taking of the goods, the recovery in replevin is a bar. In *Comyn's Digest*—"Action" (K 3), it is stated, "A recovery in replevin is a bar in trespass for the same taking," citing *Theilwall's Digest*, l. 11. c. 38. s. 39, and 14 H 7-12 b. The case of *Pease v. Ohaytor* (1) is also an authority that a judgment in replevin is a bar to the recovery of damages for the same seizure in respect of which the replevin was brought. Whether more damages can be recovered in the replevin suit than the costs of the replevin matters not; the plaintiff had the election at the time of proceeding by replevin or by action of trespass, and having elected to replevy, by which he got the goods returned to him, he cannot afterwards maintain the present action for the same taking.

[BOVILL, C.J., referred to *Roscoe on Real Actions*, p. 642.]

Then as to the entry on the land, it is clear that the defendants as mortgagees had a right to enter, both as against Parsons and as against the plaintiff who claimed under Parsons. The plaintiff was merely a tortfeasor as against the defendants, and the defendants were entitled to a verdict under the plea, denying the plaintiff's title to the house and land.

Charles Russell and *Foard*, for the plaintiff.—If the taking of the goods was wrongful, as it was decided to be in this case by the County Court Judge, then there is nothing to make the judgment in such replevin a bar to an action of trespass to the land. Therefore, supposing the recovery in replevin to be a bar to the present action as to the goods, it clearly is not such bar to it as to the land, and the plaintiff at all events is entitled to a verdict for the agreed 20*l.* as to the entry on the land. It is said the plaintiff is a tortfeasor as against the defendants, but they entered for rent and distrained, and thereby acknowledged his right to the possession. The plaintiff had a sufficient possessory title to maintain trespass. Then as to taking the goods, the recovery in replevin is no bar to an action for the special damages which the plaintiff sustained by such taking. No question as to special damage ever arises in the action of replevin, and as they are never recoverable in such action they may be recovered afterwards. In *Mayne on Damages*, 2nd ed., p. 319, it is said that in an action of replevin, "should a verdict be found for the plaintiff, the jury assess the damages as in an ordinary action of trespass. Unless special damage is laid they are generally only costs of the replevin bond, and in practice were, before 19 & 20 Vict. c. 108, always assessed at 2*l.* 2*s.* in London, Middlesex, York and some other places; 2*l.* 10*s.* elsewhere;" and in a note to this passage there is the following: "It is doubtful whether special damages arising from an injury to the goods by defendant or otherwise can be recovered — *Connor v. Bentley* (2) (see *Ognell's Case* (3), *Atkinson v. Nesbitt* (4), and cases there cited"). There are cases in *Com. Dig.*, title *Action*, L. 4, in which recovery in one action has been held no bar to another action, "as a recovery in trespass, *quare cepit et abduxit oves*, and second, damages is no bar in trover for the same sheep, if the plaintiff replies that the recovery in trespass was only for the taking away and not for the

(1) 1 B. & S. 658; s. c. 31 Law J. Rep. (N.S.) M.C. 1; 3 B. & S. 620; s. c. 32 Law J. Rep. (N.S.) M.C. 121.

(2) 1 Jebb & S. Ir. Rep. 246.

(3) 3 Leo. 213.

(4) 9 Ir. Law Rep. 271.

value of the sheep—*R. Cro. Car.*, 36; nor in replevin for the same beasts, if it be so replied—3 *Lev.* 125.”

[BRETT, J. — It all depends on the question whether special damage can be recovered in the replevin action, for if it cannot *Nelson v. Couch* (5) would be a strong authority in favour of this action.]

Before 19 & 20 Vict. c. 108, the damages which the plaintiff recovered in replevin were usually 2*l.* 2*s.*, the supposed expenses of the replevin bond—2 *Chitt. Arch.* 11th ed., 1082. There is no instance of the plaintiff recovering special damages in replevin. Trover and trespass may lie for the same goods—*Put v. Rawsterne* (6); *Ferrer's Case* (7).

BOVILL, C.J. — The first question is whether a recovery in replevin is a bar to an action of trespass for the same taking of the goods. The declaration claims damages, not only for taking the goods, but for entering on the land, but the fourth plea which raises this first question, and to which also there has been a demurrer, is limited to the goods, and upon that first question I entertain no doubt but that the recovery in replevin is a bar to the action for such taking. After a person's goods have been taken, as the plaintiff's were in this case, he has a choice of remedy. He may bring an action for damages for such taking; but in many cases the loss of the goods may be of greater value than any amount of damages that would be given, as in the case of horses and cattle on a man's farm, the loss of which would prevent his carrying on the ordinary occupation of his business as a farmer. Replevin had its origin with reference to that and such like cases, in which it was necessary to provide some immediate remedy. The ancient remedy which was by a writ out of the Court of Chancery directed to the sheriff, was found to be tedious, and in the reign of King Henry 3rd, by the statute of Marlbridge, the proceedings were commenced at once in the County Court instead of in Chancery, and in course of time that became the only practical

mode of carrying out replevin. The proceedings either continued in the County Court or were removed into the Superior Court, but whether so removed or not, the complaint was tort for the taking or the detaining of the goods. If the goods were re-delivered to the owner by the sheriff, the complaint was that the defendant had taken and unjustly detained the goods until, &c., that is to say, until they had been re-delivered by the sheriff. If the goods were not returned to the owner by the sheriff, the plaintiff might claim that the goods were still detained, which was called replevin in the detinet, and which has long been obsolete. When the goods had been re-delivered by the sheriff to the party bringing replevin (which was the ordinary case), such party could recover no damages beyond the costs of the replevin bond, which, according to the practice in London and Middlesex, were formerly 4*l.* 4*s.*, but which varied in different counties. When, however, the goods had not been re-delivered by the sheriff, the plaintiff in replevin might have recovered the full amount of his damages. There is nothing in point of law to have ever limited them to the costs of the bond, but in practice, where the goods had been re-delivered, no more damages than such costs was considered to have been sustained. The form of the declaration in replevin was that the plaintiff was injured and had sustained damage, for the wrongful taking and detaining, and the object of the suit was to recover such damages.

In the present case, at the trial of the replevin suit, the damages were fixed by the County Court Judge at 2*l.* 8*s.* 6*d.*, and it must be taken that those are the damages which the plaintiff sustained by the taking of his goods, and it by no means follows that, because by an agreement made in another action another amount is fixed as the damages, that such 2*l.* 8*s.* 6*d.* were not the damages the plaintiff had sustained. The cause of action, so far as related to the goods, was the taking of them until they were returned to the plaintiff by process of law, and that was the cause of action both in the replevin suit and in the present action, and therefore I am of opinion

(5) 15 Com. B. Rep. N.S. 99; s. c. 38 Law J. Rep. (N.S.) C.P. 46.

(6) Sir T. Raym. 472.

(7) 6 Rep. 7a.

that the present action, so far as it relates to the goods, cannot be maintained. Reference has been made to the case of *Nelson v. Couch* (5), where a recovery in a collision suit in the Admiralty Court was held no bar to an action in this Court for running down the plaintiff's vessel. I think the explanation of that is, that the proceedings in the Admiralty Court were *in rem*, and gave the plaintiff only a limited right, so that the action in this Court was not for the same cause of action as the suit in the Admiralty Court. Here, however, the two causes of action are identically the same, and the judgment in the replevin suit is therefore a bar to the present action in respect of taking the goods.

Then, as to whether the plaintiff is entitled to maintain trespass for the entry on the land, I am of opinion that the judgment in the replevin suit is no bar to such action, for replevin cannot be brought in respect of lands or fixtures, and the pleader rightly confined the fourth plea to the trespass as to the goods. Goods may be taken under circumstances which would not amount to a trespass to land, and, therefore, on the same principle as in respect of the taking of the goods, judgment in the replevin suit is a bar, it is not a bar to the trespass to the land, for the cause of action is not the same. That being so, it is said that the plaintiff can recover in respect of the trespass to the land because he was the person in lawful possession, but the defendants meet this by saying that the plaintiff was only a tortfeasor, or in possession under one who was only a tenant at sufferance. It is admitted that the defendants are entitled as against a tenant at sufferance, and as against the plaintiff claiming under one, to maintain trespass. Then how is this consistent with the proposition that the plaintiff can treat the defendants as tortfeasors and trespassers for entering on their own land? With respect to the position of mortgagors it is clearly stated in the notes to *Keech v. Hall* (8), "first, that if there be in the mortgage deed an agreement that the mortgagor shall continue in possession till default of payment on a cer-

tain day, he is in the meanwhile termor of the intervening term; secondly, that if default be made on that day, he becomes tenant at sufferance; thirdly, that when there is no such agreement, he is tenant at sufferance immediately upon the execution of the mortgage, unless the mortgagee expressly or impliedly consented to his remaining in possession; fourthly, that such consent renders him tenant at will; fifthly, that if in any of the last three cases he let in tenants, they may be treated by the mortgagee, if he thinks proper, as tortfeasors."

That is exactly the position of the present plaintiff. Parsons was only a tenant at sufferance, and it was decided by Lord Ellenborough in *Thunder v. Belcher* (9), that "one tenant at sufferance cannot make another." The plaintiff was never tenant at all or ever recognised as such by the defendants, and there was nothing to interfere with the rights of the defendants to enter on the land, and treat the plaintiff as a tortfeasor. I therefore think that this rule should be discharged.

KEATING, J.—I am of the same opinion. —The grounds on which the rule was obtained and has been attempted to be sustained are, that the plaintiff is entitled to damages in respect of the trespass to his goods, and that as tenant he is entitled to maintain trespass for entering the land. I hold that neither of these grounds can prevail. It cannot as to the goods, because he had a remedy for their taking in the replevin suit in which he recovered judgment. I think that the recovery in the replevin is a bar to an action for the same taking of such goods. It has been contended that it is not because it is said in replevin the plaintiff cannot recover special damages, but I have not heard any authority for that proposition. Although, according to custom, the amount the plaintiff recovers is usually only the price of the replevin bond, about 2*l.* 2*s.*, yet that is not the less damages, nor is he precluded from recovering the damages he has incurred. The old form of a declaration in replevin as given in *Saunders* (10) con-

(8) 1 Smith's L. Cas. 537, 6th ed.

(9) 3 East, 451.

(10) 2 Wms. Saund. 187.

cludes as in trespass, and there seems to me to be no reason why the plaintiff in such suit should not recover any damages he may have sustained. I agree with my Lord that the bar can only exist as to the same taking of the goods and to the damages incident thereto, and that it does not extend to an entry on the land or to the taking of fixtures. It is, therefore, a bar only in respect of what I take to be the same cause of action.

Then as to the plea which puts in issue the plaintiff's ownership of the land. It appears that the defendants are mortgagees, and that Parsons, their mortgagor, after such mortgage let the plaintiff into possession. There is no evidence that the tenancy of the plaintiff to Parsons was anything else than a tenancy at sufferance, but be that as it may the defendants were neither parties or privies to it, and they have a right to treat the person in possession as a trespasser, and at once to bring ejectment. For these reasons I entirely agree that this rule should be discharged.

BRETT, J.—The plaintiff has brought trespass for the wrongful taking of his goods and for the damage he has thereby sustained, and also trespass for entering on his land. It has been contended that he could not recover in respect of the goods because he had already recovered in replevin in respect of the same cause of action, and that he could not in respect of the land because he was not a person who could maintain such an action as against the defendants. With respect to the wrongful taking of the goods it was said on behalf of the plaintiff that he could maintain this action, since in replevin, as it was contended, he could only obtain reparation to a certain extent, and that he could by the present action recover the damages which he had sustained and which he could not recover in the action of replevin. If it were true that in replevin he could only recover damages to a limited extent, I think that the case of *Nelson v. Couch* (5) would be a strong authority for the plaintiff. There the plaintiff had recovered against the defendant in the Admiralty Court for a collision, and he afterwards brought an action in the Common Law Court against the defendant

for the same collision, but inasmuch as in the Admiralty Court, where the proceeding was *in rem*, the plaintiff could only obtain reparation to a certain extent, this Court held that he might in his action in the Common Law Court recover that which he could not recover in the Admiralty Court. But after considering the matter, I am of opinion that the plaintiff has failed to shew that in the replevin suit he could only have recovered to a limited extent. The action of replevin is for the wrongful taking of the plaintiff's goods. It is true that the goods are restored to him, but if the action goes against him he is bound to return them. It has been argued that replevin is only for the purpose of recovering the goods, but that is not so, for then the plaintiff could not have damages which it is admitted he always does have in replevin namely, the amount of the costs he was put to in getting back his goods, and which is as much damages as is any other sum. Special damages are no less the result of the act complained of than are ordinary damages, and when ordinary damages can be recovered in respect of any act special damages may also be recovered if they have been sustained. It is true that in a note to *Mayne on Damages*, 2nd ed. p. 319, it is said to be doubtful whether special damage can be recovered in replevin, but the Irish case of *Connor v. Benlley* (2) which is there cited seems only to express the same doubt as to special damage being recoverable in replevin as was once entertained in this country with regard to the action of trover. The plaintiff in this case has recovered damages in the replevin suit in respect of the same cause of action as that for which the present action is brought, and he might have recovered in the replevin suit all the damages he seeks to recover here. Therefore I think that the judgment in the replevin suit is a bar to the present action for taking the goods.

As regards the trespass to the land I agree with my Lord that the judgment in replevin is no bar, but the plaintiff fails because he is not the person who can sue the defendants for such trespass. According to the note to *Keech v. Hall* (8), even if Parsons were a tenant at will he

could not, as against the defendants, make the plaintiff a tenant, and as against the defendants the plaintiff was a tortfeasor. It is said that by the act of the trespass itself, of which the plaintiff complains, the defendants acknowledged the plaintiff's right to the possession, but I do not see that, and I agree with the rest of the Court that this rule should be discharged.

GROVE, J.—I am of the same opinion. I have had some doubt as to the trespass for taking the goods owing to what is said in the note to *Mayne on Damages*, and in *Chitty's Arch. Pract.* 12th edit. p. 1093, and the practice of not recovering more in replevin than a fixed sum, being only for the costs of the bond, but I think that the *onus* of removing it lay on the counsel for the plaintiff, and he has failed to shew that the damages which the plaintiff now seeks to recover, might not have been recovered in the replevin action. On the other point, namely, as to the trespass to the land, I am satisfied that the plaintiff was in no respect a tenant at all as against the defendants.

Rule discharged, and Judgment for defendants on the demurrer.

Attorneys—Wilkinson & Howlett, for plaintiff;
Shaen, Roscoe, & Co., for defendants.

1873. } CUBITT v. LADY CAROLINE
June 20. } MAXSE.

Highway—Non-User by Public—Highway created by Statute—Inclosure Act, 41 Geo. 3. c. 109.

A highway cannot be created by statute unless the provisions of the statute creating it are strictly followed.

By the General Inclosure Act, 41 Geo. 3. c. 109. ss. 8 & 9, the Commissioner, before making the allotments of the land to be enclosed, was to set out such roads as he should judge necessary, and to appoint a surveyor to form and complete the same, and until so formed and completed the parish was not to be bound to repair such roads, but after that time they were to be for ever after kept in repair by the parish. An Inclosure Commissioner appointed to act under a local

Inclosure Act, subject to the provisions of 14 Geo. 3. c. 109, duly set out a road which he described in his award made in 1808, but although such road was staked out on the ground and fenced off from the adjoining allotments on either side, it was never formed and completed as required by the 41 Geo. 3. c. 109, nor was it ever used by the public:—Held, that as the requirements of the statute had not been complied with, the road so set out was not a highway created by statute, and as there had been no user, and therefore no acceptance of the road by the public, it was not otherwise a highway.

The first count of the declaration was for breaking and entering on certain land of the plaintiff in the parish of Effingham, Surrey, and for digging up and carrying away trees and shrubs of the plaintiff, growing and being upon the said land.

The defendant pleaded, *inter alia*, 3rdly to the first count, that there was a common and public highway over the said land, and she justified digging up the trees, &c., because they were obstructing the said highway. The plaintiff took issue thereon, and also new assigned for excess. At the trial before Cockburn, C.J., at the last spring assizes for the county of Surrey, it appeared that the *locus in quo* originally formed that part of Effingham Upper Common which was in the manor of Effingham East Court, and that in 1802 (42 Geo. 3.) a Local Inclosure Act was passed for allotting and inclosing that portion of the said common which was in the said manor. That statute required the Commissioner who was appointed by it, to act subject to the powers and provisions of the then General Inclosure Act, 41 Geo. 3. c. 109. In 1808, the Commissioner made his award by which, after having stated therein that "he had set out and appointed such public carriage roads and highways, through and over the said lands as he had judged necessary, and in such directions as upon the whole appeared to him most commodious to the public," he expressly allowed and confirmed the same. One of these roads was over the *locus in quo*, and was described in the award as "one public

carriage road or highway of the breadth of forty feet leading from a certain place," &c. It was laid down in the map as is required by the General Inclosure Act, and there was evidence that it had been marked out on the ground by stakes and had been fenced off on either side from the lands allotted as directed by the award, but it had been never otherwise formed, it led nowhere, and had for many years been grown over by briars and brambles, and the jury found that in fact it had never been taken to or used by the public.

A verdict was entered for the plaintiff on all the issues, with leave to the defendant to move to enter a verdict for her on any point consistent with the facts and finding of the jury, and in last Easter term a rule nisi accordingly was obtained by *Montague Chambers* to set aside the verdict for the plaintiff on the issue on the third plea, on the ground that the *locus in quo* having been set out as a highway by the Inclosure Commissioner the public could not be ousted of their rights by non-user. Against this rule—

J. Brown and Lumley Smith shewed cause.—This was nothing but a paper highway. Before the Highway Act there must have been not merely a dedication, but a user, shewing an acceptance by the public in order to constitute a highway. An individual is not bound to accept an estate—*Townson v. Tickell* (1), and the public as well as an individual may refuse to take a gift—user and adoption would be evidence of acceptance.

[BRET, J., referred to the notes to *Dovaston v. Payne* (2). If this be a highway created by statute, the question will be if the terms of the statute creating it have been complied with.]

The Local Inclosure Act was passed after and made subject to the General Act, 41 Geo. 3. c. 109. The material sections of that Act so far as they affect this question are the 8th and 9th (3). There was no

evidence that the road had ever been completed by the surveyor as directed by section 9th, and the directions of the Act must be strictly followed—*The King v.*

any of the divisions and allotments directed in and by any such act, to set out and appoint the public carriage roads and highways through and over the lands and grounds intended to be divided, allotted and enclosed, and to divert, turn and stop up any of the roads and tracts upon and over all or any part of the said lands and grounds as he or they shall judge necessary, so as such roads and highways shall be and remain thirty feet wide at the least, and so as the same shall be set out, in such directions, as shall upon the whole appear to him or them most commodious to the public, and he or they are hereby further required to ascertain the same by marks and bounds, and to prepare a map in which such intended roads shall be accurately laid down and described, and to cause the same being signed by such commissioner, if only one, or the major part of such commissioners, to be deposited with the clerk of the said commissioner or commissioners for the inspection of all persons concerned." The section then provides for giving notice in a local newspaper, and for appointing a meeting, at which if any person shall object to the setting out of such roads the commissioners with a justice may determine the matter.

Section 9 enacts—"that such carriage roads so to be set out as aforesaid shall be well and sufficiently fenced on both sides by such of the owners and proprietors of the lands and grounds intended to be divided, allotted and enclosed, and within such time as such commissioner or commissioners shall by any writing under his or their hands direct or appoint, and that it shall not be lawful for any person or persons to set up or erect any gate across any such carriage road or to plant any trees in or near to the hedges on the sides thereof at a less distance from each other than fifty yards, and such commissioner or commissioners shall, and he or they, is and are hereby empowered and required by writing under his or their hands, to nominate and appoint one or more surveyor or surveyors, with or without a salary, for the first forming and completing such parts of the said carriage roads as shall be newly made, and for putting into complete repair such part of the same as shall have been previously made, which salary (if any) and also the expense of forming, completing and repairing such roads respectively over and above a proportion of the statute duty on the roads so to be repaired, shall be raised in like manner

(1) 3 B. & Ald. 31.

(2) 2 Smith's L.C. 6th ed. p. 140.

(3) Section 8 of 41 Geo. 3. c. 109 enacts "that such commissioner or commissioners shall, and he or they is and are hereby authorised and required in the first place, before he or they proceed to make

Haslingfield Inhabitants (4). Until the road was declared to be fully completed according to the Act the parish was not bound to repair, and if the Court make this rule absolute and so declare the *locus in quo* to be a highway it will be one which no one will be bound to repair. Next, if it be considered that the road had been created a highway there was evidence from which a jury might presume that it had been lawfully stopped up—*The King v. Montague* (5).

[BRETT, J.—In *Dawes v. Hawkins* (6), Byles, J., said: "It is also an established maxim, once a highway always a highway."]

They then contended that the plea had not been proved as it did not justify cutting down the trees which were cut by the defendant as claiming to be owner of the soil in the *locus in quo*, and not as one of the public for the purpose of removing an obstruction—*Dimes v. Petley* (7), *Bateman v. Bluck* (8).

as the charges and expenses of obtaining and passing any such Act," &c., &c., "and in case such surveyor or surveyors shall neglect to complete and repair such roads respectively within the space of two years after such award, unless a further time not exceeding one year shall for that purpose be allowed by such justices, and then within such further time, he or they shall forfeit the sum of 20*l.*, and the inhabitants at large of the parish, township or place wherein such roads shall be respectively situate shall be in nowise charged or chargeable towards forming or repairing the said roads respectively, except such proportion of such statute duty as aforesaid, till such time as the same shall by such justices in their special sessions be declared to be fully and sufficiently formed, completed and repaired, from which time and for ever thereafter the same shall be supported and kept in repair by such persons, and in like manner as the other public roads within such parish, township or place are by law to be amended and kept in repair."

(4) 2 M. & S. 558.

(5) 4 B. & C. 598.

(6) 8 Com. B. Rep. N.S. 858; s. c. 29 Law J. Rep. (N.S.) C.P. 347.

(7) 15 Q.B. Rep. 276; s. c. 19 Law J. Rep. (N.S.) Q.B. 449.

(8) 18 Q.B. Rep. 870; s. c. 21 Law J. Rep. (N.S.) Q.B. 406.

Biron, in support of the rule.—It was never suggested at the trial that the award had not been properly made, and that all the requirements of the statute had not been complied with. This is also not a question whether the road is repairable or not by the parish;—indeed section 9 of the General Inclosure Act especially provides for its not being repairable by the parish until certain things have been done by the surveyor to the satisfaction of the justices, so that the Act contemplates the road being a highway, although the parish be not bound to repair it. No doubt a highway cannot be formed by dedication by the owner of the land without adoption of it by the public, but that is very different in the case of a highway created by statute. The 8th section of the General Inclosure Act provides for notice being given to all those who are interested in the matter, and power is given for the hearing and determining of any objection to the road as set out by the Commissioner. In addition to this the Local Act gives an appeal to the quarter sessions to any person who "shall think himself aggrieved by anything done in pursuance of that Act," except where the order of the Commissioner is declared by the Act to be binding or conclusive, and except where an issue is directed to be tried which it may be by "any person interested in the intended division and inclosure," who "is dissatisfied with the determination of the Commissioner." The case of *Turner v. The Ringwood Highway Board* (9) is a strong authority for the defendant. There a public road of fifty feet width was set out by the Inclosure Commissioners in 1811, under the authority of this very General Inclosure Act, 41 Geo. 3. c. 109, but only about twenty-five feet in width was used as the actual road, and it was held by James, V.C., that the right of the public was to have the whole width of the road although it had not been used, and that such right had not become extinguished by the fact that trees had been allowed to grow up there for the period of twenty-three years. In the present case a road was set out and the public got what they

(9) Law Rep. 9 Eq. 418.

bargained for. The different allottees under the award, who were the parties chiefly interested, obtained a right of passage to their allotments, which was all they required. They had no occasion for a metal road which would have entailed expense in keeping it in repair, and therefore the provisions in that respect of section 9 were not put in force. If the legislature had meant that the road should not be a highway until the surveyor had formed it as required by section 9, it might have so expressed itself, but it has not done so. Where the legislature intends certain things shall be done before a road shall be a highway it has generally stated so in express words, as for example in the General Turnpike Act, 4 Geo. 4. c. 95. s. 87—*The King v. The Justices of the West Riding of Yorkshire* (10), and, as was said by Bayley, J., in *The King v. Lyon* (11), "the Act of Parliament makes this a public road and, therefore, the adoption by the parish to make it a public road is not wanted."

[Grove, J.—In *Comyn's Dig.* Chimin (A.4), it is said "if a highway wants repair the parish of common right ought to repair it."].

If the parish at common law is liable to repair then there was no necessity for 5 & 6 Will. 4. c. 50. s. 23—*Roberts v. Hunt* (12).

KEATING, J.—This case has been very well argued on both sides, and consequently the Court has received every assistance it could from counsel, but counsel have been obliged to admit that there is a great dearth of authority bearing upon the point which we have to determine. The rule is to enter a verdict for the defendant on the third plea which sets up, in answer to the trespass alleged in the first count, that the *locus in quo* was a common and public highway, and I am of opinion that that rule must be discharged. The defendant having pleaded the existence of such a highway in order to justify the trespass was bound to prove the existence of a common and

public highway. Now there was no proof of user to justify such a plea, and indeed such user was expressly negatived by the finding of the jury. The defendant, therefore, was driven to establish the existence of such highway by force of the Inclosure Act under which the award of the Inclosure Commissioner was made in 1808. It appears that the Commissioner appointed by that Act did set out a forty foot road which included the *locus in quo*, and if the act of setting out the road under the award constituted a highway the defendant has made out her plea. I think, however, that it did not constitute a highway within the meaning of the Local Inclosure Act when read with the previous General Inclosure Act. By that Act the Commissioner is to ascertain and set out the carriage roads over the lands to be allotted, and a surveyor is to be appointed who is to form and put the roads into a complete state of repair, and until that has been done the parish is not to be liable to the forming or repairing such roads. Therefore, as it seems to me, the road is not intended by the statute to be a highway until it has been so completed by the surveyor. But it has been said that it may still have been the intention of the legislature that the road should be a public highway although not repairable by the parish. I think, however that if the statute be read with the state of the law as it then existed, that that is not so, for at common law when a road was a highway it was repairable by the parish, and therefore when the statute says that it shall not be repairable by the parish until certain things have been done, I think the statute means that it shall not be a highway until those things have been done. Under these circumstances, there not having been a highway by dedication and user, and we having to construe the statute, (which is the only ground relied on for establishing a highway,) I think there was no highway until the road had been completed by the surveyor according to the provisions of the General Inclosure Act, 41 Geo. 3. c. 109. This rule must be discharged.

BRETT, J.—The question is, whether the Lord Chief Justice was bound at the

(10) 5 B. & Ad. 1003.

(11) 5 Dowl. & R. 500.

(12) 15 Q.B. Rep. 17.

trial to have directed the jury that the third plea was proved; in other words, whether he was bound to have told them that a highway over the *locus in quo* had been created. The facts seem to me to have been that after the local Inclosure Act was passed everything was done by the Commissioner to entitle him to make his award, and that the road in question was properly set out in the plan, but there is no evidence that after so directing the road to be set out either he or the surveyor did anything more to complete it as a road beyond that of setting it out on the land by metes and bounds. There is the finding of the jury that it had never been used by the public, which was warranted by the facts, and the question is whether, under these circumstances, the Lord Chief Justice was bound to direct that the way was a public highway. I take it, according to the notes to *Dovaston v. Payne* (2), that a public highway may be made in two ways—one, as is there stated, “derives its existence from a dedication by the owner of the land over which the highway extends of a right of passage over it.” It seems, too, from the judgment of my brother Blackburn in *Fisher v. Prowse* (13), that a road is not created a highway by dedication merely, but that it must be accepted by the public, and that such acceptance is proved by user. It is true that user is evidence of the dedication as well as of the acceptance, but there must be both dedication and acceptance in order to make a highway by dedication. Another way of making a highway is by statute. In the notes to *Dovaston v. Payne* (2), it is said—“A highway is sometimes created by an Act of Parliament passed for that purpose; provisions of such an Act must be strictly followed or the creation will not take place.” The cases cited are *The King v. Cumberworth* (14) and *The King v. Edge Lane* (15). In those cases it was said that a highway had been created by Act of Parliament, but the answer was that the Act had insisted that the road should be

from a particular point to another particular point, and that that had not been complied with, and in both cases the Judges relied on a rule of construction of such Acts given by Lord Eldon in *Blake-more v. The Glamorganshire Canal Navigation* (16), in which he says, “When I look upon these Acts of Parliament I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them.”

In those cases of *The King v. Cumberworth* (14) and *The King v. Edge Lane* (15), the Act was held to be a contract on behalf of every one interested, which in the creation of a highway is the local public, and that their interest is to have such road completed strictly according to the terms of the Act before they are made liable to repair it as a highway. Now apply that to the case of a public way made by a Commissioner under an Inclosure Act. You place the Commissioner first in the position of the owner of the land, and empower him to dedicate such road to the public, and you also place him to act on behalf of the public, and as if that public had accepted the road so dedicated, but he can only do so if the road be made completely according to the terms of the statute under which he is acting. In the present case the Commissioner was appointed to act under a Local Act, but subject to the provisions of the General Act of 41 Geo. 3. c. 109, and he was therefore bound to carry out the provisions of that general enactment strictly before the road could, as between the Commissioner and the public, be considered to be a public highway. The matter consequently depends very much on the terms of that General Inclosure Act. Now section 8 relates to all that is previous to making the award, and it requires the Commissioner to set out the intended roads and to describe them on a map, and it gives the right to certain persons to object to such roads as so set out, and if they do so object it empowers the Commissioner with a Justice to hear and determine the same. Then section 9 treats the roads, though so set out, as

(13) 2 B. & S. 770; s. c. 31 Law J. Rep. (N.S.) Q.B. 212.

(14) 3 B. & Ad. 108.

(15) 4 Ad. & E. 723; s. c. 5 Law J. Rep. (N.S.) M.C. 91.

(16) 1 Myl. & K. 164.

being incomplete and unmade, because it goes on to say that the Commissioner is to appoint a surveyor "for the first forming and completing such of the said carriage roads as shall be newly made." The road it seems, which may be described on the map by the Commissioner, may be on land where no road has ever before existed, or where there has been one before or where part has existed before and part has not, and in order to form and make the first completion of the road, the Commissioner is to appoint a surveyor (and that it would seem is to take place before the making of the award), and when such surveyor has done what is required for the completion, it is a public highway and the parish is to repair it. Where no road has ever existed before, as was the case here, and where (there being no user) the person relying on there being a highway has undertaken, as the defendant has here, to shew that it was a highway created by this statute, such person is bound to shew, not only that the road was set out on the land according to the award and map, but that the commissioner by the surveyor or otherwise made a complete road in the first instance, at least according to the circumstances and wants of the locality. It may be that if there has been a user of the road by the public before completion and when it has been only set out by the Commissioner, the public will not afterwards be allowed to say that the road was incomplete and therefore never a highway, but it is not now necessary to determine that point. Then are the cases which have been cited inconsistent with the view the Court has taken of this matter? In *Turner v. The Ringwood Highway Board* (9), it was admitted that the road had been created, and there was nothing to shew that it had not been completely formed, but merely that the public had only walked over a certain part of it, and acting on the case of *The Queen v. The United Kingdom Electric Telegraph Company* (17), James, V.C., held that it could not be said that both sides of the road, though not actually used by the public

for walking, did not form part of the road, and there being there no evidence of abandonment the road still existed according to the doctrine of Byles, J., in *Daves v. Hawkins* (6), that once a highway always a highway. So in *The King v. Lyon* (11), the road had been made and the Act of Parliament treated it as a then existing public highway, and there was no question raised as to its creation. I base my decision in the present case on the fact that the highway relied on, is one said to have been created by statute alone and not by user, and that, according to the notes to *Dovaston v. Payne* (2) to which I have referred, the defendant has failed to prove it was a highway, because she has failed to shew that the requirements of the General Inclosure Act, 41 Geo. 3. c. 109, in that respect have been complied with.

GROVE, J.—I am of the same opinion. It has been contended by the learned counsel for the defendant that by setting out the intended road on the plan (which I assume was annexed to the award) and by marking it by stakes on the ground, the road at once and for all time became by force of this statute a public highway though without user by the public. Certainly that is a proposition which would require very strong words of the Act of Parliament to support, although I do not say that a statute might not so enact. Mr. Biron was obliged to admit that after the road had been staked out it had been so grown over by brambles and hedges as to be impracticable as a way at all. If the statute is to be treated, as my brother Brett has said, as a bargain with the public, it is certainly singular that the public should be bound when the provisions of the Act for making it a road have not been complied with so that the public have not had what was bargained for. Let us see then what was provided for by the statute. Section 8, which contains matters preliminary to those in section 9, speaks of the roads which are to be described in the map as "intended roads," and evidently refers to roads which are to be made. Then section 9, which provides for the road being formed and completed, cannot apply to a road

(17) 2 B. & S. 647; s. c. 31 Law J. Rep. (N.S.) M.C. 166.

already existing, because it contemplates a road which is not even formed. Then are we to say that the performance of some only of the preliminaries required by the Act for forming the road are necessarily to amount to not merely a dedication of the highway, but to a fulfilment of the bargain with the public for its being a highway? I certainly think that is not so. According to the common law as stated in *Comyn's Digest*, Chimin (A. 4), to which I referred during the argument, a highway is repairable by the parish and, therefore, if a statute were to enact that a road should be a common highway it would have this incident attached to it that *prima facie* it would be repairable by the parish. This is supported by the case of *The King v. Sheffield* (18), where Ashurst, J., says—"It is an incontrovertible position, that by the general law of the land the parish at large is *prima facie* bound to repair all highways lying within it, unless by prescription they can throw the *onus* on particular persons by reason of their tenure, but when that is the case it is by way of exception to the general rule." As, then, we find in the General Inclosure Act, 41 Geo. 3. c. 109, provisions made for the complete forming of the road and putting it into repair, and that then, when that is done and not before, the parish shall be bound to repair the same, it seems to my mind to be a fair argument that the statute did not contemplate that the road should be a highway until those provisions had been complied with which the statute required before it made it repairable by the parish. For these reasons I think that this rule should be discharged.

Rule discharged.

Attorneys—J. Hopgood, for plaintiff; Fladgate, Clarke & Co., for defendant.

1873. } JACKSON v. THE UNION MA-
Jan. 24, 25. } RINE INSURANCE COMPANY,
July 15. } LIMITED.
THE SAME v. THE SAME.

Shipping—Insurance on Chartered Freight—Loss of Freight where no total Loss of Ship.

By a charter-party, which contained the usual exceptions of dangers and accidents of navigation, the vessel was to proceed with all convenient speed from Liverpool to Newport, and there load a cargo of iron rails for San Francisco, and the freight was to be paid on right delivery of the cargo. The vessel duly proceeded on her voyage from Liverpool to Newport, but before arriving there she took the rocks at Carnarvon Bay. She was ultimately got off the rocks, and though the damage she sustained was not such as to constitute a total loss, either actual or constructive, the time necessary for getting her off and repairing her so as to be a cargo-carrying ship, was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers, and the latter accordingly abandoned the contract and hired another vessel, by which they forwarded the rails to San Francisco:—

Held, by KEATING, J., and BRETT, J. (BOVILL, C.J., dissentiente), that under these circumstances there was a total loss of chartered freight by perils of the sea within the meaning of a policy of insurance on chartered freight on the above voyage.

This was an action on a policy "on chartered freight, valued at 2,900*l.*, at and from Liverpool to Newport in tow, while there, and thence to San Francisco." There was also an action on a policy effected by the plaintiff with the defendants on the ship for the same voyage. Both actions were tried together before Brett, J., at the Liverpool Summer Assizes of 1872, when by direction of the learned Judge a verdict was entered for the defendants in both actions, with leave to the plaintiff to move to enter a verdict for him in both or either of them.

A rule *nisi* to that effect was obtained, and upon the argument it was arranged that there should be a verdict for the

plaintiff in the action on the policy on the ship for a partial loss only, the amount of which was to be ascertained by an average stater. The question then was whether, notwithstanding there was no total loss of the ship, the plaintiff was entitled to recover on the policy on the chartered freight. [The facts and authorities are fully stated in the judgments of the learned Judges.]

F. Russell and Benjamin shewed cause.

Butt and Gully argued in support of the rule.

Cur. adv. vult.

There being a difference of opinion on the Bench separate judgments were (on July 15) delivered as follows.—

BERR, J., gave the following judgment, in which KEATING, J., concurred :—

Two actions were brought on two policies of insurance effected by the plaintiff with the defendants, the first being on the ship *Spirit of the Dawn*, of which the plaintiff was owner, and the second on chartered freight to be earned by the same ship.

At the trial before me at the Summer Assizes held at Liverpool in 1872, on which occasion both actions were tried together, it was proved that the plaintiff, on the 22nd of November, 1871, entered into a charter-party with Messrs. Rathbone & Co., by which the ship *Spirit of the Dawn* was to proceed with all convenient speed from Liverpool to Newport, and there ship a cargo of iron rails (railway iron) for San Francisco, ordinary perils excepted, and the freight payable on right delivery of the cargo, &c.

On the 9th of December, 1871, the plaintiff, through his agents, effected with the defendants the freight policy sued on, being “on chartered freight valued at 2,900*l.*, at and from Liverpool to Newport in tow, while there, and thence to San Francisco, &c.” On the 12th of December, 1871, the policy on ship was effected for the same voyage on thirty-four 64ths of ship, valued at 8,000*l.*

After some complaints from the charterers as to delay, the ship sailed in tow from Liverpool on the 2nd of January, 1872. On the 4th of January, 1872, the

ship, which was an iron ship, before arriving at Newport, took the rocks in Carnarvon Bay. By authority of the plaintiff and the defendants, Captain Chisholm, of the Salvage Association, proceeded to endeavour to extricate and save the ship. She was got into a place of comparative safety on the rocks on the 18th of February, 1872, and was got off the rocks and into Holyhead between the 21st and 24th of March, and was by consent of the plaintiff and the defendants taken back to Liverpool, still in charge of the Salvage Association, on the 12th of April, 1872. The salvage charges for rescuing the ship and bringing her to Liverpool were 4,208*l.* Upon survey, the estimated cost of repairs was 3,650*l.* Due notice of abandonment was given on both policies, but not accepted. The ship was thereupon sold to a Mr. Wilson, who proceeded to repair her. The ship was still under repair at the time of the trial, which was the 16th of August, 1872.

On the 16th of February, 1872, Messrs. Rathbone & Co. chartered, without the consent of the plaintiff, another ship, by which they forwarded the rails to San Francisco. The rails were wanted there for the construction of a railway.

Upon this evidence, and some other as to the value of the ship when repaired, I left it to the jury to say,—first, whether there was a constructive total loss of the ship; secondly, whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time; thirdly, whether such time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers. The jury answered all these questions in the affirmative. I, upon the view that there was no evidence, according to the figures, of a constructive total loss of the ship, and no evidence of a loss of freight by the perils insured against, because the shipowner had a right to repair his ship, however long it might take, and insist after its repair on the delivery of the agreed imperishable cargo so as to enable him to earn the chartered freight,

directed the verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter a verdict on either or both of the policies.

Mr. Butt moved accordingly, and obtained a *rule nisi* in Michaelmas Term, 1872; it being agreed that, upon shewing cause against such rule, the defendants should be at liberty to argue, as against the application to enter the verdict for the plaintiff, that the findings of the jury on all or any of the questions left to them were against the weight of evidence. This rule was argued before us in Hilary Term of the present year.

It was determined in the course of the argument that the verdict as to the total loss of the ship was unsatisfactory; and by the agreement of the counsel that part of the case is to be referred as an average loss.

In the action on the policy on freight, it was argued for the defendants that, unless there was a total loss of ship, either actual or constructive, there could be no loss of freight by perils of the sea; that the plaintiff, the shipowner, in the case of damage to the ship, however great, where such damage was not caused by any default of his own, had a legal right under such a charter-party as the present to repair his ship with reasonable diligence, and to tender her when repaired, however long a period of time such repairs might take, to the charterer, and to insist on the loading of the agreed cargo, if the cargo was of such a nature as to be able to be carried at the end of such period on the agreed voyage so as to earn freight. If the shipowner, it was argued, is in such circumstances prevented from earning freight by the refusal of the charterer to supply cargo, his loss must be recovered by action against the charterer; it is a loss caused by the illegal refusal of the charterer to supply cargo, and not by the perils insured against. It was further argued that none of the findings of the jury displaced this position, and that the findings of the jury were against the weight of the evidence.

For the plaintiff it was urged that the findings of the jury were justifiable, and that on either or both of them the shipowner ceased to have the power to enforce

his rights under the charter-party to earn freight; that, assuming either or both of the findings to be true, although the ship was not a total loss, the charterer, who had not as yet received any benefit from the charter-party, could not be obliged to supply any cargo; that the power of earning the chartered freight, which was the freight insured, was consequently lost to the plaintiff immediately on the happening of the damage to the ship, such damage being to the extent found by the jury; that such damage was caused by, and therefore the loss was the immediate result of, a peril insured against.

The first point raised by these arguments is, whether the findings are so far against the weight of the evidence as to call upon the Court to set them aside. If it had been within my province, I would at the trial have given answers to both questions different from the answers returned by the jury. But the amount of freight on which shipowners will undertake charters depends very much upon the time at which such charters are negotiated and the time then calculated for their fulfilment. Freight rises and falls according to the variations of the freight market; and so, on the other hand, the expediency or otherwise of the export of iron or iron rails depends upon the iron market and its fluctuations at different times. Taking these views into consideration, and paying considerable deference to the finding of a mercantile special jury with regard to them, I am not prepared to say that the findings are wrong. They must therefore be treated as correct and binding.

The question, then, is whether, assuming the findings to be correct, there was a loss of freight by perils of the sea. That question divides itself into two,—first, did the injury to the ship, caused as it undoubtedly was by sea peril, make it impossible for the shipowner to earn the chartered freight? secondly, if it did, did such impossibility so caused amount to a loss by perils of the sea within the meaning of a freight policy on chartered freight? The first question depends upon what were the rights, under the circumstances, of the plaintiff and the charterers under the charter-party, the

second upon the rights of the plaintiff and the defendants under the policy.

As to the first, the question is whether, upon an injury happening to a chartered ship in the voyage preliminary to that on which the chartered freight is to be earned, happening before the charterer has received any advantage from the contract, where the injury is caused by a peril excepted in the charter-party, where it is caused without default of the shipowner, where he has not been wanting in due diligence to arrive at the appointed place of loading, but where the injury is so great as to prevent the arrival of the ship or of her presentment to the charterer in a state fit to carry cargo within a reasonable time having regard to the business of the charterer, or within any time which could have been at the time of making the contract in the contemplation of either the charterer or shipowner as a time in any way applicable to the commercial speculation of either of them—the question is, whether the contract is not at an end, in the sense that neither party to it can enforce any obligation under it against the other. In other terms, the question may be stated to be, whether in such a contract there is not an implied stipulation that the shipowner cannot, upon the happening of such extensive injury to the ship, though without default of his, compel the charterer to supply at so remote a date a cargo, and that the charterer, conversely, cannot compel the shipowner at so remote a date to tender his ship—the reason being that the contract is not applicable, and could not in the mind of either party have been considered as applicable, at the time of making it, to the earning of profit either by the shipowner or the charterer by reason of the transport of goods at so remote a period under mercantile contingencies and on mercantile considerations which must be absolutely different from and unconnected with any consideration then before them. There being no stipulation that the ship should be at Newport at any fixed date, the stipulation being only that she should proceed there with all convenient speed, there is no condition precedent that she should be there at any given time—*Had-*

ley v. Clarke (1). The cases of *Clipsham v. Vertue* (2), *Hurst v. Usborne* (3), and *Jones v. Holme* (4), seem to me authorities for saying that there is no condition precedent, though there is a contract that the ship shall arrive or be fit to be tendered within a reasonable time in regard to the charterer's business. If the finding of the jury, therefore, on the second question proposed to them, is immaterial, the question itself was immaterial. Even a delay caused by the default of the shipowner will not of itself release the charterer from his obligation to provide a cargo—*Havelock v. Geddes* (5); *Clipsham v. Vertue* (2). But, in *Havelock v. Geddes* (5), Lord Ellenborough deals with the rights of the parties where the ship is so unfit as to take from the charterer all the advantage he can be supposed to have originally contemplated from the contract, and where he has in fact had no advantage whatever from it. "Had the plaintiff's neglect," he says, "here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar." In *Freeman v. Taylor* (6), Tindal, C.J., directed the jury, in an action for not loading, "that the freighter could not for an ordinary deviation put an end to the contract; but if the deviation was so long and unreasonable that in the ordinary course of mercantile concerns it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might be considered at an end." He left it to the jury to decide. The jury found for the defendant, the freighter; and the Court held that there was no misdirection. In *Tarrabochia v. Hickie* (7), Cresswell, J., in an action against the freighter for not

(1) 8 Term Rep. 259.

(2) 5 Q.B. Rep. 265; s. c. 13 Law J. Rep. (N.S.) Q.B. 2.

(3) 18 Com. B. Rep. 144; s. c. 25 Law J. Rep. (N.S.) C.P. 209.

(4) 36 Law J. Rep. (N.S.) Exch. 192; s. c. Law Rep. 2 Exch. 335.

(5) 10 East 555.

(6) 8 Bing. 124; s. c. 1 Law J. Rep. (N.S.) C.P. 26.

(7) 1 Hurl. & N. 183; s. c. 26 Law J. Rep. (N.S.) Exch. 26.

loading, asked the jury whether the vessel sailed and proceeded to Cardiff with convenient speed, or in a reasonable time; and, if not, whether the object of the voyage was thereby frustrated. The jury found that the vessel did not with all convenient speed, or in a reasonable time, sail and proceed to Cardiff, but that the object of the voyage was not thereby frustrated. A verdict was entered for the defendant; leave being reserved to the plaintiff to move to enter a verdict for him. The rule was refused. That case is a direct authority against the second question and answer in this case; but it seems to assume the propriety and materiality of the third question and answer.

In *Blasco v. Fletcher* (8), it was elaborately argued that the shipowner, in case of damage to the ship by an excepted peril in the charter-party, is entitled to any period of time, however long, to repair his ship, and is entitled to insist on carrying the agreed cargo and on earning freight at the end of such time. The decision is put on other grounds; but it is evident that the Court did not accept the validity of the argument urged on behalf of the shipowner. In *M'Andrew v. Chapple* (9), Willes, J., states the present position of the decisions to be thus—"It seems to be now settled that delay by deviation is the same as a delay in starting; and it is also settled, at any rate in this Court, that a delay or deviation which, as has been said, goes to the whole root of the matter, and deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charter in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay or deviation short of that gives an action for damages, but does not defeat the charter." In *Geipel v. Smith* (10), Blackburn, J., speaking of the contract of charter-party, and of the parties to it, says—"The object of each of them was the carrying out of a commercial speculation within a reasonable time;

and if restraint of princes intervened and lasted so long as to make this impossible, each had a right to say 'our contract cannot be carried out,' and therefore the shipowner had a right to sail away, and the charterer to sell his cargo, or refrain from procuring one, and treat the contract as at an end."

In the opinions given by the Judges in the House of Lords in *Rankin v. Potter* (11), Blackburn, J., says—"I should have added a further term, that the repairs could be done so promptly that she might arrive at Calcutta within a reasonable time as between the shipowner and De Mattos, were it not for the case of *Hurst v. Osborne* (3), which seems to me an authority against this position. And, though I should not hesitate to advise your Lordships to re-consider that case, if necessary, I think it is not necessary to do so in the present case." And Bramwell, B., says—"I may observe in passing that I could not, acting as a jurymen, find as a fact that they could have repaired the ship in time for it to be ready for the adventure for which De Mattos agreed to find the cargo; and indeed, as the case stands, I should think he might have refused, on the ground that the ship was a year overdue." And again—"No doubt, had the owner repaired the ship, the loss of freight would not have been total, supposing the repairs in time for the voyage for which De Mattos undertook to find a cargo, which, if it were in controversy, I could not find in the plaintiff's favour." And Brett, J., says—"Without, therefore, relying upon the other impediment and prevention obviously in the way of the plaintiff's earning the charter-party freight, viz., the certainty from the extent of damage that the ship could not be repaired so as to be seaworthy within any time during which the charterer would be bound to wait, it seems to me that the other facts which I have mentioned shew conclusively that there was a loss of freight by reason of damage to the ship caused by sea peril happening during the voyage insured."

These authorities seem to support the proposition, which appears on principle

(11) 42 Law J. Rep. (N.S.) C.P. 169; s.c. Law Rep. 6 H.L. 83.

(8) 14 Com. B. Rep. N.S. 147; s.c. 32 Law J. Rep. (N.S.) C.P. 284.

(9) 35 Law J. Rep. (N.S.) C.P. 281; s.c. Law Rep. 1 C.P. 643.

(10) 41 Law J. Rep. (N.S.) Q.B. 153; s.c. Law Rep. 7 Q.B. 404.

to be very reasonable, that, where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have *any* application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made. Such a state of things arises where the third question left to the jury in this case can be properly answered as the jury have answered it in this case.

In such a state of things arising under a charter-party such as the charter-party under discussion, where no benefit of any kind has accrued to the charterers, the shipowner has lost his power of earning any part of the chartered freight. The immediate cause of such a loss is the extent of injury caused to the ship by a peril insured against under the policy during the voyage thereby insured. Such a loss is, therefore, a loss caused by a peril insured against, within the policy on freight.

For these reasons, I think that, in the action on the policy on freight, the rule must be made absolute to enter the verdict for the plaintiff for a total loss.

BOVILL, C.J. — The first question in these cases was, whether there was a total loss of the ship within the meaning of the policy. The jury found that there was such a constructive total loss; but my brother Brett was dissatisfied with the verdict upon that point, and during the argument it was agreed that the Court should dispose of it, and that, if in our opinion the total loss could not be maintained, the amount of the average loss upon the ship should be referred to an average-stater.

The evidence upon this point was no doubt contradictory; but it strongly preponderated in favour of the defendants (quite independently of any liability of the freight to contribute to the expenses of salvage); and, although the ship was upon the rocks, yet, from her position there, and the probability of her being got off, and looking to the evidence of the damage which she had sustained and of the probable expense of repairing her, I

am of opinion that the circumstances were not sufficient to establish a total loss of the ship, or to justify her abandonment. An intimation to this effect was given by the Court in the course of the argument; and I concur with my learned brothers in their judgment that the plaintiff cannot maintain his claim for a total loss of the ship. The amount of the partial loss will be ascertained by an average-stater as arranged.

With respect to the insurance on the freight, I have the misfortune to differ from my learned brothers, and think that the plaintiff is not entitled to recover. As there was no total loss, either actual or constructive, of the ship, the only loss of freight was that which arose from the refusal of the charterers to load the vessel, and from the plaintiff's not having insisted upon their performance of the contract. The plaintiff contends that, under the circumstances, and by reason of the perils insured against, the charterers were absolved from their engagement to load the vessel, and that he was therefore justified in adopting the charterers' refusal to load, and may maintain this action for a loss of the freight against the underwriters on freight.

The question then is, whether the charterers were justified in throwing up the charter. By the charter-party the vessel was to proceed with all convenient speed (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. On the 2nd of January, 1872, the vessel, having been properly equipped, proceeded on her voyage from Liverpool to Newport, and on the following day took the rocks in Carnarvon Bay. Whilst she remained there, viz., on the 15th of February, the charterers threw up the charter, and the next day hired another ship by which they forwarded the iron rails to San Francisco. The plaintiff on the same 15th of February gave notice of abandonment of ship and freight to the underwriters, but which was not accepted. If there had been a total loss of the ship, both the charterers and the plaintiff would have been justified in the course which they took, and the underwriters would have been responsible for the loss of the

freight; but, upon the facts as they appeared at the trial, we have already decided that there was no such total loss of the ship.

It was probably a very convenient course as well for the charterers as for the shipowner, in the then position of the vessel, and looking to the delay which would necessarily be occasioned by repairing her, to abandon the charter; and the plaintiff may have been more willing to acquiesce in its abandonment, from the hope of being able to claim the freight from the underwriters; but if the charterers were not entitled to abandon their contract, the plaintiff clearly cannot recover for a loss of freight against the underwriters.

In considering whether the charterers were absolved from their contract, the position of the shipowner must also be borne in mind. When the accident occurred, we must assume that in the ordinary course of business the shipowner would have incurred expense in equipping his vessel and providing her with some portion at least of her stores and supplies, and had made engagements with the crew, and for having the vessel towed to Newport, as well as other arrangements for the voyage: he would also in the ordinary course have probably insured her; and the voyage had actually been commenced. A shipowner also constantly makes engagements for the further employment of his vessel, dependent upon the completion of a previous voyage. It is important to all parties to know what their rights and obligations are with reference to the prosecution of the voyage on the one hand, and the loading of the vessel on the other; and it would, as it seems to me, lead to the greatest inconvenience to shipowners with reference to the engagements connected with their vessels if under such circumstances, after they had incurred expense and partially performed their part of the contract, and made no default, a charterer was at liberty to throw up the contract.

The vessel having met with misfortune in the course of navigation, and being upon the rocks, it was the duty of the plaintiff, both as regards the charterers and the underwriters, to use all reasonable

and practicable means to get her off and repair her within a reasonable time, and then to prosecute the voyage and fulfil her engagements without any unreasonable delay. The reasonable time, however, would be that which was required for the purpose of putting the vessel in a fit state to continue her voyage; and if the shipowner had made default in that duty, his rights and liabilities might be very different from those which arise where there is no default on his part.

There was no engagement in this charter-party that the vessel should arrive at Newport by any particular day or within any specified time; and, if it was of importance to the charterers that the ship should be there to receive the mails by any particular time, they might have introduced a stipulation into the charter to that effect. As they did not do so, the risk and consequences of any justifiable delay must, I think, rest with and fall upon them. If a charter-party were altogether silent as to the time of proceeding to the port of loading, the law would imply that it was to be done within a reasonable time; but in this case, as in most charter-parties, the obligation of the shipowner was not left to be implied, but was made the subject of express stipulation; and all that the shipowner agreed to do was, to proceed to Newport with all convenient speed, with an express stipulation, in the usual form, whereby the dangers and accidents of the seas were excepted. This stipulation would, in my opinion, equally apply to any implied engagement to proceed within a reasonable time and to the express agreement to proceed with all convenient speed, and must govern the rights of both parties. Where such an exception is contained in a charter-party, it seems to me that, upon a misfortune occurring to a vessel, not amounting to an actual or constructive total loss, and for which neither party is responsible, it is not competent either for the charterer or the shipowner, of his own will, and without the concurrence of the other party, to put an end to the contract, and on this simple ground, that by the terms of the contract the parties have expressly agreed that such an occurrence shall not affect

its continuance. If this were not so, whenever a vessel was stranded or got upon rocks, or even when she met with serious damage requiring heavy repairs and a long time to complete them, it would be in the power of a charterer who found the delay inconvenient or injurious, and likely to frustrate his object in making the charter, to abandon the charter-party; which would be contrary to every principle of law as applicable to contracts generally or to charter-parties which contain the usual exceptions of the dangers and accidents of navigation.

In cases where the delay, inconvenience or expense of repairing the vessel would materially affect and be injurious to both parties, they would generally agree to cancel the contract. But, where it is the interest of one party only to put an end to it, he must make out his right to do so before he can be justified in refusing to perform it. In order to excuse himself, he must bring his case within some exception in the contract, or there must be a breach by the other party of some condition or warranty, or of some stipulation in it which goes to defeat the whole consideration; otherwise, and however great the inconvenience may be to both or either of the parties from some unforeseen occurrence which is not provided for, the engagements of the contract must still be performed.

Upon a charter-party where the charterer does not stipulate for the arrival of the vessel by any particular date, the risk of her non-arrival, by reason of weather and the accidents of navigation, always rests with the charterer; and, where the stipulation is simply that the ship will proceed to the loading port with all convenient speed, the dangers of the sea excepted, the shipowner performs his part of the contract, and there is no breach of it by him, if without his default the arrival of the vessel is delayed only by the accidents and dangers of the seas, even although that delay may prevent the loading of the vessel at the usual time, or so as to be profitable to the charterer.

The law has no power to make a contract different from that which a person has entered into; and where a shipowner

does not agree that his vessel shall arrive at the loading port by any particular day, but only that she shall proceed there with all convenient speed, or, what the law would imply, that she shall proceed and arrive within a reasonable time, and expressly stipulates that this shall be subject to the dangers and accidents of the seas and navigation, I do not see how that exception is to be got rid of, or how a contract with such an exception can properly be construed as, or converted into, an absolute engagement on his part that his vessel shall proceed or arrive within a reasonable time, as if there were no exception. If the contract could be so treated, it must be equally open to the shipowner to put an end to it, which in some cases might be productive of the greatest inconvenience to the charterer.

I quite admit the great inconvenience and possible loss to both shipowner and charterer when any serious delay is caused by the necessity for heavy repairs arising from sea perils; but the answer to such an argument, as it seems to me, is, that if either party desires to protect himself from such risk or inconvenience, he should introduce stipulations into the contract with that object; and if, instead of doing so, both parties agree that the vessel is to proceed and load subject to the accidents of navigation, which they expressly except, I think it is not competent for either of them afterwards to claim to be absolved from his contract by reason of an accident of navigation which he has expressly agreed shall be excepted.

If a man chooses to enter into a contract to do a particular act, he is bound to answer for it, although the performance of the act may be prevented by the occurrence of unforeseen circumstances which it was beyond his power to control, and which have arisen from no act or default of his own, because he might and ought to have provided for the contingency by his contract—see *Paradine v. Jones* (12). Where such a contingency is provided for, effect must be given to such provision as affecting the rights and obligations of both parties; and there is no principle of law that I am

aware of which would excuse either party from performance of a contract, because such performance would be highly inconvenient or injurious to himself, or lead to extraordinary expense. Where a lessee had engaged to pay a proportion of the value of coal to be raised, unless prevented by unavoidable accident from working the pit, and the pit became flooded with water from an unavoidable accident, which prevented the coal being raised except at a cost exceeding its value when raised, it was held that as all coal-pits are liable to such accidents, and inasmuch as the water might have been removed, though at a ruinous cost, and after some months' interruption of the working, the lessee was not excused from working the pit or paying the stipulated proportion of the coal which could have been so raised—*Morris v. Smith* (13).

In all maritime contracts, the performance of them must necessarily be affected by the winds and waves, and also by the regulations of foreign ports, which may be wholly or partially inaccessible in consequence of sanitary or police regulations, or restrictions in time of war, and they must equally be dependent in some parts of the world upon frost and ice and all the accidents of the weather, as well as upon fire and all contingencies which are considered as the act of God; but, in the absence of express stipulation, the risks arising from such causes would not generally excuse the performance of the engagements of the contract on either side: see, generally, *Barker v. Hodgson* (14), *Kearon v. Pearson* (15), and *Jones v. Holme* (4). It is on this account that, in charter-parties, bills of lading, and other contracts of a similar description, the dangers of the seas and many other contingencies are usually provided against and excepted; and, in such cases, unless some precise time be stipulated for the arrival of a vessel, I apprehend there is no engagement by a shipowner that the ship shall arrive within a reasonable time, but only that she shall arrive within a rea-

sonable time unless prevented by the excepted perils. Where such matters have not been provided for by the contract, they have constantly led to the greatest possible inconvenience and serious loss to one or both of the parties, and the occurrence of them has practically frustrated the purposes and objects of one or other and sometimes of both the contracting parties; and yet it has, I believe, always been held that their occurrence, unless provided for, will not absolve either party, whilst, if they are provided for and excepted in the contract, the engagements of the parties must be construed accordingly, and the obligations of each party will be qualified by the exception.

In the case of *Hadley v. Clarke* (1), goods had been put on board the defendants' vessel under a contract to carry them for the plaintiff from Liverpool to Leghorn, the dangers of the seas only excepted. Leghorn was then in the possession of the French Republic; and, when the vessel reached Falmouth, an embargo was laid upon her under an order in council, and she remained there under the embargo for more than two years, viz., from July, 1796, until August, 1798. The question was, whether the defendants were bound to carry on the plaintiff's goods. It was contended amongst other things for the defendants, that it was sufficient if they had waited a reasonable time after the embargo was first laid, and that, there being no probability that it would be taken off within a reasonable time, and it in fact lasted for two years, that the contract was at an end. The Court, however, considered that the defendants were not absolved from the contract. Upon this point Lawrence, J., said: "The counsel for the defendants were driven to the necessity of introducing into this contract other terms than those which it contains. They contended that the defendants were only bound to fulfil their engagement within a reasonable time, and then argued that, as the embargo prevented the completion of the contract within a reasonable time, the defendants were absolved from their engagement altogether. But it was incumbent on the defendants when they entered into this contract to specify the

(13) 3 Dougl. 279.

(14) 3 M. & S. 287.

(15) 7 Hurl. & N. 386; s. c. 31 Law J. Rep. (N.S.) Exch. 1.

terms and conditions on which they would engage to carry the plaintiff's goods to Leghorn. They accordingly did express the terms, and absolutely engaged to carry the goods, 'the dangers of the seas only excepted.' That, therefore, is the only excuse which they can make for not performing the contract. If they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract. In *Aleyn*, p. 27, this distinction is taken,—'Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.' So, in this case, there was one accident against which the defendants provided by their contract. They might also have provided against an embargo: but we cannot vary the terms of this contract, and the defendants must be bound by the terms of the contract that they have made."

In the case of *Touteng v. Hubbard* (16), a Swedish vessel belonging to the plaintiffs, and then in London, was chartered to proceed to St. Michael's and there load a cargo of fruit for London, restraints of princes and rulers excepted. The vessel proceeded on her voyage from London for St. Michael's, and put into Ramsgate Harbour, where she was detained under an embargo by the British government upon Swedish vessels for six months, viz., from the 15th of January until the 19th of June. She was then released; but the season for shipping fruit from St. Michael's was at that time over, and the charterer refused to load a cargo, on the ground that the season for shipping fruit had long since passed, and that the voyage would therefore be wholly useless and nugatory. The case was twice argued; and the ultimate decision proceeded upon the ground that the plaintiff, as a Swedish subject, could not recover

from the defendant, a British subject, damages sustained in consequence of an embargo by the British government upon Swedish vessels. But, upon the general question, in the judgment of the Court delivered by Lord Alvanley, there are the following passages: "The only question, therefore, will be, whether the defendant was bound by the terms of the charter-party to furnish a cargo to the plaintiff, notwithstanding the intervention of the embargo. I will first consider for what purpose and for whose benefit the words 'restraint of princes and rulers during the said voyage always excepted' were inserted in the charter-party. It appears to me that they were introduced for the benefit of the master, not of the merchant, and that the true construction of the charter-party is this,—the captain engages to go to St. Michael's, restraint of princes excepted, and the merchant engages to employ him and furnish the ship with a cargo. Lord Kenyon, in the case of *Blight v. Page* (17), put this construction on an instrument nearly similar with the present. If, then, this had not been the case of a Swedish ship hired by an English merchant, the merchant would have been under the necessity of furnishing the ship with a cargo if she had arrived at St. Michael's as soon as she conveniently might after the embargo was taken off, although, by arriving after the fruit season was over, the object of the voyage might be defeated; such is the doctrine in *Hadley v. Clarke* (1) and *Blight v. Page* (17). I have no difficulty in subscribing to the doctrine laid down in *Hadley v. Clarke* (1), that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise therefrom, unless they have provided against it by the terms of their contract. The object of the voyage might equally have been defeated by the act of God as by the act of the State, as, if the ship had been weather-bound until the fruit season was over; and yet in that case the merchant would have been bound

(16) 3 Bos. & P. 291.

(17) 3 Bos. & P. 295n.

to fulfil his contract. The principle of *Hadley v. Clarke* (1) is, that an embargo is a circumstance against which it is equally competent to the parties to provide as against the dangers of the seas, and therefore, if they do not provide against it, they must abide by the consequences of their contract."

In *Hurst v. Usborne* (3), a vessel which was under charter by the defendants was delayed by perils of the seas *one hundred and fifty-two days* beyond the usual time of the voyage to the port of loading, and the defendants in consequence refused to load her, partly on the ground that she had arrived after the time when the export trade usually took place from the port of loading, namely, Limerick. All the Judges were of opinion that the state of the trade at Limerick did not affect the question; and Willes, J., upon this point laid down the law as follows: "As to the other question, whether the construction of the charter-party can be affected by the fact that the particular description of cargo could only be supplied at a certain season of the year, the answer to that, I apprehend, is, that the charter-party was probably entered into in the hope that the vessel would arrive at Limerick at that time of the year. But the question is, who takes the risk whether she will or not? Why, the person who is to ship the goods takes the risk, unless he stipulates that the other party shall take it. Here it is not stipulated that the vessel shall arrive at Limerick by any particular day, but only that she shall proceed there with all convenient speed. The owner has performed his contract to proceed to Limerick with all convenient speed, when he has done all he could, but has been prevented by dangers of the seas."

In the American case of *Allen v. The Mercantile Marine Insurance Company* (18), a vessel had been stranded and sprang a leak which took three weeks to repair, during which time she was frozen in by ice, and there was no possibility that the navigation would be free or the vessel be able to continue her voyage for five

months. There was the usual exception in the bill of lading of dangers of navigation. The cargo had been delivered up to the shipper free of freight, and the action being brought against the underwriters for loss of freight, it was held that both the stranding and the closing of the navigation were dangers of the navigation within the exception of the bill of lading, and excused the delay which would necessarily ensue in making delivery of the cargo at the port of destination, and did not afford a sufficient excuse for the voluntary surrender of the cargo to the shipper free of freight, and that the underwriters on freight therefore were not liable. The Court there expressed their opinion that the repairs must be done within a reasonable time; and that no doubt would be so; but, unless the owner failed to complete them within a reasonable time, there would be no breach of contract by him. In that case it was also held that, so long as the vessel is capable of completing the voyage and thus earning the freight, neither the question of profit and loss to the owner nor of the length of time required to deliver the cargo, can so excuse the surrender without payment of freight as to render the insurers liable as for a loss: and that neither an injury to the vessel, not sufficient to create a total loss but repairable within a reasonable time, nor the act of God in closing navigation by ice, would authorise the abandonment of the voyage; but that either would authorise a detention of the goods until the voyage could be completed.

The case of *Blasco v. Fletcher* (8) was relied upon by the plaintiff. It was an action for the freight of goods which during the voyage and in consequence of serious damage to the ship had been taken possession of by the charterer and sold by him: but the decision really turned upon the point of whether the charterer had authority from the shipowner to act as he had done, which depended upon whether he had adopted a reasonable course under his special authority; and he having so acted and adopted a reasonable course for the interests of all parties, it was held that no claim for freight could be maintained.

(18) 5 Hands' Ap. Cas. (now cited by authority, as 44 New York Rep. 437.)

I fail to see the application of that decision to the present case.

The case of *Geipel v. Smith* (10), which was also relied upon by the plaintiff, turned entirely upon the exception in the charter-party of the "restraint of princes:" and it was held that, by reason of that exception, a blockade which prevented the defendant (the shipowner) from proceeding to the port of discharge, absolved him from doing so, or even from loading; and *à fortiori*, where by reason of the blockade the charter-party could not (as was alleged in one of the pleas demurred to) have been carried out within a reasonable time. The defendants, the shipowners, in that case, were held to be wholly excused by the terms of the charter-party from proceeding to deliver the cargo if loaded, and therefore it was considered to be useless for them to load, and that they were absolved from doing so. The expressions to be found in the judgments in that case as to reasonable time must, I think, be considered to have reference to the particular allegations in one of the pleas to that effect.

There are, no doubt, cases where delay which frustrated the object of a contract has been held to absolve a party from the further performance of it; but that is only where there has been some default or breach of contract by the other party as to a stipulation which was not in the nature of a condition precedent, and would not, but for such frustration of the adventure, have gone to the whole consideration or have afforded an excuse in law for the breach of contract complained of. The cases of *Havelock v. Geddes* (5), *Freeman v. Taylor* (6), and *Tarrabochia v. Hickie* (7), were all cases where there had been a breach or default by one of the parties; and the question arose as to the effect of such breach if it frustrated the whole object of the contract: but I am not aware of any case in which the mere frustration of the voyage by an unforeseen circumstance, where there has been no breach or default, has been held to absolve either party from his engagement.

The observations of several of the learned Judges in *Rankin v. Potter* (11),

in the House of Lords, are certainly deserving of great consideration with reference to the obligation of a charterer to load a cargo where, upon a ship becoming disabled, the necessary repairs are likely to cause considerable delay and inconvenience to him. But, on the other hand, the consequences to the shipowner, if a charterer were at liberty to throw up the contract under such circumstances, might, and in many instances would, be very serious with reference not only to the engagements into which the shipowner had entered with the crew and other persons connected with the voyage, but also with reference to further charters and engagements of the vessel which might be dependent on the first charter.

It seems to me almost impossible to determine the rights or obligations of the parties upon any principle or doctrine of convenience, which must vary in almost every case, and might affect the respective parties to the contract so very differently; and the only safe rule, as it seems to me, is to abide by the general principles of law and the cases that have been decided. Those decisions have, as far as I know, been uniform,—that a charterer is not discharged where the delay arises from an excepted cause, and where there has been no breach of contract or default by the shipowner. I am not aware of any decision to the contrary, although expressions may be found in some of the cases to that effect; nor have I been able to discover any authority for saying that a shipowner who makes a contract to proceed with convenient speed (sea perils excepted) comes under any obligation that his ship shall arrive within a reasonable time with reference to the business of the charterer; and I cannot find any clear ground of mutual convenience in such cases which should induce the Courts to lay down such a rule. It also appears to me that, if any such doctrine were allowed to prevail, it would give rise to great confusion, and no one would know, when once a ship was disabled, what the effect would be on her engagements, or what course ought to be taken either by the owner or the charterer. Where parties desire to protect themselves against contingencies, they can

always do so by express provisions ; and, if they omit to adopt this precaution, and especially when such contingencies are provided for by being excepted from the contract, they have no good ground for complaint if they suffer inconvenience, or loss, by being held to the terms of their contract.

Where, from the nature of the contract, circumstances occur which make its provisions altogether inapplicable, it may be admitted that the contract has no longer any effect ; but that doctrine, as it seems to me, does not apply to a case like the present, where the vessel might and ought to have been repaired, and where the cargo of iron could have been loaded and carried to its destination, and where the contract might thus have been fully performed on both sides, and where the contingency which has occurred of damage to the vessel by sea perils was specially contemplated and provided for in the contract itself.

In answer to questions put by the learned Judge, the jury found that the time necessary for getting the ship off and repairing her was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time, and so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the ship-owner and the charterers.

If the general views which I have stated with respect to the law applicable to this case be correct, then I apprehend these findings by the jury are wholly immaterial, and that the defendants, notwithstanding what the jury have so found, would be entitled to our judgment ; but, as such findings of the jury seem to have proceeded mainly upon the intention and object of the charterers in agreeing to load the vessel, it appears to me that they cannot, consistently with the view of the law which I have ventured to express, be supported in point of fact.

The underwriters do not insure against mere delay or its consequences, nor against wrongful breaches of contract or the voluntary surrender of a charter-party ; and, assuming that the charterers were not justified in their refusal to load

the vessel under the charter-party, then it is clear there is no loss of freight by any of the perils insured against. The vessel was not wholly lost, but might and ought to have been repaired ; and she would then have been capable of completing the voyage and earning the freight.

The probable delay in this case was provided for and excepted by the express terms of the charter-party ; and there was consequently no breach of any condition or warranty—no default or breach of the charter-party by the plaintiff ; and not even a breach of any stipulation in the contract for which an action for damages could have been maintained against him ; and therefore in my opinion nothing to justify the charterers on that ground or under the provisions of the charter, in refusing to carry it out.

If the charterers were not entitled—as I think they were not—to throw up the charter, then the remedy of the plaintiff for the freight is against them (unless he has precluded himself from that remedy by assenting to the abandonment of the charter), and not against the underwriters ; and I think, under the circumstances, that, upon this point, the view which my brother Brett originally took at the trial was correct, and that our judgment ought to be for the defendants.

My two learned brothers being of a different opinion, the judgment of the Court will be entered for the plaintiff.

The rule will, therefore, be absolute to enter the verdict for the plaintiff in the first action, for a partial loss on the ship, the amount of which loss is to be ascertained by an average-stater, as arranged between the parties ; and also to enter the verdict in the second action for the plaintiff as for a total loss of the freight.

Rule absolute accordingly.

Attorneys—Norris, for plaintiff ; Field, Roscoe, & Co., agents for Bateson & Co., Liverpool, for defendants.

[IN THE HOUSE OF LORDS.]

1873. { DUDMAN (clerk) (plaintiff in
June 10. { error, defendant in the Court
below) v. VIGAR (defendant
in error, plaintiff in the Court
below).

Tithes—Modus—Conversion into "Tillage."

Land was held subject to a modus in lieu of tithes until it should be converted into tillage, when a yearly rent at so much per acre was to become payable:—Held, that the building a house upon such land and converting a part of it into an orchard was not a conversion into tillage or a breach of the modus, and that the same modus continued in force.

A small portion of the land was converted into a garden for the use and convenience of the house:—Semble, such conversion was not a conversion into tillage.

An award made under an Inclosure Act set out the "tithe money payment to be hereafter payable out of lands subject to moduses in the event of and during the time when the lands or any part thereof should be converted into tillage." A schedule to the award shewed the actual measurement of the land in question to be 1a. 1r. 3p.; the payment to be made on conversion 12s. 8½d.; and the payment per acre 10s. The owner having converted a small portion into garden, and having paid in respect of that portion after the rate of 10s. per acre:—Held, that if such payment was of right payable in respect of the small portion so converted, it did not follow that payment must be made in the same way in respect of the rent of the land which was not converted.

This was a proceeding in error from a judgment of the Court of Exchequer Chamber affirming the judgment of the Court of Common Pleas upon a Special Case stated in an action of replevin, in which the now plaintiff in error was defendant, and the now defendant in error was plaintiff.

The action was brought by the plaintiff, who was a farmer and landowner residing at Pitney in the county of Somerset, against the defendant, who was the rector of the parish of Pitney, to recover damages for a distress levied on the plaintiff's

goods for the sum of 8l. 16s. 8d., being six years' arrears of a corn rent-charge alleged to be due to the defendant as for a broken modus.

The tithes of the parish of Pitney, otherwise Pitney L'Ortie, were commuted before the Tithe Commutation Act for a corn rent-charge by an award made under the provisions of the General Inclosure Act, 41 Geo. 3. c. 109, and the Pitney Inclosure Act, 42 Geo. 3. c. xv. (private). The latter Act provided that lands exempted from payment in kind by moduses were not to be affected, but the moduses were to continue payable, and the lands exempted were to be ascertained by the award. The award stated all the particulars relating to the exempted lands in a schedule; in referring to which schedule the arbitrator, after stating that in the Pitney modus schedule appended to his award, he had set forth the lands, &c., subject to moduses, and that the lands, &c., exempted by moduses were liable to become subject to the payment of tithes when the same should be occupied by persons not residing within the parish of Pitney, or should be converted into tillage, used the following language: "I have inserted in the said schedule, opposite to such lands, the tithe money payment to be hereafter payable thereout respectively in the event of and during the time when the same lands or any part thereof may be occupied by any person or persons not residing within the parish of Pitney, or shall be converted into tillage as aforesaid." The particulars ascertained by the schedule in respect of the lands in question in the schedule were therein entered in ten columns as follows—first, No. on plan 422; second, property of Matthews, John, sen.; third, computed acreage 1 acre; fourth, modus payable yearly 1d.; fifth, actual measure of land 1a. 1r. 3p.; sixth, yearly rent to be paid to the rector of Pitney when the modus lands shall be occupied by non-residents, 4s. 9d.; seventh, payments per acre 3s. 3½d.; eighth, corn payment at 8s. 7½d. per bushel, 4 gallons, 3½ pints; ninth, yearly rent to be paid to the rector of Pitney when the modus lands shall be converted into tillage, 12s. 8½d.; tenth, payment per acre 10s.; eleventh, corn payment at

8s. 7½d. per bushel, 1 bushel 3 gallons 6½ pints.

About forty years before the action a house had been built on part of No. 422, also about twenty-two perches had been converted into a garden for the use of the house, and the remainder had been planted for an orchard. Down to October, 1869, the modus of 1d. had been paid and accepted. In October, 1869, the agent of the rector claimed 3l. 16s. 3d., being six years' arrears of the corn rent (12s. 8½d.) charged under column nine of the schedule, on the ground that the planting of the ground as an orchard was a breach of the modus, and the conversion of part into garden was a conversion into tillage equivalent to a conversion of the whole into tillage. The plaintiff, now respondent, refused to pay the whole sum claimed, but he tendered the sum of 9s., being six years' arrears in respect of the twenty-two perches actually converted into garden at the rate of 10s. per acre specified in column ten of the schedule.

In order to try the question, the rector by arrangement distrained for the amount claimed, the plaintiff replevied in the Somersetshire County Court. The action was removed to the Court of Common Pleas, and the opinion of the Court was asked on a Special Case, whether the plaintiff was entitled to recover damages in respect of the distraint. If he was not so entitled, the judgment was to be entered for the defendant's claim of 3l. 16s. 3d. and costs.

The Court of Common Pleas, and, in error, the Court of Exchequer Chamber, gave judgment in favour of the defendant for the full amount of damages claimed and costs, being of opinion that there had been no conversion into tillage, and that the modus continued in force. For the report in the Exchequer Chamber, see 40 Law J. Rep. (N.S.) C.P. 229.

Philbrick and *Edwin Jones*, for the plaintiff in error.—The conversion into garden of a part was a conversion into tillage, and the conversion of the remainder into an orchard was a conversion to another use and nature. In *Beddingfield v. Feak* (1) such a conversion was ex-

(1) Cro. Eliz. 467*.

pressally mentioned as one of the modes of conversion which would render land which was subject to a modus liable to the payment of tithe. Tillage does not necessarily imply the use of a plough. In *Birch v. Stevenson* (2) the expression was—if the land be broken up, ploughed or converted into tillage. In the Pitney Inclosure Act, the commissioner is ordered to publish directions as to the laying down, ploughing, tilling and folding of the lands to be inclosed, so that in this very act a distinction is drawn between ploughing and tillage. But any conversion of land subject to a modus would destroy the modus, as by converting grassland into a hop-yard—*Rolle's Abr.* 651, Dismes F. 2; or a conversion of fulling mills into corn mills—*Com. Dig.* 499, Dismes H. 12 and 489, E. 20. Moreover a modus must be certain, it must discharge the lands altogether or from a certain tithe; a modus of so much per pound according to the value of the land or of one kind of tithe for another kind is void—*Com. Dig.* 485, 486, E. 16, 17. Therefore, both by the conversion of a part into garden and by the conversion of part into orchard, this whole modus is destroyed, or at least suspended, and tithes are payable out of this land after the rate specified in the schedule to the award.

Manisty and *Charles*, for the respondent, were not called on.

THE LORD CHANCELLOR.—So far as the question raised by this appeal relates to the garden land, there is no reason for your Lordships expressing any opinion, because the respondent has tendered the amount which would under the award be payable in respect of the twenty-two perches which have been converted into garden, and also because of the nature of the pleadings by which the only question raised was whether the plaintiff was entitled to recover damages, or whether the defendant should recover the amount of 3l. 16s. 3d.

The language of the commissioner with reference to the award,—“I have inserted in the said schedule, opposite to such lands, the tithe money payment to be hereafter payable thereout respectively in

(2) 3 Taunt. 469.

the event of and during the time when the same lands or any part thereof may be occupied by any person or persons not residing in the said parish of Pitney, or shall be converted into tillage," would have allowed of the argument that conversion of any part of the land into tillage would make the whole liable to the payment of tithe money, and that by the conversion of a part into garden ground the modus was wholly destroyed, but no such argument was, wisely, addressed to this House. The Act which is recited in the award was intended once for all to settle the future payments between these parties, and, except for the purpose of illustration in argument, we have nothing to do with the land as it would have stood if the tithe had not been commuted. The moduses were of a very special and peculiar kind, as to the lawfulness of which it is just possible that before the passing of the Act some doubt might have existed, but of course none can be raised now. The only question, therefore, is that which is raised by the Special Case,—whether the plaintiff in the Court below is entitled to recover damages, and the question is limited to the conversion of part of the land into orchard. Now it cannot be seriously argued that the planting of land with trees is a conversion into tillage. But the award made in pursuance of the Act expressly shews that unless converted into tillage this land is exempt from tithe. The argument, in fact, is that the words "converted into tillage" do not mean what they state but something wholly different, or that they mean converted into any other kind of use, in respect of which other tithes would be payable. I should, therefore, advise that the judgment of the Court of Exchequer Chamber be affirmed, and this appeal be dismissed with costs.

LORDS CHELMSFORD and COLONSAY concurred.

Appeal dismissed with costs.

Attorneys—Lowless, Nelson & Jones, for plaintiff in error; Vizard, Crowder & Anstie, agents for Tuson, of Ilchester, for defendant in error.

[IN THE HOUSE OF LORDS.]

1873.
June 16.

{ ALLEN (*clerk*) v. THE BISHOP
OF GLOUCESTER AND BRISTOL
AND THE RIGHT REV. DAVID
ANDERSON AND THE REV.
CHARLES HILL WALLACE.

*Church Building Act, 5 Geo. 4. c. 103—
Right of Presentation to Incumbency—
Election of Trustee.*

Section 6 of the 5 Geo. 4. c. 103, a church building Act, provides that the persons subscribing 50*l.* to the building of a church built under that Act shall have power to elect three trustees from among themselves for the management of the temporal affairs of the church, and for the nomination to the bishop of a spiritual person to serve the same; such trustees to be called life-trustees. Section 7 provides that in case of the death or resignation of any of such trustees, the majority of the subscribers of 50*l.* present at a meeting, which the surviving trustees or trustees are required to convene, may elect from among themselves another person to be a life trustee in the place of the trustee so dying or resigning. Section 12 limits the right of nomination by the life trustees, elected under sections 6 and 7 to the first two turns or to any number of turns that may occur within forty years after the consecration of the church. All subsequent nominations were to be in the incumbent of the parish in which such church should be built; and if all the subscribers entitled to elect trustees should die within the forty years, &c., the nominations are to be made by the incumbent during such period. "Provided also that if all such subscribers shall die so that no such election of any trustee can be made, and any one of the trustees for the time shall die or vacate, then and in every such case the incumbent for the time being shall be and become a trustee to use and exercise all powers and authorities given to trustees under the provisions of this Act":—Held, that where only one subscriber of 50*l.* was left surviving, and only one trustee by election, the incumbent of the parish became trustee *ex officio* jointly with the surviving trustee by election, and, on the death of the latter within the forty years, entitled to nominate on the vacancy in the incumbency of the church.

In 1830, F. and others, exceeding three in number, subscribed 50l. a-piece towards building a church which was built under the above Act. Three life trustees were duly elected, who all died, and fresh trustees were elected in their places. In April, 1866, only one of these new trustees thus elected in the place of the original trustees, viz., H., was living. In July, 1866, F., believing that he was the sole surviving subscriber of 50l., and being unaware that H. was yet alive, went through the form of publishing a notice, in the mode prescribed by the Act, convening a meeting of the subscribers of 50l., and at the time and place mentioned in the notice he elected himself a life trustee. In April, 1867, H., the survivor of the trustees, died, and F. thereupon became in fact the sole surviving subscriber of 50l. On the 11th of August, 1867, the incumbency of the church became vacant, and F. immediately, viz., on the 22nd of August, 1867, nominated the Rev. J. A. The bishop refused to accept that nomination, and approved, licensed and inducted another clerk who had, on the 19th of August, 1867, been nominated by the incumbent of the parish. By this time F. had discovered that in July, 1866, he was not the sole surviving subscriber of 50l. He therefore went through the form of convening another meeting for the 20th of September, 1867, at which he again elected himself a life trustee in the place of H., the original trustee, and on the same day he again nominated the Rev. J. A. to the bishop:—Held, that prior to the incumbency becoming vacant in August, 1867, the incumbent of the parish had become a trustee jointly with the then surviving trustee, and had a right of nomination of a spiritual person to serve the church, and that H. was not, either on the 22nd of August or on the 20th of September, 1867, a sole trustee either by election or by reason of his being the sole surviving subscriber of 50l., and therefore he was not solely entitled to nominate to the living on either of those days.

This was a proceeding in error from a judgment of the Court of Exchequer Chamber, which had affirmed a judgment of the Court of Common Pleas upon an action of *quare impedit*, in which the facts were stated in a Special Case. The

case before the Court of Exchequer Chamber is reported in 38 Law J. Rep. (N.S.) C.P. 341, and before the Court of Common Pleas in the same volume at p. 253, *sub nom. Fowler and another v. The Bishop of Gloucester*, where the Special Case is printed.

The question was whether Mr. Fowler, the co-plaintiff, with the now plaintiff in error in the Courts below, had a right to nominate or present the plaintiff in error to the Bishop of Gloucester as a spiritual person to serve the church of the Holy Trinity, Hotwells, in the city of Bristol, which church had been built under the Church Building Act, 5 Geo. 4. c. 103. This Act, after providing for the election of life trustees by a majority of the subscribers of 50l. and upwards towards the building of the church and for the election of trustees in succession to any of those first elected who might die or resign, enacts, by section 12, as follows—“And be it further enacted that the life trustee or trustees of any such church or chapel which shall be built or purchased by private subscription may nominate for the first two turns which shall occur after the consecration of the church or chapel, or for any number of turns which may occur during the space of forty years after the same, to the bishop of the diocese for his approbation and license, a spiritual person to serve the same; and all subsequent nominations shall be in the incumbent of the parish or extra-parochial place in which such church or chapel shall be built or purchased; unless in case of such chapel being made a district church as hereinafter mentioned, in which case such subsequent nomination shall be in the patron of the church of the original parish; and in case of any neglect of any trustee or trustees, patron or incumbent respectively, to make such nomination, the same shall lapse as in the case of actual benefices; and if all the subscribers entitled to elect trustees shall die before such nominations shall have been made, or such forty years shall have elapsed as aforesaid, then and in every such case the nomination shall be made by the incumbent during such period. Provided also, that if all such subscribers shall die, so that no such

tion of any trustees can be made, and one of the trustees for the time shall or vacate, then and in every such case incumbent for the time being shall be deemed to become a trustee, to use and exercise powers and authorities given to trustees under the provisions of this Act."

In the year 1830 the church or chapel the Holy Trinity, Hotwells, in the parish of Clifton and city of Bristol, was built by subscriptions under the above Act, and a Mr. Fowler was one who, with many others, subscribed upwards of 50*l.* towards its building. On the 6th of October, 1830, Sir E. T. Hartopp, Bart., Thomas Whippie, and A. G. H. Battersby were duly elected trustees under section 6 of the Act; and on the 8th of the same October, they nominated the Rev. J. Hensman. On the 26th of August, 1833, Mr. Isaac Cooke was elected trustee in the place of Sir E. T. Hartopp, deceased. On the 21st of September, 1836, J. S. Harford was elected trustee in the place of Thomas Whippie; and on the 17th of July, 1854, the Rev. J. Hensman, who had previously resigned the incumbency, and A. Hillhouse, were elected life trustees in the places of A. G. H. Battersby and I. Cooke, deceased. In April, 1864, the Rev. J. Hensman died, and no new trustee was appointed in his place. On the 16th of April, 1866, J. S. Harford died, and no trustee was elected in his place. At that time Mr. Fowler and A. Hillhouse were the sole surviving subscribers of 50*l.* to the building of the church. In July, 1866, Mr. Fowler, not being aware that A. Hillhouse was alive, called a meeting of subscribers of 50*l.*, at which he elected himself a life trustee. On the 9th of April, 1867, A. Hillhouse died. On the 11th of August, 1867, the incumbency of the church became vacant by the resignation of the Rev. Humphrey Allen, at that time incumbent of it. On the 19th of August, 1867, the Vicar of Clifton, the defendant Anderson, nominated the defendant, the Rev. C. H. Wallace, as his clerk to serve the church; and on the 22nd of August, 1867, Mr. Fowler nominated the plaintiff, the Rev. J. Allen. The bishop approved, licensed and inducted the Rev. C. H. Wallace. Mr. Fowler, conceiving that his nomination

had not been accepted by the bishop on account of some irregularity in his appointment of himself as life trustee, went through the form a second time of convening a meeting, and of electing himself a trustee; and on the 20th of September, 1867, he again nominated the Rev. J. Allen to serve the church. But the bishop refused to accept the nomination, on the ground that he had previously acted on the nomination of the defendant, the Right Rev. David Anderson.

Therefore the plaintiffs brought their action against the defendants declaring that they had unjustly hindered the plaintiff, J. Fowler, from nominating and presenting the plaintiff, J. Allen, to the church. The question left by the Special Case for the opinion of the Court (which was to have liberty to draw inferences), was "whether the plaintiff, Fowler, was at the time of either of the nominations made by him of the plaintiff, the Rev. J. Allen, to the said church entitled to nominate or present thereto."

The Court of Common Pleas and, on error brought, the Court of Exchequer Chamber had given judgment against the plaintiffs, on the ground that Mr. Fowler did not become a life trustee by election or otherwise, and that the nominations made by him were therefore invalid. From this judgment the Rev. J. Allen now brought error alone, and *in forma pauperis*.

Philbrick (Dawson Yelverton with him) was heard for the plaintiff in error.

Lopes and *Ledyard*, for the defendants in error, were not called on.

THE LORD CHANCELLOR.—The present appeal cannot succeed unless Mr. Fowler was the sole trustee at the time of presentation by him to the bishop of the plaintiff, Mr. Allen. A question has been raised whether there is any provision made, by section 7 of the Act referred to, for filling the place of a trustee appointed in place of one of the three first appointed trustees, and as in this case all the three first appointed trustees had been replaced by others, the last of whom was Mr. Hillhouse, who died in April, 1867, if on the true construction of the Act we should hold that no such provision is made by

the Act, it would follow that Mr. Fowler never became a life trustee, and that he was not entitled to make a valid presentation to this incumbency. Assuming, however, that the self-election of Mr. Fowler as trustee was in all respects valid, he still would not thereby become a sole trustee, because in that case the provisions of the 12th section would come into operation, and as all the trustees were dead, and there were no surviving subscribers so that no election of any trustee could be made, the incumbent of the parish in which the church was built, in this case the defendant, the Right Rev. D. Anderson, became and was a trustee, entitled to use and exercise the powers and authorities given to trustees under the provisions of the Act, and therefore entitled to present to this incumbency.

The bishop having accepted the clerk presented to him by Mr. Anderson, the claim of the plaintiff altogether fails, and it follows that this appeal must be dismissed with costs.

LORDS CHELMSFORD and COLONSAY concurred.

Appeal dismissed with costs.

Attorneys—Poole & Hughes, for plaintiff in error;
Young, Maples, Teesdale & Nelson, for defendants in error.

1878. }
May 3. }
July 7. }

BURNS v. POULSON.

Master and Servant—Negligence of Servant—Acting within Scope of Employment.

One W. was employed to cart certain iron to a wharf, and the defendant, a stevedore, to ship it on board a ship alongside; the defendant's foreman, who was acting for him, being dissatisfied with the uncarting of the iron by W.'s carters, got into the cart, threw out some iron, and in so doing injured the plaintiff. Two of the plaintiff's witnesses said it was the duty of W.'s carters to put the iron on the ground, and of the stevedore then to take it; this was the only evidence as to the duty of the defendant and his servants:—Held, by GROVE, J., and DENMAN, J., that it was a question for the jury whether, in the particular case, the foreman was acting within the scope of

his employment; but by BRETT, J., that the Judge was bound to say that what was done by him was done before his employment by the defendant commenced.

This was an action for injury caused to the plaintiff by the servant of the defendant. The facts are fully stated in the judgments of the Court. At the trial a nonsuit was entered, with leave to the plaintiff to move to enter a verdict for 30l. if the Court should think fit, and a rule nisi was granted pursuant thereto.

Gully shewed cause.

O. Crompton supported the rule.

The following cases were referred to—*Greenwood v. Seymour* (1), *Limpus v. The London General Omnibus Company* (2), *Page v. Defries* (3), *Allen v. The London and South Western Railway Company* (4), *Whatman v. Pearson* (5), *Bayley v. The Manchester Railway Company* (6), *The Thetis* (7), *Barwick v. The English Joint Stock Bank* (8), *Huzzey v. Field* (9), *Storey v. Ashton* (10) and *Poulton v. The London and South Western Railway Company* (11).

Cur. adv. vult.

The Court differing in opinion, the following judgments were now (on July 7) delivered—

DENMAN, J.—In this case, which was tried before the Judge of the Passage Court who nonsuited the plaintiff, a rule was obtained to set aside that nonsuit, and to enter a verdict for the plaintiff for 30l. damages if this Court should think fit. It was assumed upon the argument

(1) 7 Hurl. & N. 355; s. c. 30 Law J. Rep. (n.s.) Exch. 327.

(2) 1 Hurl. & C. 526; s. c. 32 Law J. Rep. (n.s.) Exch. 34.

(3) 7 B. & S. 137.

(4) 40 Law J. Rep. (n.s.) Q.B. 55.

(5) 37 Law J. Rep. (n.s.) C.P. 156; s. c. Law Rep. 3 C.P. 422.

(6) 41 Law J. Rep. (n.s.) C.P. 278; s. c. (Ex. Ch.) 42 Law J. Rep. (n.s.) C.P. 78.

(7) 38 Law J. Rep. (n.s.) Adm. 42.

(8) 36 Law J. Rep. (n.s.) Exch. 147; s. c. Law Rep. 2 Ex. 259.

(9) 2 Cr. M. & R. 432; s. c. 4 Law J. Rep. (n.s.) Exch. 239.

(10) 38 Law J. Rep. (n.s.) Q.B. 223; s. c. Law Rep. 4 Q.B. 476.

(11) 8 B. & S. 616; s. c. 36 Law J. Rep. (n.s.) Q.B. 294.

of the rule by the counsel on both sides, and I think we are also bound to assume, that this reservation means that the plaintiff is to be entitled to the verdict for 30l. if this Court should be of opinion that there was evidence upon which the jury *might* not unreasonably have found for the plaintiff. I am of opinion that there was such evidence. The material facts proved at the trial were as follows—The defendant was a stevedore, who was employed to ship some iron rails which were to go by a ship lying in the Liverpool Docks. He had a foreman named Malone, who, on the day in question, was acting for him at the dock. The iron rails in question were being unloaded from a cart, which belonged to one Wood and was standing at a small distance from the ship on board of which the rails were in course of being loaded. The carter, in unloading the rails, was putting them down on one side of the cart, when Malone, for what purpose is not stated, but I think it may be inferred in order to assist his own operations in some way, told him to put them on the other side, and upon his refusal, got into the cart, and threw out some rails, one of which injured the plaintiff—a passer-by. The only evidence in relation to Poulson or Malone's duty, in respect of the iron rails in question, was as follows: The second witness, a warehouseman in the service of the plaintiff's employers, in his cross-examination, said, "Poulson is a stevedore. He receives the iron rails after they are thrown out on the ground, and takes them to the ship." The carter, in his cross-examination, said, "It is our duty to put the rails down out of the cart on the ground, and then the stevedore takes them to the ship." It was contended for the defendant that upon these facts there was no evidence upon which a jury could have found a verdict for the plaintiff, and upon this ground the learned Judge nonsuited the plaintiff. The contention before us on the part of the defendant was that, inasmuch as the duty of the stevedore did not commence in relation to any particular portion of the rails in question until they were on the ground, it was impossible to hold the defendant liable for the act of Malone in

throwing the rail in question from the cart; that that act could not be within the scope of his employment or duty, being an act done at a period antecedent to that at which his duty in relation to that iron commenced, and at a place where he had no business to be meddling with it at all. In my opinion this contention of the defendant proceeds on too narrow a view of the duty or employment of Malone; and that the cases applicable to the subject establish that even though in the *ordinary* course of his employment it would not be a part of Malone's duty to assist in moving the rails from the cart, it was still a question for the jury, and not for the Judge, whether, in this particular case, he was acting within the scope of his employment. It cannot, I think, be contended in this case that the Judge or jury were bound to hold that Malone was acting for any purpose of his own as distinguished from his master's service, as was the case in *Storey v. Ashton* (10), where the carman, by whose negligence the plaintiff was injured, had been induced by a clerk of the defendants to drive in a wrong direction after business hours on business of the clerk's; nor, as it appears to me, if it was a question for the jury, would it be unreasonable for them to have found that he was acting within the scope of his employment, inasmuch as they might not unreasonably have thought that the act was one done for his master's benefit, and with a zealous desire to expedite the work, and for aught I know in a manner proper and even usual, under the circumstances, for a person employed as Malone was at the time. In *Joel v. Morisson* (12), which though a *Nisi Prius* case is cited with approval in many other cases decided by the Courts, Parke, B., says: "The master is only liable where the servant is acting in the course of his employment;" but he immediately adds, "If he was going out of his way against his master's implied commands when driving on his master's business, he would make his master liable;" and earlier in the summing up, "If the servant, being on his master's business, took a *détour* to call upon a friend, the

master will be responsible," and this view of the law is entirely in accordance with the judgment in *Whatman v. Pearson* (8), cited for the plaintiff, which indeed is a stronger case, inasmuch as there the servant acted in violation of his instructions. No doubt cases may be put in which a servant may so conduct himself about goods of his master with which he is dealing as servant as to make it clear that the master is not responsible for his negligence in the course of such conduct. *Storey v. Ashton* (10), mentioned above, and *Mitchell v. Craseweller* (13) were such cases, but can it be said that in the present case it would have been unreasonable for a jury to find that the act of the foreman in getting into the cart, and throwing the iron down, was an act *bona fide*, and not unreasonably done in the zealous discharge of his duty to his master in the course of the business he was employed upon, and if they were of that opinion, might they not also properly find that he was acting within the scope of his employment? I think they might, and therefore that this nonsuit was wrong, and that, by virtue of the understanding at the trial, the rule should be made absolute to enter a verdict for 30*l*.

My brother Grove agrees with me that in this case there was evidence for the jury, and that the nonsuit was therefore wrong.

BRETT, J.—In this case the plaintiff sued the defendant for injuries alleged to be caused by the defendant's servant. The case was tried before the Judge of the Passage Court at Liverpool and a jury. The plaintiff in his evidence stated that he was in the employ of Messrs. Davis & Co.; that he was at work for them at the Huskisson Dock; that one Malone, the defendant's foreman, threw an iron rail off a cart, which struck and crushed him the plaintiff; Malone, he said, was ordering the truck men to take the iron from the cart to the ship. Felix Brooksope, being examined, said that he was outside warehouseman to Davis & Co., that he saw Malone unloading the cart, and saw him throw the iron off the cart. Being cross-examined, he said that the defendant is a stevedore, that he as

such receives the iron rails after they are thrown out of the cart on to the ground, and takes them to the ship. The cart was the cart of Wood, a carrier. James Gradle stated that he saw Wood's carter unloading the iron, and saw Malone throw the iron out of the cart. Edward Stringfellow said that he was Wood's carter, that he was carrying the iron rails, that he was putting them down on the off side of the cart, when Malone told him to put them on the other side, and when he would not do so *Malone got into the cart and threw the iron out.* Being cross-examined, he said, *it is our duty to put the rails down out of the cart on the ground, and then the stevedore takes them to the ship.* Upon this evidence the learned Judge nonsuited the plaintiff, giving him leave to move this Court to enter a verdict for the plaintiff by consent for 30*l*. if the Court should think fit. A rule having been obtained according to the leave reserved, the case was argued before my brothers Grove and Denman and myself. The question was stated in argument on both sides to be whether there was evidence that Malone was acting within the scope of his authority. If there was, it was admitted by the defendant's counsel that the judgment should be for the plaintiff; if there was not, it was admitted by the plaintiff's counsel that the judgment should be for the defendant. The arguments raise the question—What is the proper application in point of law in this case of the phrase or doctrine "that the servant must be acting within the scope of his authority?" Some cases have raised the question whether the servant in what he did was intending to act for his master or for purposes of his own. That does not seem to me to be the point in this case. Malone may be considered to have been intending to act in performance of the duty delegated to him. In this case the question is, whether the time had arrived or the circumstances had arisen for doing anything which the servant was employed to do. Had his employment commenced? "The question," says Lush, J., in *Storey v. Ashton* (10), "in all such cases is, whether the servant was doing that which the master employed him to do?" "Where the ser-

(13) 13 Com. B. Rep. 237; s. c. 22 Law J. Rep. (N.S.) C.P. 100.

vant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant"—Maule, J., in *Mitchell v. Grassweller* (13). "It is not sufficient that the act should be done with intent to benefit or intent to serve the master. It must be something done in doing what the master has employed the servant to do"—Blackburn, J., in *Limpus v. The General Omnibus Company* (2). In *Whatman v. Pearson* (5) the servant was held to be acting in the course of his employment, because he was employed to manage the horse and cart during the day—Byles, J. Now in the present case Brocksop, who was the warehouseman of Davis & Co., the shippers of the iron rails, stated that the defendant's employment was to receive the rails after they were thrown out of the cart on to the ground, and take them to the ship. It was therefore obviously the business of Davis & Co. by their own servants, or some other agent of theirs, to carry the rails to the quay, and place them on it, i.e. on to the ground there, for the defendant to carry them thence into the ship, and there stow them. And it is obvious that Davis & Co. employed Wood, a master carter, to carry the rails to the quay, and deliver them there. Stringfellow, who was Wood's carter, stated, "It was our duty to put the rails down out of the cart on the ground, and then the stevedore takes them to the ship." The joint employer of Wood and of the defendant therefore limits the commencement of the defendant's employment to a time after the rails were on the ground. And the person employed on the previous and antecedent operation, namely, that of carrying the rails from the warehouse and delivering them out of the cart on to the quay, equally limits the commencement of the defendant's employment to the time after the rails are on the ground. Now what the defendant was employed to do, what he might according to that employment have done himself, he employed Malone to do. He employed Malone to carry the iron rails, after they were on the ground at the quay, thence into the ship, and there stow them. For anything done by Malone in carrying or stowing the rails, or anything done by

NEW SERIES, 42.—C.P.

Malone with the rails after they were on the ground with the intent to carry out his orders to take them into the ship and stow them there, the defendant would have been liable. But it seems to me that the defendant had not employed Malone to do anything with regard to the rails before they were on the ground. The defendant himself was not employed to do anything with the rails before they were on the ground. Anything voluntarily done by Malone therefore before the rails were on the ground, though done with intent to serve the defendant, was not a thing done which the defendant had employed Malone to do. The evidence which described and limited the employment of the defendant and of Malone was given on behalf of the plaintiff, and there was no evidence to vary or render doubtful the limitation of the commencement of the employment. There was no question which the jury would have been entitled to entertain about it. The Judge was, in my opinion, bound to say that what was done by Malone was done before his employment by the defendant was called into play, that is to say, it was a thing which the defendant had not employed Malone to do. I am of opinion, therefore, that the learned Judge was right in nonsuiting the plaintiff, and that this rule ought to be discharged.

Rule absolute.

Attorneys—Torr, Janeway & Co., agents for E. Hughes, Liverpool, for plaintiff; S. C. H. Sadler, agent for T. Bellringer, Liverpool, for defendant.

1872.	{	EBSWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.
Nov. 20, 21, 22.		
1873.		
Jan. 28.		
July 15.		

Marine Insurance—Insurable Interest—Parties to bring Action—Pleading.

The plaintiffs were cotton brokers and agents in London, who were accustomed to receive consignments of cotton from Bombay for sale on behalf of the shippers who drew bills of exchange on them against the consignments; the bills of exchange were usually negotiated in India, sent to this country with the bills of lading attached as security,

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presented to, and accepted by, the plaintiffs against delivery of the shipping documents; and the plaintiffs were in the habit of effecting open floating policies of insurance with the defendants "as well in their own names as for and in the name or names of all and every person or persons to whom the same doth, may or shall appertain in part or in all." Cotton having (under the circumstances detailed at length in the judgments of the Court, which had power to draw inferences of fact) been shipped, bills of exchange drawn on the plaintiffs against it, negotiated, and sent with the bills of lading and accepted against delivery of the documents, the plaintiffs declared the cotton against two open floating policies previously made and not yet exhausted, and the cotton being lost, the bills of exchange paid by them and bills of lading obtained, brought an action on the policies, averring that they, or some or one of them, were interested to the full amount named, and that the insurances were made for the use and benefit and on account of the persons so interested:—Held, per BOVILL, C.J., and DENMAN, J., on the facts of the case, that the plaintiffs had an equitable interest in every part of the cotton, and that it was intended that not only their interests but those of the other parties interested should be covered, and that the plaintiffs having such an interest and a duty of selling and managing, were in law entitled so to insure, were the only persons to bring an action, might aver as they did in their declaration, and recover to the full extent, applying the proceeds to their own benefit to the extent of their own claims, and holding the residue for the other persons interested; but per BRETT, J., and KEATING, J., the plaintiffs were consignees for sale of goods not arrived, who had made advances on goods, but had only a contract right as to them, and though interested in every part, were not the legal owners, and therefore they were by law limited to the recovery of their own beneficial interest, which alone they could properly insure and recover.

This was an action on two open floating marine policies of insurance on cotton, in which the declaration in effect alleged that the plaintiffs were interested to the amount insured, and that the policies were made for the benefit of those so

interested, whilst the pleas denied that the plaintiffs insured as alleged, that the goods were shipped as alleged, and that the plaintiffs were interested or the insurances made for the benefit of such persons as alleged.

The facts and pleadings are so fully set forth in the judgments of the Court that it is not here necessary to state them.

At the trial before Keating, J., a verdict was found for the full amount insured, with leave to the defendants to move to enter a verdict for themselves if the Court thought the plaintiffs had no insurable interest; or to reduce the damages if the Court thought they could only recover the amount of their own interest, the Court to have power to amend, and during the argument it was agreed that it might draw inferences of fact.

A rule nisi having been obtained accordingly,

Henry James and Watkin Williams shewed cause.—The plaintiffs at the time of the loss had a vested pecuniary interest in the arrival of the goods, and only the perils insured against stood between them and the realisation of their interest; and the declaration was no part of the contract but only a record of what the law would effect without it—*Hunter v. Leathley* (1). Two questions are raised by the plea which avers, first, that the plaintiffs were not interested; secondly, that the policy was not made for their benefit. Now as respects the first question, what does the averment of being "interested" mean? It has been sometimes said that this averment originated with 19 Geo. 2. c. 37, but this is not so, it is as old as the insurance law itself. That statute was passed in 1746, but, as was said by Lord Mansfield in *Cohen v. Hannam* (2), when the precedents were examined in *Lucena v. Craufurd* (3) it was found that even before the statute a policy without interest was void (*Goddart v. Garrett* (4), decided in 1692, being one case to that effect); and inasmuch as interest was necessary, and if the policy was made for some one else the real contract would not appear, it

(1) 10 B. & C. 858.

(2) 5 Taunt. 107.

(3) 3 Bos. & P. 95, 98; s. c. 2 N.R. 269, 290.

(4) 2 Vern. 269.

was thought that it was necessary to state interest, as otherwise the interested parties might be called as witnesses. But though it is stated in many text books and authorities that an averment of interest means exclusive interest, this is a mistake, and is not borne out by the authorities. The plaintiffs rely on *Page v. Fry* (5) which is good law and has not been overruled as has sometimes been stated. In that case the objection was taken, that there was an averment of interest in two persons, whilst a third was, in fact, also interested, but it was held, that the question was whether the two had sufficient interest in the entirety. And again, in *Hiscox v. Barrett*, cited in *Bell v. Ansley* (6), the interest was averred to be that it should be, and it was objected that it should have been averred that two other persons were jointly interested, but the averment was held to be sufficient because he made the contract, and was interested in the whole though liable to account to another person. Lord Mansfield, in *Cohen v. Hannam* (2), no doubt thought that *Bell v. Ansley* (6) was opposed to these cases, and that they were not law, but in that case the policy was "made" for several while the declaration averred it was made for the plaintiff, and the decision turned on this averment and did not affect the previous cases, which were approved of, there being a clear distinction between the averments as to interest and making. This is clearly pointed out in 2 *Duer on Marine Insurance*, 22, 74. Consequently the averment of interest is proved by shewing any interest. And here the plaintiffs had an insurable interest, for when they accepted the bills they became interested in the goods, and had a positive right to receive and sell them ultimately, and thereupon the policies attached as from the time of loading, as is shewn by *Joyce v. Swann* (7) (where the point taken in *Watson v. Swann* (8) was not taken), and the decision on the second count in *Wolff v. Horncastle* (9),

which was not so strong a case as the present, and *Lucena v. Craufurd* (8), and *Sparkes v. Marshall* (10). As respects the second question, it is said that the policies were not made for the plaintiffs. But a policy, even in the form used here, cannot be made to apply to unascertained persons to whom it might have applied if known when it was made—2 *Duer on Marine Insurance*, 29. Here the policies were intended by the plaintiffs to cover their interest arising in their business, and were made without reference to particular persons who might eventually become interested, but were then unascertained. And if the plaintiffs had averred that the policies were made for Bell and Cursonadas Madhowdass, they must have failed according to *Watson v. Swann* (8), for Cursonadas Madhowdass was unascertained, and such a person could not be made a party to the contract. Lastly comes the question of amount. Now the plaintiffs had a right to insure to the full value, for though no doubt they were not beneficially interested in the whole 5,000*l.*, yet *Lucena v. Craufurd* (8), where the Commissioners were in the same position as the plaintiffs here, shews that apart from his own beneficial interest a person may insure to the whole amount, and the observations of Gibbs, C.J., in *Carruthers v. Sheddon* (11) shew that consignees may recover for the whole though only interested in part; and further, here the valuations in the declarations are initialed by the defendants and the policies became valued, and *Barker v. Jansen* (12) shews that the amount cannot be re-opened if there be an interest and no fraud.

Sir J. Karlake and *Cohen*, in support of the rule.—It is a material fact that one of the plaintiffs says that he insured 3,000*l.* for the plaintiffs and 2,000*l.* for their correspondents, and *Willes, J.*, in *Watson v. Swann* (8), expressly declines to decide whether correspondents can be joined together in policies of this kind. There can be no doubt that this was the meaning of the declaration, and

(5) 2 Bos. & P. 240.

(6) 16 East 141.

(7) 17 Com. B. Rep. N.S. 84.

(8) 11 Com. B. Rep. N.S. 756; s. c. 31 Law J. Rep. (N.S.) C.P. 210.

(9) 1 Bos. & P. 316.

(10) 2 Bing. N.C. 761; s. c. 5 Law J. Rep. (N.S.) C.P. 286.

(11) 6 Taunt. 14.

(12) 37 Law J. Rep. (N.S.) C.P. 106; s. c. Law Rep. 3 C.P. 303.

the question is, if the plaintiffs in effect insured more than 3,000%. The whole property was to go to the bank, and the plaintiffs might never have had anything to do with the goods, for no interest would come to them unless they took up the acceptances, and if the drawers had taken the bills up this would not have happened. The plaintiffs had no legal interest, and only an equitable right, if even that, on payment of the acceptances, which might never happen, to get the goods and sell them; so that at most, they, at the time of the loss, had only a contingent interest in the goods and no insurable one. But admitting the plaintiffs might have had an insurable interest when they insured, by declaring on the floating policy they meant not to insure their own interest alone, but also that of Bell & Co., the consignors. The question is, whether they could so insure to the whole extent of the goods, and hold the surplus for those who may be entitled to it. The plaintiffs never insured for the National Bank, they were never the agents of the bank, or professed to act on behalf of the bank—*Watson v. Bell* (13). The terms used in the insurance, however broad and comprehensive, must be restricted to those for whom the insurance was, in fact, intended, and by whom it was previously directed or authorised, or subsequently, in due season, adopted. All other persons, although they may equally fall within the description in the policy, are not parties, but strangers to the contract—2 *Duer on Insurance*, p. 30. The plaintiffs insured for Bell & Co., and therefore should have alleged that Bell & Co. were interested, and the declaration is not correct in stating that the plaintiffs were interested, which must mean that they alone are interested. As the policy was made for Bell & Co., the plaintiffs cannot recover the whole of the insurance—*Cohen v. Hannam* (2) and *Bell v. Ansley* (6). These cases are commented on in 2 *Duer on Insurance*, p. 78, where it is stated that in consequence of the decisions in those cases, the new general rule of 2 Wm. 4. was made—that in actions on policies the interest of the

assured may be averred thus: "that A, B, C and D, or some or one of them, were or was interested, &c." *Wolff v. Horncastle* (9), which has been relied on by the counsel for the plaintiffs, was wrongly decided on the second point as to there being an insurable interest in the plaintiffs in that case. At all events it was not decided there that Wolfe, the plaintiff, if he had not insured his interest, but Lund's, could, notwithstanding, have recovered in respect of his own interest. The plaintiffs cannot recover without amending the declaration by averring that the insurance was on behalf of themselves and others—*Irving v. Richardson* (14), 2 *Duer on Insurance*, p. 79, and *Page v. Fry* (5). The plaintiffs contend that if a person has an interest, however small, in every part of the cargo, he may recover for the whole, though he avers that the insurance was made for himself, and that he was interested in the whole; and even though he had no vested interest. This contention is novel, and would alter the course of insurance law. Where there is a total loss, the person averring interest in himself must prove what interest was in him at the time of the loss, and can recover no more, though where there is a partial loss the law is different. What is said in *Arnold on Marine Insurance* (last edition), 54, shews that the contention on the other side is not correct. The plaintiffs' interest at the time of loss was a future right, with a power of sale depending on the handing over of the bills of lading and payment of the bills of exchange, which was only a contingent interest, which a Court of Equity would protect, if it were clearly shewn to be in danger. Such an interest is not insurable—*Stockdale v. Dunlop* (15).

[BOVILL, C.J., referred to *Ex parte Waring* (16) and *Ex parte Smith* (17).]

Ex parte Waring (16) (which was followed by *Powles v. Hargreaves* (18)), is com-

(14) 2 B. & Ad. 193.

(15) 6 Mee. & W. 226; 9 Law J. Rep. (N.S.) Exch. 83.

(16) 19 Ves. 345.

(17) Weekly Notes, Dec. 28th, 1872.

(18) 3 De Gex, M. & G. 430; s. c. 23 Law J. Rep. (N.S.) Chanc. 1.

(13) 11 Com. B. Rep. N.S. 756; s. c. 31 Law J. Rep. (N.S.) C.P. 210.

mented on in *Shelford on Bankruptcy*, 274, and *The Bank of Ireland v. Perry* (19), and turned on the peculiar rights under a bill of exchange in case of insolvency. The interest here was constituted; by the acceptance, and recovery can only be to the extent of the loss, unless there be a legal ownership of the whole interest—*Lucena v. Craufurd* (3), *Duer on Insurance*, 169. The indorsee of a bill of lading, who has advanced money, is the legal owner of the goods—*Duer on Insurance*, 173, *The Freedom* (20); and a part owner can only recover his own interest—*Duer on Insurance*, 79, 80; *Phillips on Insurance*, § 309, 416; *Irving v. Richardson* (14).

[BOVILL, C.J., referred to *The London and North Western Railway Company v. Glyn* (21).]

The cases on fire insurance do not apply, as will be seen on reference to that case, and *Waters v. The Monarch Life and Fire Insurance Company* (22). He who has no legal property or possession at the time of loss can only recover the amount of actual beneficial interest, and if the insurance be for the use of two whilst the declaration is founded on one made for the use of one that is bad—*Bell v. Ansley* (6), *Cohen v. Hannam* (2). It is said on the other side that the insurance was not made for the shippers and the plaintiffs, because made before the shipment was known, but it was either made for the shippers and the plaintiffs or did not attach. *Watson v. Swann* (8) only decided that an action cannot be brought unless the interest was ascertainable at the time of the contract. But a marine insurance involves a contract with the insuring agent to indemnify those who may be interested. And lastly the present policy contains different insurances.

Cur. adv. vult.

The Court differing in opinion, the following judgments were delivered on July 15th.

(19) 41 Law J. Rep. (N.S.) Exch. 9.

(20) Law Rep. 3 Pr. Ap. Cases, 599.

(21) 1 E. & E. 652; s. c. 28 Law J. Rep. (N.S.) Q.B. 188.

(22) 5 E. & B. 870; s. c. 26 Law J. Rep. (N.S.) Q.B. 102.

BOVILL, C.J.—I regret to say that, after the very able arguments of the learned counsel on both sides, and the assistance which we derived from them, and after much consideration on our part, the members of the Court who heard the argument are equally divided in opinion as to the result. I will first deliver judgment on behalf of my brother Denman and myself.

The action was brought upon two policies of insurance, to recover a loss upon cotton shipped at Bombay for Liverpool by a vessel called the *Aurora*. Both policies were effected by the plaintiffs in their own names, under the firm of Irving, Ebsworth & Holmes, and were two of a series of insurances which they had effected in the usual course of their business. The plaintiffs were brokers and agents engaged in the cotton trade in London, and were in the habit of receiving consignments of cotton from Bombay for sale on behalf of the shippers, who drew bills upon the plaintiffs against the consignments. These bills were usually negotiated in India, with the bills of lading attached as security, and were then remitted to this country. The holders of the bills on their arrival here presented them to the plaintiffs for acceptance, and the plaintiffs accepted them against delivery of the shipping documents; their security being the goods in respect of which the bills were drawn. The holders of the bills of lading had no further interest in them, or in the goods which they represented, than as security for payment of the bills drawn upon and accepted by the plaintiffs, subject to which, the plaintiffs had the right to the bills of lading as security for the amount for which they had come under acceptance against the consignment; and they had also the right to sell the goods for their reimbursement, as well as to earn their commission upon the sales, and had generally to manage the consignment.

The plaintiffs were in the habit of effecting insurances with the defendants to cover goods thus consigned to them; and the policies, including those now sued upon, were all in the same form, expressing in the usual way that they were made by the plaintiffs "as well in their own names as for and in the name or names of all and every person or persons to whom

the same doth, may or shall appertain in part or in all," and were each for 5,000*l*. "on cotton and [or] produce from Bombay to London or Liverpool direct or *via* Havre . . . by ship or ships," and at the rate or premium per cent. stated in each policy. As the plaintiffs received advices of the shipments, they declared to the defendants, and upon the policies, the particulars and value of the goods and the names of the vessels by which they were shipped.

The terms on which goods were to be shipped, are contained in the following extract of a letter from the plaintiffs to Messrs. Robert Bell & Co., of Bombay, dated the 28th of October, 1869—

"Our previous letters of credit for advances on cotton to our consignment having expired, we beg leave to renew the same, as follows :

"You are by the present authorised to value on us at usance at the rate of 10*l*. sterling per bale of cotton, cost f. o. b. and freight, against shipping documents and *timely insurance orders* or policies of insurance ; and we engage to accept your drafts so drawn on presentation, and to pay the same at maturity, or previously, at our option, under discount.

"The shipments not to exceed 200 bales cotton by any one vessel, and the present credit to be limited to 30th April next, unless previously withdrawn."

On the 28th of April, 1870, Messrs. Robert Bell & Co. in Bombay shipped 250 bales of cotton on board the *Aurora* for Liverpool, under bills of lading making the goods deliverable to them or order, and the freight to be paid at the port of discharge.

On the 29th of April, Messrs. Robert Bell & Co. wrote to the plaintiffs as follows :

"We have now the pleasure to inform you that we have induced Mr. Cursonadas Madhowdass (respectable merchant of this place) to ship in joint account with ourselves 250 bales new Dho Uera cotton per ship *Aurora* (freight 1*l*. per ton), and against this shipment we have valued upon your good selves by this opportunity, through the National Bank of India, p. 3,000*l*., at six months' sight (ex. 1*s*. 11*d*.), to which we crave your kind protection.

Sample of this shipment goes forward over land to your address by this mail.

"We hope this cotton will arrive with you at a very favourable opportunity ; and, confiding the same to your care and attention, and referring to the accompanying letter for market information we remain, &c.,

"Robert Bell & Co."

There was a further shipment by Messrs. Robert Bell & Co. of 250 other bales of cotton by the same vessel ; and upon the whole of the cotton Messrs. Bell & Co. had advanced Cursonadas Madhowdass a sum of 6,000*l*.

A bill of exchange for 3,000*l*. in respect of the 250 bales first mentioned was drawn by Robert Bell & Co., payable to their own order, upon the plaintiffs, and payable at six months after sight.

This bill of exchange was indorsed by Robert Bell & Co., and then discounted by them with the National Bank of India in Bombay ; and at the same time, as security for the acceptance and due payment of the bill, Messrs. Robert Bell & Co. placed in the hands of the bank the bills of lading for the 250 bales of cotton against which the bill of exchange was drawn. The following letter was also signed by Robert Bell & Co., and given to the National Bank of India :

"To the Manager of the National Bank of India, Limited.

"Bombay, 28th April, 1870.

"Sir,—Having this day negotiated to you one bill of exchange drawn by us on Messrs. Irving, Ebsworth & Holmes, of London, the particulars of which are noted at foot, and having at the same time as collateral securities for the due payment of the said bill indorsed to you the bills of lading and handed to you the shipping documents of the several goods, also, stated at foot,—we hereby authorise you or any of your managers or agents, if you or he shall think fit, at our expense to insure the above goods from sea risk, including loss by capture, and also from loss by fire on shore, in case Messrs. Irving, Ebsworth & Holmes (the plaintiffs) shall omit to do so immediately after notice from you to that effect, and to add the premiums and expenses of such insurances to the amount chargeable to us in respect of the said bills.

We also authorise you or any such agent, if you or he shall think fit, to sell any portion of the said goods if you or he may deem necessary, for payment of freight and of such premiums and expenses of insurance, and to take charges for commission as in ordinary cases between a merchant and his agent.

We also authorise you and the holders of the above bills for the time being to accept, if you or they shall think fit, *conditional acceptances* to all or any of such bills to the effect that, on payment thereat at maturity, the above-mentioned bills and shipping documents shall be delivered to the drawees or acceptors of; such authorisation on our part to extend to cases of acceptance for cash.

We further authorise you or any of our managers or agents, on default being made in acceptance on presentment or payment at maturity of any of the said bills, to sell the said goods or a substantial part thereof, and to apply the proceeds (after deducting usual commission and charges), as far as they will

go, in or towards payment of such bills, with re-exchange and charges, and to retain the surplus balance, if any, and place the same against any other of our bills which may at the time be in your hands; and, subject thereto, we request you to account for such surplus, if any, to the proper parties.

"We further authorise you or the holders of the said bills, for the time being, at any time before their maturity, to accept payment from the drawees or acceptors thereof, if required so to do, and on payment to deliver the said bill of lading and shipping documents to such drawees or acceptors; and we request that you or the holders of the said bills will allow, if required, in that event, discount thereon for the time such bills may have to run, at the Bank of England minimum rate of the day, if taken up in London, or if in —, at the current rate of discount of the day on government acceptances in —, but not to exceed the rate of five per cent. per annum.

(Signed) "Robert Bell & Co."

"Bills and documents above referred to—

Particulars of Bills.			Particulars of Goods.	
Date.	Amount.	Drawee.	Bill of Lading.	Name of Ship.
28, 1870.	3,000 <i>l</i> .	Messrs. I., E. & Holmes.	250 bales cotton, R. B. & Co.	<i>Aurora</i> .

Messrs. Robert Bell & Co. at the same time also handed to the National Bank an order for insurance addressed to the plaintiffs in the following terms:

"Bombay, 28th April, 1870.

Messrs. Irving, Ebsworth & Holmes,
"London.

Dear Sirs,—We have to request you to effect English insurance on 250 bales cotton shipped by us per *Aurora* for Liverpool, to the extent of 20*l*. per bale, and will thank you to deliver the policy to the National Bank of India, London, with the lien duly secured thereon, to be held by them until payment of our draft on you of 3,000*l*., dated 28th April, 1870. We

beg to add that, should you omit to effect insurance, the bank will be at liberty to insure the shipment for their own protection, and recover the cost from you before giving up the bill of lading.

(Signed) "Robert Bell & Co."

The letter of hypothecation was countersigned by Cursondas Madhowdass, who was interested with Bell & Co. in the adventure; and he also endorsed the bill of exchange, and wrote and gave to the National Bank a letter addressed to the plaintiffs (but which was not shewn to them until after payment of their acceptance), in the following terms—

"Bombay, 29th April, 1870.

"Messrs. Irving, Ebsworth & Holmes.

"Gentlemen,—I beg to advise you that I have shipped to your care, through Messrs. Robert Bell & Co. of this place, the undermentioned cotton; and I enclose invoice thereof, amounting to R.38,981. 6. Against the same I have drawn upon you as at foot, with the endorsement of the above-mentioned firm, and I beg your kind protection to my draft. I shall also feel obliged by your effecting insurance to the extent of 18l. p. B. (eighteen pounds per bale). On arrival of the shipment, please sell it to the best advantage, remitting to me any balance that may be due hereafter. Should, however, the net proceeds fall short of the amount of your acceptance, together with any charges that may have been incurred by you, I hereby authorize you to draw upon me at usance for the difference, and I agree to honour any such draft or drafts that may be passed upon me, and also to accept as correct all accounts that may be rendered.

(Signed) "Cursondas Madhowdass."

Then followed particulars of the shipment, describing by marks the 250 bales new Dho Uera, per *Aurora*, and bill dated 28th April, 1870, for 3,000l., adding—"The cotton sample sent to you represents fair average quality of the 250 bales."

No bill of exchange, however, was drawn by Cursondas Madhowdass in respect of the 250 bales of cotton now in question.

The National Bank of India remitted the bill of exchange for 3,000l. and the other documents which had been given to them by Robert Bell & Co. to the chief manager of their bank in London.

The bill of exchange was presented to the plaintiffs for acceptance on the 21st of May, and they gave a conditional acceptance, as contemplated by the letter of hypothecation, in the following terms: "Accepted, 21st May, 1870, against delivery of shipping documents for 250 bales cotton per *Aurora*. Irving, Ebsworth & Holmes."

The order for insurance from Messrs. Robert Bell & Co. was also shewn to the plaintiffs by the National Bank; and it was arranged between them that the 250

bales of cotton per *Aurora* should be declared by the plaintiffs upon their open policies with the defendants' company, which were then running.

At this time the plaintiffs had effected two open policies with the defendants for 5,000l., one of which was dated the 23rd of November, 1869, and the other the 17th of December, 1869; and, as there remained a balance of 846l. not declared for upon the November policy, the plaintiffs declared that amount upon that policy, and a declaration, following other similar declarations, was made on the policy, under the general heading of "The interest attaching to the within policy is hereby declared to be shipped and valued as under," as follows, viz.—

"23/5/70. per *Aurora* to Liverpool direct. [Marks] 250 bales of cotton valued at 5,000l., attaching to this policy 846l."

A similar declaration of interest was endorsed upon the December policy, stating it to be "Per *Aurora*, balance from preceding policy on 250 bales cotton, valued at 5,000l., 4,154l."

These are the policies upon which the plaintiffs are now suing in this action.

The plaintiffs then sent the following letter to the National Bank of India—

"London, 27th May, 1870.

"To the chief manager of the National

"Bank of India, Limited, London.

"Sir,—We beg to inform you that we have declared on our open marine policies for 5,000l. dated 23rd November, 1869, 5,000l. dated 17th December, 1869, effected with the Alliance Insurance Company, the following shipments from Bombay to Liverpool, as per specification at foot; and we hereby undertake and guarantee to hold the amount insured at your disposal until payment of our acceptance for 3,000l. due 24th November.

(Signed)

"Irving, Ebsworth & Holmes."

"Goods, 250 bales cotton, R. B. & Co.; Ship, *Aurora*; amount declared, 5,000l."

The *Aurora* left Bombay on the voyage in question, and was lost at sea on the 11th of June, 1870, and there was a total loss of the cotton.

On the 24th of November following the plaintiffs paid their acceptance at ma-

y, and received from the National Bank the bill of lading, which until that time had remained with the bank as security for payment of the acceptance.

The declaration contained averments (which were traversed) that the plaintiffs, one of them, were or was interested in goods to the amount of all the moneys therein insured thereon, and that the insurances were made for the use and benefit on account of the person or persons interested; and the question discussed was the argument depended upon the facts thus raised. There was also a defence of the plaintiffs having caused themselves to be insured.

It was agreed on the argument that the plaintiffs should be at liberty to draw such inferences of fact as a jury should have made; and power was reserved to the court to amend the pleadings, if necessary. Upon the facts proved at the trial, it was clear to us that the shipment in question was one of that description which was intended to be covered by, and which the plaintiffs were at liberty to declare, their floating policies. From the nature of the transactions in which they were engaged, their object in keeping on a succession of open policies must have been to cover shipments which from time to time be consigned to them; and both they and the underwriters must, we think, be taken to have contemplated that the transactions would be conducted in the usual course of business, which is, that, when goods are so consigned, bills of exchange would be taken upon the plaintiffs by the shippers, and would or might be negotiated to third parties with the bills of lading attached as security.

Before the bill of exchange in this case was accepted, the bill of lading and the bill of exchange which it represented would be a title to the holders of the bill of exchange, and the plaintiffs would have no interest in them; but, as soon as the plaintiffs accepted the bill, they became liable to pay it upon the shipping documents being delivered to them—*Smith v. Smith* (23); and, in the ordinary course

of business, when the bill arrived at maturity, upon the plaintiffs paying the amount, the bill of lading would be handed to them. It was also contemplated, as appears by the concluding part of Messrs. Bell & Co.'s letter to the National Bank, of the 28th of April, 1870, that the plaintiffs might desire to take up the bill of lading and pay the amount of their acceptance before maturity, and this would be in accordance with the usual course of business, in order to enable the plaintiffs, as consignees for the shippers, to take advantage of a favourable market and to make immediate sales of the cotton.

The bill of exchange being drawn by the shippers, and accepted by the plaintiffs against the consignment, that consignment immediately became an equitable security to the plaintiffs for the amount of their acceptance; and they would have been entitled in equity to have the cotton appropriated for their reimbursement—*Ex parte Barber* (24), *Ex parte Mackey* (25), and see also the recent case before the Lords Justices of *Ex parte Smart, Re Richardson* (26), and *The Bank of Ireland v. Perry* (19). The plaintiffs would further be entitled to their commission on the sale of the goods, and also to be reimbursed the cost of the insurance, and their other expenses in respect of the consignment; and it was their business to sell, manage and dispose of the cotton as consignees. The equitable interest of the plaintiffs, after coming under acceptance against the shipment, was not in any particular portion of the cotton, but in the whole and in every part of it; and no portion of it could have been withdrawn without diminishing their security. They had also the power to sell and dispose of every portion of it, and to receive the purchase-money.

Under these circumstances, were they entitled to insure in their own names the whole of the cotton, and to its full value, or were they entitled to insure the cotton only to the extent of their personal liability under their acceptance?

It is clear that the mortgagee of goods

(24) 3 Mont. D. & D. 174.

(25) 2 Mont. D. & D. 136.

(26) 42 Law J. Rep. (N.S.) Bankr. 22; s. c. Law Rep. 8 Chanc. 220.

9 Com. B. Rep. N.S. 214; s. c. 30 Law J. (N.S.) C.P. 56.

SHERRIN, 42.—C.P.

by assignment would be entitled to insure the whole of the goods in his own name, and to their full value, and, in case of a loss, would be entitled to recover in his own name the full amount of the insurance, and would be a trustee for the mortgagor as to any surplus beyond the amount of his own debt. The plaintiffs, having an interest in every part of the cotton, would, as it appears to us, stand in the same position in equity as a strict mortgagee in a Court of law, and would clearly be entitled to insure themselves against the loss of the cotton, as affecting not only their security for reimbursement of the amount of their acceptance, but also their commission on the sale; but it also appears to us that, having an equitable security upon the whole of the goods and every part of them, and the duty of selling and managing the consignment, they might, *if it was so intended*, insure their own names, not only their own individual interest in the cotton, but also the interest of the other parties interested, viz., the shippers (Messrs. Bell & Co.) and the National Bank of India.

Prima facie, an insurance by a mortgagee, whether legal or equitable, would cover only his own particular interest in the goods; but if the insurance was, as between him and the underwriters, intended to cover the interest of all parties and the whole value of the goods, there would be no objection to a legal mortgagee so insuring in his own name to cover all the interests and the entire value of the goods; and we think there is equally no objection to an equitable mortgagee, or a person who stands in a similar position, insuring in like manner. An insurable interest is clearly not confined to a strict legal right of property. It then becomes a question of fact what was the interest intended to be covered by the policy. If it was only the individual interest of the mortgagee, he could recover only the amount of that interest; but if the insurance was intended to cover the interest of the mortgagor also, then he would be entitled to recover in his own name for both interests—see *Irving v. Richardson* (14). In that case the assured, though a mortgagee of the ship, had under the Registry Acts no legal ownership, but

only an equitable interest in it; and yet it was considered that he might insure and recover in his own name the whole amount, if the insurance was intended to cover the mortgagor's interest as well as his own; and that whether it was so intended or not, was the proper question to be left to the jury in such a case—see also the observations of Parke, B., in *Sutherland v. Pratt* (27).

Upon the facts of the present case, and having power to draw inferences, we can entertain no doubt that the insurances effected by the plaintiffs were intended to cover the whole interest of all the parties interested in the consignments. They seem to us to have been effected for that express purpose, and to have been so treated by all parties; and we think that they must be considered in that light. It is, we believe, the common practice of consignees and underwriters to have floating policies of this description, with a view of covering the interest of all parties in the goods; and it seems to us that as each shipment was declared the policies would enure for the benefit of the different parties who were interested in the goods so declared.

In this case the cotton was declared by the plaintiffs under their floating policies after orders to insure from Bell & Co., and with the assent of the National Bank of India; and, upon the declarations being made, these policies would as to this shipment enure, not only for the benefit of the plaintiffs themselves, who were interested in the safety of the whole of the goods to cover their own liabilities and claims, but also for the benefit of the National Bank of India, to secure to them the amount of the acceptance, as well as for the shippers, as the persons entitled to the surplus proceeds of the goods when sold by the plaintiffs. There was also the very possible contingency that the goods when sold might not from various causes realise the amount for which the plaintiffs had come under acceptance.

Although the insurances would, in our opinion, as they were intended to do, cover the whole value of the shipment,

(27) 12 Me. & W. 17; s.c. 31 Law J. Rep. (N.S.) Exch., 235.

all the different interests in the goods, from the nature of these floating policies, and their being effected in anticipation of future transactions of the plaintiffs with various persons who were known at the dates when the policies were effected, they were necessarily effected by the plaintiffs in their own names; and it could not be said that as facts they were made by the plaintiffs in order or for account or on behalf of persons who were then unknown, but might at some future time consign to the plaintiffs. The consequence is, as it seems to us, that no action could be maintained upon the policies in anticipation by or in the names of any person except the plaintiffs; and, in this peculiar case, if it had been averred that Messrs. Bell & Co. were interested in the cotton, and that the insurances respectively were made for their use and benefit on their account, we think that such allegation would not have been maintained—*Watson v. Swann* (8). Neither could it have been properly alleged that the plaintiffs and Messrs. Bell & Co., with or without the National Bank of India, were jointly interested in the cotton, and that the policies were effected in their account; for no such joint interest existed, and the policies at the time they were made were not effected on their behalf; and the only proper conclusion follows from the facts, as it appears to us, that the plaintiffs, having effected the policies in their own names to cover mere consignments, such as the cotton in this case, not only may, but must, sue on the policies in their own names, and we think that the averments in this declaration that the insurances were made for their use and benefit and on their account, and that they were the parties interested, were the proper, and, indeed, the only correct mode of framing the declaration.

It is quite true that Messrs. Bell & Co. had an interest in the cotton, and were, in fact, the general owners of it, subject to the rights which they had created on their part of the National Bank of India for the plaintiffs; but, as between the lawwriters and the plaintiffs, the former must, we think, be taken to have

agreed that the plaintiffs might declare goods consigned to them under circumstances like the present, upon the floating policies effected by them, and that they might recover upon them the full value in their own names.

There is no doubt that in a declaration, the averments of interest, and as to the person on whose behalf the insurance is effected, must be correctly made, and that a variance in that respect would be fatal, though the interest is now allowed to be alleged alternatively in various persons. It is also not sufficient to aver the interest to be in another person, without also alleging that the insurance was made on his behalf. These averments likewise affect the evidence and right of recovery at law, though, where a plaintiff sues as trustee for another, a recovery might be had in equity from the *cestui que trust*, and relief obtained as against him.

It is quite true that, after the floating policies had been opened, and when the shipment was made, there was an order by Messrs. Bell & Co. to the plaintiffs to insure, and that by agreement with the National Bank of India the declarations of interest by the plaintiffs under these floating policies were to be treated as covering this cotton; but that would not entitle either Bell & Co. or the bank to sue upon the policies in their own names, or maintain an allegation that the policies were made on their behalf.

The law with respect to the insurable interest which a consignee may include in a policy and recover in his own name is, we think, correctly stated in the third edition of *Arnould on Insurance*, at p. 72, in the following terms—"As a general principle, then, there can be no doubt that consignees of the goods, being in advance to the consignors, or under acceptances for them, may insure in their own name and on their own account to the full value of the goods, and apply the proceeds of the policies to their own benefit up to the extent of their claims in respect of such advances and the acceptances, holding the residue in trust for the consignors."

The practice of the mercantile community as well as of underwriters has also, we believe, been entirely in accordance with this view of the law; and there is

this manifest convenience in it, that it saves a multiplicity of insurances upon the same subject-matter, and avoids the necessity for any nice distinctions as to the precise nature of the various interests of the several parties which are intended to be covered by the particular insurance. This more especially applies to the case of floating policies effected by consignees to cover goods of all persons who may thereafter consign goods to them, and to similar floating policies which wharfingers, warehousemen, factors and others are in the habit of effecting to cover the owners' interests as well as their own; and it seems to us that it would lead to great practical inconvenience if a different rule were now to be laid down.

Many of the passages which were cited for the defendants from text-writers had reference only to what a person might insure *on his own account*; and a great part of the argument for the defendants rested on the assumption that there was, in fact, an insurance in this case of the *separate* interest of Bell & Co., and that these policies were made by the plaintiffs as the agents of Bell & Co. and on their behalf; but which assumption, for the reasons before stated, we consider to be not well founded.

The case of *Robertson v. Hamilton* (28) is an important decision to shew that, where a person having a limited personal interest in the safety of every portion of the subject-matter of insurance insures not only that particular interest but the whole of the subject-matter to its full value for the benefit of the other parties who are interested in it as well as of himself, he will be considered entitled to recover the full amount in his own name upon an averment of interest in himself, and will be considered a trustee for the other parties interested. In that case the plaintiffs were owners of the *Ross*, which, with another ship called the *Atlantic*, belonging to Fisher & Co., and their cargoes, had been captured as Spanish prize. The plaintiffs and the respective owners of the other ship and of the cargoes employed one Cowan as their agent in Spain to obtain restitution or compromise the claims

of the captors and to send the property back to England. He effected an arrangement by giving up part of each cargo, and upon the terms that the two ships and the rest of the cargoes should be restored for the common benefit of the original owners of both ships and cargoes in the lump; and he drew a bill upon the plaintiffs (which was accepted and paid by them) for the general expenses of effecting the arrangement, and for the outfit of the vessels on their return homewards. The agent stated in a letter to the plaintiffs, "The whole property restored is to form a mass, and the reparation made agreeably to the respective values that may be affixed to both ships and cargoes. The *Atlantic* I shall consign to you, in order to simplify the concern; and you can arrange with the owners. The above information will guide you with respect to insurance." The plaintiffs then effected an insurance upon the *Atlantic*, and that vessel was again captured by the French. The plaintiffs thereupon sued in their own names to recover for a total loss of that vessel. It was held that the plaintiffs, though not the owners of the *Atlantic*, had an insurable interest in her and to the full amount of the insurances. In the course of the argument, when the case of *Lucena v. Craufurd* (3) was cited, Lord Ellenborough said (29), "Independent of that case, can there be any doubt but that the plaintiffs had an insurable interest? The ships and cargoes were all thrown into hotchpot; and the plaintiffs had an interest in the conjoint property, and had expended their own money upon it, and were further authorised to make the insurance, by Cowan, of Corrunna, who had full powers of attorney from all the original owners of the property." And, upon its being argued that the ship insured never was in the possession of the plaintiffs, and therefore that they could have no lien on it (and which argument was also pressed upon us in this case), Lord Ellenborough said (30), "This is no question strictly of lien. Cowan was in possession of the whole, and Cowan continued to be the plaintiffs'

(28) 14 East 522.

(29) 14 East 526.

(30) 14 East 530.

for this purpose after the *Atlantic* and the *Ross* were thrown into hotchpot for the benefit of all concerned. The ship then became a new property, and a joint interest was constituted in the property by the several owners conjointly, so that the interests of the ship *Ross* thereby came to be an interest in the *Atlantic*. Upon arrangement made with the captors, a receipt was given for the whole property in the lump, as it is said, for the benefit of the original owners of the ships and cargoes; and then Cowan, as agent of the conjoint interest, was called upon by the plaintiffs, to deliver the *Atlantic* to them, and drew upon them for the general expenses of the whole concern, which they accepted and paid. If this does not give them an adequate interest, it is difficult to say will." And, in giving judgment, Lord Ellenborough says (31), "The plaintiffs, having an insurable interest in the whole mass of the property restored, may recover upon this policy as trustees for those who are interested with them in the whole, though they may be afterwards called upon to divide it amongst the several claimants in the proportions due to each; and a recovery in this action will not exclude any of the claims from unravelling the account in this case." And again (32), "The assured, before, upon this policy are entitled to recover from the underwriters if they had an insurable interest in the ship. The question then is, who had such an interest? I answer, the original proprietors of the ships and cargoes, whose interest had been united in hotchpot through the appointment of their common agent, Cowan. Cowan himself had an interest in the ship; and the plaintiffs had also an interest in respect of the bills which they accepted and paid for Cowan on account of this conjoint property. The ship was thrown into hotchpot when it was delivered up to Cowan by the captors; and therefore the plaintiffs, as well as the original owners of the ship, became interested in the whole. The plaintiffs were also interested in it as the con-

signees and representatives of Cowan, who had expended money upon the whole in hotchpot, and for whom they had accepted and paid bills on that account. It cannot, therefore, be said that the plaintiffs had not an insurable interest in the subject-matter." It was held that the plaintiffs might insure and recover as for a total loss on the policy on the *Atlantic*, of which they were not the owners, though they might be responsible over to the owner of that vessel or his representatives for a proportion of the money when recovered. That case seems to us a very strong authority in favour of the plaintiffs in this action.

A similar principle has been adopted and acted upon in the case of fire policies, where persons having a very limited personal interest, such as, a warehouseman in one case, having only a lien for his charges, and not being himself an insurer by law, and a carrier in the other, had effected and kept on foot floating policies for the purpose of covering, and which were considered to cover, not only their own individual interests, but also the interests of the owners of the goods, and these persons were held to have insurable interests as against the insurers, to the full value of the goods, and to have a right to recover the whole amount of the insurances in their own names, though they would be trustees as to any surplus beyond their own individual claims for the other parties interested; see *Waters v. The Monarch Insurance Company* (22) and *The London and North Western Railway Company v. Glyn* (21).

It is true that those were cases of fire insurance, and upon policies which expressly covered "goods in trust;" but, if the policies in this case were intended to cover the interests of all parties in the goods, as we think they were, then they must be treated as if they had contained express words to include all such interests; and in that view the cases above cited would be quite analogous to the present, for the purpose of considering the other question, viz., whether the persons insuring had an insurable interest in and were entitled to recover the whole value of the goods in their own names. It is upon this latter point, viz., as to the na-

(31) 14 East 532.

(32) 14 East 534.

ture and extent of the insurable interest and the right to recover the full amount, that these cases seem to us to have an important bearing upon the present question. In the case of the warehouseman (who is not an insurer), *Waters v. The Monarch Life Assurance Company* (22), Lord Campbell, after deciding that upon the proper construction of the policy the interest of the general owners of the goods was intended to be covered, proceeds as follows (33)—“And I think that a person intrusted with goods can insure them without orders from the owner, and even without informing him that there was such a policy. It would be most inconvenient in business if a wharfinger could not at his own cost keep up a floating policy for the benefit of all who might become his customers. The last point that arises is, to what extent does the policy protect those goods? The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good 'all such damage and loss as may happen by fire to the property hereinbefore mentioned.' That is a valid contract; and, as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest.” Crompton, J., also says (34), “The parties meant to insure those goods with which the plaintiffs were intrusted, and in every part of which they had an interest, both in respect of their lien and in respect of their responsibility to the bailors. What the surplus after satisfying their own claim might be, could only be ascertained after the loss, when the amount of their lien at that time was determined; but they were persons interested in every particular of the goods.”

In *The London and North Western Railway Company v. Glyn* (21), where the plaintiffs were carriers, Wightman, J., says (35), “The question in this case is whether the plaintiffs are entitled under this policy to recover more than their own

particular interest in the goods which they as carriers had in the warehouse when it was burnt. I think that they are, and that they ought to recover the full value of the goods. They must, in my opinion, be considered as having insured the goods which they held in trust as carriers, for the benefit of the owners, for whom they will hold the amount recovered as trustees, after deducting what is due in respect of their own charges upon the goods.” And again (36), “It is true that this insurance is in the nature of a voluntary trust undertaken by the plaintiffs without the knowledge of the *cestuis que trust*, the owners of the goods; but it is a trust clearly binding on the plaintiffs in equity, who will hold the amount which they now recover, in the first place, for the satisfaction of their own claims, and in the next, as to the residue, in trust for the owners. If a different construction was put on such a policy as this, it would be necessary, as my brother Crompton has observed, that several policies should be effected on the same goods, and thus insurance companies would obtain several premiums instead of one in respect of what to them is the same risk.” Crompton, J., at p. 663, also states that, in his opinion, the plaintiffs intended to insure, first, their own interest (if any) in the goods, and secondly, the interest of their *cestuis que trust*, the owners of the goods, and that the case of *Waters v. The Monarch Assurance Company* (22) had established that persons who are the bailees of goods have an insurable interest in them as against the assurers to their full value, although the assured may be trustees for third persons of part of the amount recovered on the policy.

In the great case of the Dutch commissioners, *Lucena v. Craufurd* (3), the ultimate decision of the House of Lords awarding a *venire de novo*, rested upon the ground that general damages had been assessed in one aggregate sum for all the vessels, whereas one of them, having been lost after the declaration of hostilities, and thus become vested in the Crown, could not in any sense be consi-

(33) 5 E. & B. 881.

(34) 5 E. & B. 882.

(35) 1 E. & E. 660.

(36) 1 E. & E. 661.

within the jurisdiction of the commissioners. But, at the same time, the Lords expressed a clear opinion, against the views of Chambre, J., and Grove, J., that the commissioners had no insurable interest. This was, however, on the ground that their authority derived entirely from an Act of Parliament and a commission, which gave no power or right of interference or control over any of the ships or property until after they were detained or brought into the ports of this kingdom; up to that time the control and management over the vessels rested entirely in the Crown; that the vessels might have come under the power of the commissioners; that they had nothing more than a mere expectation or hope of possibility that the vessels might come under their control; and that they themselves had no insurable interest to support the policies which had been issued whilst the vessels remained in port, and before they had been brought into the country. It was contended for the commissioners, the plaintiffs, in that that they had authority to sell, lease and dispose of the vessels, and were therefore in a position similar to ordinary consignees, and entitled to recover as such consignees to insure and receive the full amount of the insurances on their own names, under an averment that they rested in themselves. It seems to us that they have been considered by all the Judges, as by the House of Lords, to be clear that ordinary consignees having a special interest in the whole subject-matter might recover the full sum insured under an averment of interest in themselves; and that if the commissioners could be considered as such consignees, they were entitled to recover. The three arguments in the Exchequer Chamber (37), and the argument in the House of Lords, it was said by the majority of the Judges (38) that no one could question that an ordinary consignee has a beneficial interest might insure for the benefit of the owner of the goods, and not as a naked consignee, as he was

termed, being a mere agent of the consignor, could not do so. But, as different views have been taken of the effect of the observations of the learned Judges and of Lord Eldon (who, as Chief Justice of the Common Pleas, had heard the three arguments in the Exchequer Chamber) upon the subject of insurable interest of consignees generally, it may be useful to refer to those observations more in detail. They are as follows, namely, in the judgment of the majority of the seven Judges in the Exchequer Chamber (39): "Independent, however, of these observations, it is not necessary that an insurer should have a beneficial interest in the property insured; it is sufficient if he be clothed with the character of a trustee, an agent, or a consignee; and if these commissioners can be considered in either of these capacities, they have an insurable interest. According to the terms of the statute (40), it seems as if they may be considered in either of these capacities. They may be considered as trustees for the Crown, or for the persons who shall be ultimately entitled to the property; as general agents for the purpose of disposing of the property on its arrival in England, or as statutable consignees." Again (41): "Suppose a merchant upon his marriage to covenant with trustees in his marriage-settlement, that certain ships then upon the sea should when they came to England be vested in them for the purposes of the settlement, are we to be told that the trustees might not insure, because the settlor did not in terms convey and assign over the ships immediately? A Court of Equity would consider the interests in the trustees exactly the same as if the ships had been immediately conveyed. It is objected, however, that the Dutch commissioners did not resemble consignees, because they were directed to sell and dispose of the property intrusted to them according to the directions which they should receive from Government. But many consignees receive goods with orders to attend to the directions of the consignor as to their disposal; and yet they are not the less able to insure. So, every trustee

(37) 3 Bos. & P. 75.

(38) 2 N.R. 292.

(39) 3 Bos. & P. 95.

(40) 35 Geo. 3. c. 80.

(41) 3 Bos. & P. 97.

is subject to the directions either of the *cestui que trust* or of the Court of Chancery." In the judgment of Chambre, J., whose views were ultimately adopted by the House of Lords, he says (42): "I am not disposed to question the authorities in general: on the contrary, there appears to me to have been great propriety in establishing the contract of insurance wherever the interest declared upon was in the common understanding of mankind a real interest in or arising out of the thing insured, or so connected with it as to depend on the safety of the thing insured and the risk insured against, without much regard to technical distinctions respecting property, still however excluding mere speculation or expectation, and interests created no otherwise than by gaming. What the parties themselves may do, they may also do by their trustees, consignees, or agents, provided the act done by an agent comes within the scope of the authority given him by his principal, either expressly or impliedly from the nature of his employment." In the House of Lords, in the opinions of the seven Judges, and in which Thompson, B., concurred, the following passages occur (43): "It is with reference to these premises, they (the plaintiffs) aver that they as such commissioners were interested, and that the insurance was made for their use and benefit as commissioners. The nature of their connection with the property insured appears from the previous part of the declaration. They claimed no beneficial interest in it; they were merely *consignees*, agents or trustees for others; and, to make the whole declaration consistent, the averment must be taken to import, what the words will fairly admit, that the insurance was made for the benefit of those for whose benefit the plaintiffs were authorised by the Act of Parliament and commission to manage the property as consignees, that is, in the present instance, for the King. A consignee without any beneficial interest in himself is agent for the consignor, and may insure for his benefit; and, if such a consignee were to state in his declaration

the circumstances of the consignment of goods to him to manage, sell and dispose of for certain persons abroad, might he not aver the *interest* in himself as such *consignee*? and would not such an averment, coupled with the disclosure of his having no interest but for the consignors' use be equivalent to an averment of interest in his consignors?" Again (44): "Though a consignee be usually appointed by bill of lading, it is not necessary to invest a person with that character. Mr. Justice Buller, in the case of *Wolff v. Horncastle* (9), defines a consignee to be a person residing at the port of delivery, to whom the goods are to be delivered on their arrival. A consignee, as distinguished from a vendee, is the mere agent of the consignor; and such a consignee may be appointed by any direction, verbal or written, to the captain, to deliver the goods to such particular person, or by a letter to the person himself requesting him to take care of the goods upon their arrival. Where, then, is the difference between such a consignee and these commissioners? The ships were directed, by the person who had the possession and power to direct the voyage, to Great Britain; and the commissioners were appointed to receive the ships and cargoes, and to manage and dispose of them upon their arrival. What is the effect of the most solemn appointment of a consignee different from this? What greater interest or closer connection with the ship does he acquire? If, then, there be no difference, *no one ever questioned that a consignee or agent of the description spoken of might make an insurance for the benefit of the owner and person entitled, and for whom he as consignee is authorised to act.*" . . . "At the time both of the insurance and the loss, their (the commissioners') title, like that of a consignee, was inchoate; occupancy was necessary to perfect it. It is true that their interest was revocable. But so is that of a consignee." Again (45): "And if it were now to be decided that the interest of these commissioners was not insurable, it would render unintelligible that doctrine upon which mer-

(42) 3 Bos. & P. 104.

(43) 2 N. R. 289, 290.

(44) 2 N. R. 291, 292.

(45) 2 N. R. 294.

and underwriters have acted for, and paid and received many thousands." Mr. Justice Chambre, thought that the commissioners had insurable interest, says (46): "The ships of their office were confined to property that was actually in the lorn, and provisionally detained there by the King's authority. No matter brings it in. They have nothing to do with commissioners with consignments abroad; nor was any consignment made to them. They have been statutable consignees. If that means anything, it must mean the statute had consigned these parships to the commissioners; but, at the statute, and we find nothing than that it authorises a commission which whatever property of a certain description arrives, it will if they the commissioners fall within their management officially, to prevent shipping. But the Act had in no way attached upon this property: it only created a capacity to the plain certain events to receive these or other Dutch ships or merchandises." he says (47): "A consignment is a species of mercantile conveyance operating upon the particular effects consigned, which, though it may be defeasible, operate in the meantime, and enable the consignee by his acts to bind the consignor."

In the opinion of Lawrence, J., who thought that the commissioners had no insurable interest, and whose opinion was also adopted by the House of Lords, there are the following passages: "Conceiving for these reasons that the contract of marine assurance is not in its nature confined to protect the interest arising from the ownership of the ship exposed to risk insured against, we proceed to consider," &c. "Had the commissioners been authorised by the Majesty's orders, by the act of Parliament the ships would have become a matter of their concern, and from thence it might possibly have been inferred

to take all proper steps to prevent any damage from their loss, and an averment that the defendants in error insured as such commissioners might have borne the meaning which has been contended for. But that cannot be understood in this case; for the averment in effect refers their interest to the Act of Parliament and their commission, the terms of which respect only the case of ships and goods detained and brought into the ports of this kingdom: and I know not how to conceive an interest dependent on a thing with which thing the persons supposed to be interested have nothing to do. The defendants in error have been considered as trustees or consignees, who, it is said, have an insurable interest. *But I do not think they can be considered as trustees or as consignees having such interest as will support this averment.* A trustee who has an insurable interest must, as I conceive, have some existing right to the thing insured for the benefit of another; but the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be considered as *consignees* in whom any interest or right is vested by bill of lading or other instrument or consignment by which the property of the subject-matter of the consignment *prima facie* will pass. If they be consignees, they were *naked* consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees, according to the common understanding of that word; and, taking them to be *naked* consignees who have not the legal property of the subject-matter of the insurance, and who are not beneficially interested in it, they ought, I conceive, to have averred the interest to be in those on whose account the insurance was made, whether they were defined persons or uncertain persons, and not in themselves as commissioners; for, taking the meaning of the word interest to be what I have stated it to be, it is obvious that a *naked consignee* who means that the insurance should be applied to the protection of the things insured and the indemnification of him who suffers by losing the value of those things, his object being not to secure himself from some

(46) 2 N. R. 298.

(47) 2 N. R. 299.

(48) 2 N. R. 304.

damage consequential to the loss as his commission, but that others interested as proprietors should be indemnified,—it is obvious, I say, that such consignee can himself suffer no prejudice by the total or partial destruction of a thing which forms no part of his property. In the safety of such thing such naked consignee can in this view have no interest. The persons prejudiced by the loss of property are his consignors, or those for whose benefit the property is to be disposed, and in them only in such case and in such light is there any interest" (49).

Lord Eldon, in giving judgment in the House of Lords, says (50): "With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may therefore insure. So, a consignee has the power of selling; and the same may be said of an agent. I cannot agree to the doctrine said to be established in the Courts below, that an agent may insure in respect of his lien upon a subsequent performance of his contract; nor can I advise your Lordships to proceed, without much more discussion, upon authority of that kind. There are different sorts of consignees: some have a power to sell, manage and dispose of the property, subject only to the rights of the consignor. Others have a mere naked right to take possession. I will not say that the latter may not insure, if they state the interest to be in their principal."

Lord Ellenborough and Lord Erskine concurred entirely in the views of Lord Eldon.

In the previous case of *Craufurd v. Hunter* (51), in the Court of King's Bench, where precisely the same points arose, it was considered that the commissioners were in the nature of consignees, and had therefore a right to insure and to recover the whole sum insured in their own names; and it appears to us that the correct opinion to be collected from the observations of all the learned judges and also of the peers who took part in the judgment in the House of Lords in *Lucena v. Craufurd* (8), is, that an ordinary

consignee, who has made advances or come under acceptance, and has a beneficial interest in the subject-matter, is entitled to insure to the full value and recover the whole sum insured, and to aver the interest to be in himself.

In *Carruthers v. Sheddon* (11), the plaintiffs by order from Dowrick & Way had effected an insurance upon coffee in which Dowrick & Way were interested to the extent of seven-sixteenths jointly with three other persons. The policy professed to be made by the plaintiffs as agents and by order of and for account of Dowrick & Way. The adventure was managed by Dowrick & Way, who made advances and paid what was required. Gibbs, C.J., held at the trial that, as Dowrick & Way were the managers of the adventure, if the policy was intended to cover the interests of the three other persons (of which the jury were to judge), the plaintiffs might, as the agents of Dowrick & Way, recover the whole amount insured; and he also thought "that Dowrick & Way, as consignees of the cargo, had an insurable interest to the whole amount, for that a consignee may insure as well as a principal;" and the Court confirmed his ruling. We are unable to discover any intimation of opinion by the Court in that case, or to see any inference that can properly be drawn from it, to the effect that a consignee who makes advances can insure and recover only to the extent of his own lien; and the language of Gibbs, C.J., which was adopted by the Court, seems to us to be exactly contrary to that view.

In *Godin v. The London Assurance Company* (52), the only question was whether, where two persons having different interests had each insured by a separate policy, this was to be considered as a double insurance, so that the amount insured was to be apportioned between the two sets of underwriters; and, though some observations were made as to persons being entitled to insure for a lien, the case does not appear to us in any way to affect the main question in this case.

In *Wolff v. Horncastle* (9) the plaintiffs had, without orders in the first instance (though their act was adopted after-

(49) 2 N. R. 306, 307.

(50) 2 N. R. 324.

(51) 8 Term Rep. 18.

(52) 1 Burr. 489.

is), effected the insurance for their respondent Lund, for whom they were advances, and for whom they were in respect of the shipment in question after it had been refused by the actual consignee. They had also advanced for 300% against the shipment. The declaration contained two counts, the first averring the interest in Lund and the second averring it in themselves. Objections were taken, as to the first count, it could not be supported under the statute of 28 Geo. 3. c. 56, for want of a proper order to insure from Lund, the principal; and, as to the second count, the plaintiffs had not an insurable interest, and that they made the insurance on account of Lund, and not of themselves. The Court supported the first count for the plaintiffs on the first count for the full amount, upon the facts, on account of ratification by Lund; but also held that the second count was rejected; for, that the plaintiffs had a right to insure to the amount of the loss for which they were interested in the goods. The Court considered that, the consignment being refused by the original consignee, the plaintiffs became the consignees for Lund; and Buller said, in the course of his judgment that "a debt which arises in consequence of the article insured, and which has given a lien on it, does give a valuable interest;" and that "the case is at all altered by the goods not having arrived." The plaintiffs in that case covered the full amount of the interest; and it does not seem to us that, in the Court thought it clear that the plaintiffs had an insurable interest to the amount of their acceptances sufficient to support the second count against the objection that was taken to it, and the judgment for the plaintiffs for the full amount insured, that therefore it is inferred that the Court thought the plaintiffs had no insurable interest beyond the amount of their acceptances; and especially as that point was never upon the argument. The subject appears to have been much decided in America; and in the year

1836 a case came before the Supreme Court of New York, of *De Forest v. The Fulton Insurance Company* (54). In that case a commission merchant had effected insurances against fire upon goods in his own warehouses, "as well the property of the assured as held by him in trust or on commission," and a fire had destroyed goods belonging to his consignors as well as his own goods; and it was held that the plaintiff had an insurable interest in the goods held on commission for his consignors to their full value, and might recover the whole amount under an avowment of interest in himself, though he would be accountable as a trustee to his consignors for any sums beyond his own individual claims. Very elaborate judgments were delivered by the learned Judges in that case, which are well worthy of perusal; and the general principles applicable to insurable interests as regards marine insurances, as well as terrene policies against fire, are fully and very ably discussed. Mr. Duer, in his *Law of Marine Insurance*, vol. 2, pp. 108, 109, refers to this case in the following terms—"It must, however, be admitted that it has been held by a Court of high authority that a consignee, as such, has in all cases an insurable interest co-extensive with the value of the property, and consequently that, when he has effected a policy in his own name, he is entitled to recover the entire loss that is claimed, on an avowment in himself of a sole and exclusive interest; and this without any evidence of an authority express or implied, or of any previous advances, or of any subsequent adoption of the contract. It is true that this decision was made in relation to a policy against fire; but the reasoning of the Judges was just as applicable to a marine insurance, and has been so considered by an eminent jurist (55), who seems to have given to their doctrine the sanction of his approval. I am, however, constrained to express the conviction that the decision thus interpreted is not sustained by prior authorities. My researches have not enabled me to discover a single case in the English reports in which a consignee, on

(54) 1 Hall, 84.

(55) Mr. Justice Story.

an averment of a sole interest in himself, has been permitted to recover beyond the amount of his own advances; but, on the contrary, there are several decisions from which the opposite doctrine, viz., that in such a case his right to recover is limited to his own beneficial interest, seems a plain and necessary deduction."

At the date when this was published—in 1846—the English cases upon fire policies had not been decided. This decision of the Superior Court of New York is afterwards elaborately controverted by Mr. Duer in a long note at p. 161 of the same volume. With his views, however, we are entirely unable to concur. A great portion of his reasoning is founded upon the assumption which he makes at p. 167 with reference to *Lucena v. Craufurd* (3), that "it is not to be denied that the assured in this case (that is, in *Lucena v. Craufurd* (3)), were consignees." It seems to us, however, that this assumption, and the argument of Mr. Duer which rests upon it, are not well founded. It is quite true that the Court of Queen's Bench in *Craufurd v. Hunter* (51), and the whole of the Judges except Chambre, J., in the Exchequer Chamber, in *Lucena v. Craufurd* (3), and all the Judges except Chambre, J., and Lawrence, J., in the same case in the House of Lords (56), considered that the commissioners were in the position of ordinary consignees of the Dutch vessels and goods, and as such entitled to insure them on their own account. But the two dissentient Judges whose views ultimately prevailed, and the peers who decided the case in the House of Lords (though upon a point which applied to one only of the vessels), expressly repudiated that view of the position of the commissioners under the Act of Parliament, and considered that they had no right, interest or power of interference or control in or over the property in any way until its actual arrival in this country; and that, if they were consignees in any sense, it could only be as mere agents, or, as it was termed, naked consignees, having no beneficial interest whatever in the property, and having merely a right to take possession of it and act as agents for

the owners after its arrival in this country.

We think, therefore, that it not only can be, but after the decision of the House of Lords must be denied that the commissioners were consignees; and, if so, a great portion of Mr. Duer's argument as to the insurable interests of consignees, which is founded on this assumption, necessarily fails.

We also think that the other conclusions which Mr. Duer has drawn from those English cases which he cites, and which have been already noticed, are not warranted by those decisions, and that he has failed to establish that the decision of the Superior Court of New York in *De Forest v. The Fulton Insurance Company* (54), which proceeded in a great degree upon the doctrines of *Lucena v. Craufurd* (3), was not well founded (57).

Mr. Justice Story, in his *Law of Agency*, s. 111, refers to this subject in the following terms—"The question has often been discussed, whether factors or consignees for sale have an implied authority to insure for their principal; for there cannot be a doubt that they may insure upon their own account to the extent of their own interest. The general doctrine now established is, that they may insure both for themselves and for their principal. But they are not positively bound to insure, unless they have received orders to insure, or promised to insure, or the usage of trade, or the habit of dealing between them and their principals, raises an implied obligation to insure. They may insure in their own names or in the name and for the benefit of their principal; and, if they insure in their own name only, they may in case of loss recover the whole amount of the value of the property insured from the underwriters, and the surplus beyond their own interest will

(57) Mr. Duer says, vol. ii. p. 166, in a note, that the case of *Craufurd v. Lucena*, in the Queen's Bench, is not reported. But it may be as well to mention that no fresh argument took place in that Court, as the same point had already been decided there in *Craufurd v. Hunter* (8 Term Rep. 13), and by the bill of exceptions the case was taken at once to the Exchequer Chamber without any argument or judgment in the Queen's Bench beyond the formal entry of judgment consequent upon the verdict.

resulting trust for the benefit of their principals. Whether, if they are mere consignees to take possession of goods only, without a power to sell, have a right to insure for themselves or their principal, is perhaps more questionable; but the point has not become the subject of direct adjudication." And in a note to this passage, referring to the authorities, Mr. Justice Story says, "The whole subject underwent much examination in the case *Wadena v. Craufurd* (3); but the most able and satisfactory discussion of it is to be found in the very elaborate opinions rendered by Mr. Chief Justice Jones and Justice Oakeley in the Superior Court of New York in *De Forest v. The Fulton Insurance Company*" (54).

The case of *De Forest v. The Fulton Insurance Company* (54) is cited by Mr. Lipp, 4th edition, p. 176, s. 311, without dissent or comment, though in some passages he seems rather to adopt the view that a consignee's insurable interest is limited to his own lien. In *Parson Insurance*, edition 1868, at p. 50, said, "But, if the goods are insured by consignee, or a warehouseman who takes them as goods in trust, he can recover not only to the extent of his lien charges, commission, &c., but also to the full value of the goods, and the policy will be held in trust for the benefit of the goods." And at p. 201, commission-merchant may insure for the full value of the goods consigned to him, and may recover not only what will indemnify him for the loss of his commissions, but the full value; so much of the value as is not needed to indemnify him being recovered by him for the benefit of the owners of the goods, provided he binds to insure for them, and the terms of the insurance are wide enough to cover their interest, and he has their express authority to insure or their subsequent ratification of his act."

Upon the whole, it appears to us that the weight of authority in America, as well as in this country, is against the views of Mr. Duer; and, with all respect to his opinions upon the subject, we adhere to the law as stated by Mr.

Arnould and by the Superior Court of New York, and by Mr. Justice Story and Mr. Parsons, which we consider to be in accordance with the decisions of the Courts and the opinions of the great majority of the Judges in this country, which have been already referred to. We believe it also to have been adopted in practice by merchants, agents and underwriters, for a long series of years, without inconvenience or objection; and we are of opinion that the plaintiffs had an insurable interest to the full value of the cotton, and that the whole interest of all parties was covered by and recoverable by the plaintiffs in their own names, under the policies in this case.

The effect of the plaintiffs' insuring and recovering in their own names would be to place them in the position of trustees for the other parties interested, as to any surplus beyond the amount of their own claim; and they, having received orders from Bell & Co. to insure, and having arranged with the National Bank of India to make their open policies available by declaring the whole value of the cotton under them, did by so doing constitute themselves, in our opinion, trustees for the other parties interested.

The plaintiffs effected these policies in their own names. It appears to us that, with the concurrence of the underwriters, they effected them on their own behalf, and not as agents, they having then no persons as principals, and to cover goods to be thereafter consigned by various persons to them, and in every portion of which they would have an interest. The insurances were, we think, intended to cover the whole value of the goods to be declared, and the interests of the consignors as well as of the plaintiffs themselves, and, when the declarations were made, did in fact cover the interests of both. No other person except the plaintiffs could, in our opinion, sue upon these policies; nor could it be correctly alleged in the declaration that they were made on behalf of any persons other than the plaintiffs themselves; and, under these circumstances, and for the reasons before stated, we are of opinion that the allegations in this declaration were supported by the facts, and that the plaintiffs are entitled to recover the whole

amount of the insurances in their own names in this action.

I will now proceed to read the judgment of my brother Brett, who is unavoidably absent, being upon the circuit.

BRETT, J.—This action is brought on two policies of insurance. By the first, dated the 23rd of November, 1869, Messrs. Irving, Ebsworth & Holmes, the plaintiffs, as well in their own name as for and in the name or names of all and every person or persons to whom the same doth, may or shall appertain in part or in all, did cause themselves and every of them to be assured to the extent of 5,000*l.* on cotton, lost or not lost, from Bombay to London or Liverpool direct, or *via* Havre, in ship or ships, to follow policy of the 4th of September, 1869. By the second, dated the 17th of December, 1869, the plaintiffs in the same terms as before caused themselves to be insured to the extent of 5,000*l.* on cotton, lost or not lost, from Bombay to London or Liverpool direct, or *via* Havre, in ship or ships, to follow former policy.

On the 23rd of May, 1870, 846*l.* on the first policy was appropriated to 250 bales of cotton per *Aurora*; and on the same 23rd of May, 1870, 4,154*l.* on the second policy was appropriated to the same 250 bales of cotton per *Aurora*.

The declaration stated the interest in the cotton as follows—That the plaintiffs or some or one of them were or was interested in the said goods to the amount of all the moneys by them insured thereon, and the said insurance was made for the use and benefit and on account of the person or persons so interested.

There were pleas traversing the allegations that the plaintiffs caused themselves to be insured as alleged, and that the goods or any part were shipped as alleged, and a plea alleging that the plaintiffs were not, nor were any, nor was either of them interested in the said goods, nor was the said insurance made for the benefit of the persons or person so interested as in the said counts alleged.

It was proved at the trial before my Brother Keating, at Guildhall, that Messrs. Bell & Co., of Bombay, were correspondents of the plaintiffs, merchants in London, and that, on the 28th

of October, 1869, the plaintiffs in London wrote and sent to Bell & Co. in Bombay a letter of credit, in the following terms—

“Our previous letters of credit for advances on cotton to our consignment having expired, we beg leave to renew the same as follows, You are by the present authorized to value on us at usance at the rate of 10*l.* sterling per bale of cotton, cost f. o. b. and freight, against shipping documents and timely insurance orders or policies of insurance; and we engage to accept the drafts so drawn on presentation, and to pay the same at maturity, &c. The shipments not to exceed 200 bales cotton by any one vessel, and the present credit to be limited to 30th April next, unless previously withdrawn.”

On the 23rd of November, 1869, the plaintiffs effected with the defendants the first, and on the 17th of December, 1869, the second floating policy sued on. The plaintiffs on the 23rd of November, 1869, declared on the first policy cotton per *Ann Milicent*, and on the 13th of September, 1869, other cotton per *Olutha*, and so on.

It is to be taken that, in April, 1870, Bell & Co. and Cursonadas Madhowdass, of Bombay, agreed to consign cotton to Liverpool on joint account, and that 250 bales were shipped by Bell & Co. on such joint account on board the *Aurora*. The bill of lading, dated the 28th of April, 1870, was as follows—“Shipped, &c., by Robert Bell & Co., of Bombay, &c., 250 bales of cotton, &c., to be delivered, &c., unto order or their assigns, he or they paying freight as per margin,” &c.

On the same 28th of April, 1870, Bell & Co. drew on the plaintiffs a bill of exchange in the following form—“Bombay, 28th April, 1870. Six months after sight, &c., pay to the order of ourselves the sum of 3,000*l.* sterling, value received, which place to account of shipment of 250 bales cotton per *Aurora*.” This bill was endorsed in blank by Bell & Co., and then specially to the National Bank of India or order by Cursonadas Madhowdass. Bell & Co. on the same day entered into a transaction with the National Bank of India, in Bombay, which is described in the following letter written and handed

hem to the bank. (See this letter set *ante*, p. 310.)

On the 29th of April, 1870, Bell & Co. wrote direct to the plaintiffs—"We have pleasure to inform you that we have received *Cursondas Madhowdass*, of Bombay, to ship on joint account with ourselves 250 bales cotton per *Aurora*, and against shipment we have valued upon yourselves by this opportunity, through the National Bank of India, for 3,000*l.* at 20 months, to which we crave your kind attention. Sample of this shipment we send overland to your address by this day's post."

We hope this cotton will arrive at your place at a favourable opportunity, and, being the same to your care and attention, we are, &c. &c.

On the 29th of April, 1870, *Cursondas Madhowdass* wrote to the plaintiffs, and their letter open to the bank—"I beg to advise you that I have shipped to care through Messrs. Bell & Co., of Bombay, the under-mentioned cotton, and enclose invoice thereof. Against the same I have drawn upon you as at value for the endorsement of the above-named firm; and I beg your kind attention to my draft. I should also feel obliged by your effecting insurance, and rival of the shipment please sell it at the best advantage, remitting to me any commission, &c. Should, however, the net proceeds fall short of the amount of your draft, together with any charges, I hereby authorize you to draw upon the bank for the balance."

The bill of exchange or draft before mentioned for 3,000*l.*, endorsed by Bell & Co. and *Cursondas Madhowdass*, being presented by the National Bank of India, and forwarded by them to their agents in Bombay, together with the bill of lading and shipping documents. The draft was presented to and accepted by the plaintiffs on the 21st of May, 1870, in the following form—"Accepted 21st May, 1870, for the delivery of shipping documents for 250 bales cotton per *Aurora*."

On the 23rd of May, the plaintiffs declared on the open policy of the 23rd of May, 1869, 846*l.* on 250 bales cotton per *Aurora*, valued at 5,000*l.*, and on the 17th of May, on the open policy of the 17th of May, 1869, 4,154*l.*, to make up

5,000*l.*, on the same 250 bales per *Aurora*, valued at 5,000*l.* On the 27th of May, 1870, the plaintiffs wrote to the National Bank of India, in London, as follows—

"We beg to inform you that we have declared on our open marine policies for 5,000*l.* dated 23rd November, 1869, and 5,000*l.* dated 17th December, 1869, effected with the Alliance Insurance Company (the defendants), the following shipments from Bombay to Liverpool; and we hereby undertake and guarantee to hold the amount insured at your disposal until payment of our acceptance for 3,000*l.*, due 24th November."

"Particulars—250 bales cotton per *Aurora*: amount declared, 5,000*l.*"

The ship and cargo were lost by the fraudulent scuttling of the ship on the 17th of June, 1870. The plaintiffs met their acceptance when due, i.e. on the 24th of November, 1870, and then received from the National Bank of India the bill of lading endorsed and the shipping documents.

The plaintiffs gave evidence at the trial as follows—"The insurance was effected for Bell & Co. and ourselves." A verdict was found for the plaintiffs for 5,000*l.*, with leave to reduce the amount to 3,000*l.* Sir John Karslake obtained a rule calling upon the plaintiffs to shew cause why the verdict should not be entered for the defendants on the third plea, on the ground that the plaintiffs had not proved that which was therein traversed; or to reduce the damages.

Before entering on an examination of the different propositions of law which have been discussed, as applicable to the relative positions of the plaintiffs, the defendants, and the other parties mentioned in the case, it is necessary to determine accurately what that relation was.

The first transaction in evidence is the letter of credit from the plaintiffs to Bell & Co., dated the 28th of October, 1869, authorizing Bell & Co., within certain limits and on certain conditions, to draw on the plaintiffs.

The next transactions—and which were before any act done by Bell & Co. having reference to the plaintiffs—were, the taking out by the plaintiffs of the floating policies now sued upon, and the declara-

tions on them of cargoes shipped on consignment to the plaintiffs by other correspondents than Bell & Co. or Cursondas Madhowdass. These policies were therefore clearly not taken out solely to cover any goods which might be consigned by Bell & Co. They were taken out before there was any binding contract between the plaintiffs and Bell & Co. as to future shipments. They were taken out when the name of Cursondas Madhowdass was unknown in business to the plaintiffs. They were taken out with a view to cover either any interest which the plaintiffs might afterwards have in consignment from any correspondents of theirs, or such interests and also the interests of any as yet unascertained correspondents who might consign to them. The shipment of the cotton on board the *Aurora* is to be taken to have been made on the 28th of April, 1870. It was not within the terms of the letter of credit; it exceeded the limits, and was not according to the conditions; it was not on behalf of Bell & Co. only, but on behalf of Bell & Co. and Cursondas Madhowdass jointly. It was a shipment which the plaintiffs were not bound to recognise. Until they did recognise it they had no interest in it. Bell & Co., however, drew in respect of it on the plaintiffs.

The next transaction was between Bell & Co. and Cursondas Madhowdass on the one part, and the National Bank of India on the other, which took place also on the 28th of April, 1870. The bank discounted the draft for 3,000*l.* drawn by Bell & Co. on the plaintiffs, and took as security an indorsement of the bill of lading of the cotton, with a power of sale if the draft should not be accepted and paid. Such an indorsement passed the legal property in the cotton to the bank, subject to a trust in favour of Bell & Co. and Cursondas Madhowdass jointly. Bell & Co. & Cursondas Madhowdass then both addressed the plaintiffs, requesting them to accept and honour the draft and insure the cotton, and authorising the plaintiffs, on payment of their acceptance, to obtain the bill of lading and to sell the cotton, in order, first, to reimburse the plaintiff's advance, and then, subject to commission, to hold and pay over the surplus for and

to Bell & Co. and Cursondas Madhowdass jointly. On the 21st of May, 1870, the plaintiffs accepted the draft for 3,000*l.*, and thereby recognised the shipment and accepted the terms proposed to them. Then for the first time was established a relation of the plaintiffs to the cotton in question. Then arose a contract between them on the one part, and Bell & Co. and Cursondas Madhowdass on the other, by which they undertook to pay their acceptance and to receive and to sell the cotton, and to hold and pay over any surplus proceeds, and by which they acquired a right to have the bill of lading eventually indorsed to them, and to have the cotton placed in their hands for sale to cover their advances. This contract and position of affairs did not pass the legal property in the cotton to the plaintiffs, for that was still in the National Bank of India. It did not give a present right of possession of the bill of lading, or even a right of possession of the cotton on arrival. It gave a present interest in the cotton to the plaintiffs, that is to say, a right by an existing contract to have the bill of lading indorsed to them on the payment of their acceptance, so as to enable them to sell the cotton to pay themselves 3,000*l.* and their expenses, and to earn their commission, and to hold the surplus proceeds as agents for Bell & Co. and Cursondas Madhowdass. The right in equity would, I apprehend, be to have a decree for a specific performance of such contract. But, until the acceptance should be met, I should apprehend that the plaintiffs could not be held to be either legal or equitable owners of the cotton. Nor were the plaintiffs trustees for Bell & Co. of the cotton.

Speaking of the relation of the Dutch commissioners to the ships of which they would have had the disposal if they should have arrived, Lord Eldon says, in *Lucena v. Craufurd* (3)—“With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may,” he adds, “therefore insure.”

It was after entering into this relation with Bell & Co. and Cursondas Madhowdass, and having acquired this interest in the cotton, that the plaintiffs, on the 23rd

May, 1870, declared 5,000*l.* in respect the cotton on the policies. And, whatever may have been the terms used by the business in giving evidence, it must, I think, be taken with regard to the declarations then made, that it was stated "that plaintiffs insured for Bell & Co. and themselves." In reality they intended then declare for, and so to insure their own interest of 3,000*l.*, and the interest of their respondents in the anticipated, or net surplus of 2,000*l.*

It was whilst the transactions thus stood that the ship was lost. The plaintiffs then had the interest above described; they were not legal owners, nor equitable owners, nor trustees, but contractors acting by contract certain rights to deal with the cotton in a certain way, on the opening at a future time of a certain contingency.

Afterwards, on the 24th of November, 1870, the plaintiffs paid their acceptance of 5,000*l.*, and received the bill of lading issued by the bank. But the cotton was already lost, and no property therepassed by such indorsement.

Upon these facts it was contended on behalf of the plaintiffs that they had the whole legal interest in the goods when they accepted the draft; and that all their obligation to Bell & Co. from that time was, to account as trustees for the whole proceeds of sale; and, if not, that they had an interest in every part of the goods which gave them an insurable interest in the whole, so that they might recover the whole to their full value in their own name, holding the surplus (if any) above their own actual or beneficial interest as trustees for Bell & Co. and Sondas Madhowdass, one or both.

It was contended on behalf of the defendants, that the plaintiffs had no insurable interest at all; that they had only an expectancy of profit resting on a contingency; that, if they had an insurable interest, it was to the extent only of their beneficial interest, viz., 3,000*l.*; that they could not insure in their own names on their own behalf more than such interest; that the only persons who, without having a beneficial interest equal to the whole value, can insure in their

own names to the full value, holding a surplus as trustees, are those who are in law owners and in equity trustees of the property insured, and that the plaintiffs were not such legal owners, and consequently not such trustees.

It was further argued that, if in consideration of law the plaintiffs could be said to have insured for themselves and Bell & Co., they failed on the pleadings, because they had invited and accepted an issue that they alone were interested and they alone had insured.

In answer to this last objection, it was urged on behalf of the plaintiffs, that the plea was severable; that, as to the allegation that the insurance was made on their behalf alone, it was true; and that there was no allegation that they alone were interested, but that the allegation amounted only to an assertion that they had an interest, which was true.

The first point thus raised is, whether the plaintiffs had any insurable interest. I think they had; because they had an existing contract with regard to the cotton, by virtue of which they had an expectancy of benefit and advantage arising out of, or depending on the safe arrival of the cotton.

The next question is, what was the amount of the plaintiffs' insurable interest. If they had any, it would seem to be at least to the extent of 3,000*l.*, their advance, and their expenses and expected commission.

The main question is, whether they could insure for more than that in their own name, and recover for more on a declaration alleging the interest to be in themselves. Their relation to the cotton was described in argument, and I think fairly described, to be that of consignees for sale of goods not yet arrived, who have made advances on the goods, but have only a contract right with regard to the goods, without being legal owners of them. They have the interest described in every part of the goods, but are not legal owners of any part. The ruling principle of insurance, which is that it should afford only an indemnity to any assured for his loss, would seem to limit the right of the plaintiffs under such cir-

cumstances to the recovery of their own beneficial interest only. If in an action at law the assured can recover on the contract of insurance more than his own beneficial interest, he recovers, according to law, more than an indemnity. It would seem to be no answer in a Court of law to say that he holds a surplus of what he has recovered as trustee for some one else. The law has no means of enforcing the payment over by him, on the mere ground of his being a trustee. This view, it is true, should prevent a legal owner, but trustee, of the property insured from being able to insure and recover in his own name: yet it seems to be stated on high authority that a legal owner, being trustee, may insure and recover in his own name, holding the proceeds in trust for his *cestui que trust*. This must be on the ground that the law will not dispute the legal interest which is the legal result of the legal ownership; though in insurance contracts it will also recognise an equitable interest as entitling the owner of it to enter into or take advantage of the legal contract of insurance.

In *Lucena v. Craufurd* (3), Lawrence, J., says—"The defendants in error have been considered as trustees or consignees, who, it is said, have insurable interest. A trustee who has an insurable interest must, as I conceive, have some existing right to the thing insured, for the benefit of another." Having regard to what follows, and to the statement of Lord Eldon in the same case, the phrase "existing right," as here used, means an existing legal right. "But," continues the learned Judge, "the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be considered as consignees in whom any interest or right is vested by bill of lading or other instrument of consignment by which the property of the subject-matter of the consignment *prima facie* will pass. If they be consignees, they were naked consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees according to the common understanding of that word; and, taking

them to be naked consignees *who have not the legal property of the subject-matter of the insurance*, and who are not beneficially interested in it, they ought, I conceive, to have averred the interest to be in those on whose account the insurance was made."

The real effect of the decision of the House of Lords in this case is well discussed by Duer, Vol. 2, p. 161 *et seq.*, in n. 2 to § 10. The proposition to be discussed, he says, and for the maintenance of which this case has been cited, is, "that a consignee clothed with the power of sale has in all cases an insurable interest to the full value of the goods consigned to him, and may cover them on the voyage of importation by a policy effected in his own name and on his own account. The truth of this proposition, and the justness of its deduction from the authorities relied on, are the questions I propose to examine; but I shall first endeavour to shew that the opposite doctrine, viz. that the right of a consignee to recover on an averment of interest in himself is limited to his own advances, constituting a lien on the goods insured (which necessarily implies that he has no insurable interest beyond those advances), is established, not by ambiguous dicta, but by positive decisions." The learned author then minutely, and I think accurately, discusses the case of *Lucena v. Craufurd* (3), and sums up thus—"The result is that the final decision in *Lucena v. Craufurd* (3) seems definitively to have settled the law, that a consignee, where he means to cover, not a beneficial interest of his own, but the entire property of the consignor, must so frame the policy as by its terms to embrace that interest; and, to enable him to recover a loss, must aver that interest in the declaration, and on the trial, not only prove its existence, but his own authority to make the insurance, or the adoption of his contract."

In *Wolff v. Horncastle* (9), the plaintiff, who was held by the Court to have become before the loss the consignee of the goods, and to have advanced 300*l.* on the security of the goods, was further held to be entitled to recover on the

second count in the declaration, in which he averred the interest to be in himself. But Buller, J., says expressly,—“I hold that the plaintiffs had a clear right to insure to the amount of 300*l.* for which they were interested in the goods.”

In *Carruthers v. Sheddon* (11), the plaintiffs were held entitled to recover the full value of the cargo, upon a count alleging the interest to be in Dowrick & Way. The cargo was shipped under an agreement by which it was stated that Dowrick & Way and two others had agreed to become partners in an adventure of sending goods which Dowrick & Way had on their own separate and personal credit actually and really purchased, &c. The jury found for the plaintiffs, and that the policy was intended to cover all the partners in the adventure. The objection taken in argument was, not that the interest ought to have been declared to be in all, but that Dowrick & Way could not insure more than their own interest as partners. The Court did not hold that Dowrick & Way might insure to the whole value merely on the ground of their being consignees; if that ground had been sufficient, the whole argument was futile: the Court held, in terms, “that Dowrick & Way might protect *all their species of interest* under one policy.” Duer, Vol. 2, p. 162, holds that “the sole ground of the decision was that the advances which they had made as consignees, added to their individual interest as partners, were equivalent to the entire value of the property insured.” It does not appear in the case whether Dowrick & Co. were indorsees and holders of the bill of lading. It may be inferred from the nature of the transaction and their position that they were; and, if so, they were legal owners as well as consignees. Speaking of this case, and of *Wolff v. Horncastle* (9), Mr. Phillips, Vol. 1, § 423, says—“So, a consignee or other party entitled to a lien upon property on account of advances or otherwise, may cover *his own interest* by insurance on it in his own name generally.”

In *Godin v. The London Assurance Company* (52) it was held that the English factor, to whom the bill of lading was

not indorsed, might insure to the full value of the goods; but on the ground that his advances were to the extent of the full value and more. “Such factor,” says Arnould, Vol. 1, p. 247, abstracting this case, “had an insurable interest to the extent of his general balance, and might recover, averring the interest to be in himself.”

In *Robertson v. Hamilton* (28), it is difficult to extricate the exact grounds of the decision. The interest was in two counts alleged to be in the plaintiffs; in the third count, in Fisher, Kidd & Co., the registered owners of the ship. The plaintiffs were consignees of the ship, and had made advances the amount of which is not disclosed in the case. It was held that the plaintiffs might recover the full value of the ship “as trustees,” it is said, “for those interested with themselves in the whole.” If the plaintiffs were entitled to recover as agents for Fisher, Kidd & Co., they recovered as for the legal registered owners. If they recovered on the counts alleging their own interest, it may be that their advances, *prima facie*, and until the accounts were settled in equity, were equal to the whole value. Lord Ellenborough says—“The plaintiffs had an insurable interest as upon a hotchpot right.” That, I confess, I do not understand.

In *Irving v. Richardson* (14), the question was whether the assured had insured in fact, that is to say, had intended to insure, more than his own interest as mortgagee. If he intended to insure only that, he could keep only as much as his interest amounted to. If he had intended to insure both his own interest and that of the mortgagor, I collect from the judgment of Littledale, J., that, in an action on the policy, he must under the new Registry Acts have alleged interest both in himself and the mortgagor. “Before the late Registry Act (58),” he says, “the mortgagee of a ship was in point of law the owner, and might insure to the full extent of the ship’s value to the mortgagor as well as to himself. But by the statute the interests of mortgagor and

mortgagee are more distinctly severed than they formerly were." That says, in effect, that, when the mortgagee was legal owner, he could insure to the full value of the ship, though not beneficially interested to that extent; but now he was not legal owner, and could therefore insure and recover in his own name only to the extent of his beneficial interest.

In *Sutherland v. Pratt* (27), it is obvious that the bill of lading, indorsed generally to bearer, was delivered to the plaintiff, so that he was the legal owner of the goods. In *Crouley v. Cohen* (59), the plaintiffs, who were carriers and not the legal owners, were allowed to insure and recover the full value in their own name; but it was on the ground that they were carriers, and were themselves liable for the full value. Speaking of this case, it is said in 1 *Phillips on Insurance*, § 424, p. 234,—“This is in effect a re-insurance, as the carriers may be considered to be insurers.”

In 1 *Arnould on Insurance*, 4th ed. p. 70, the cases of factors, consignees and agents are treated of—“There are different sorts of consignees; some have a power to sell, manage and dispose of the property, &c.; others have a mere naked right to take possession; others, again, though not intrusted to sell, are yet interested in the property, as having a lien or claim upon it for their advances.” As to mere naked consignees, i.e. those only entitled to take possession, they have, he says, no insurable interest—“they have no legal property; they are not beneficially interested.” But, “with regard to consignees who have a lien or claim on the property in respect of advances, or commission-agents to whom it is intrusted for the purpose of sale, or indorsees of the bill of lading to whom a general balance is due, there is no doubt they may effect an insurance on the property in their own names and on their own account to its whole value, and recover thereon, averring interest in themselves, at all events to the amount of their lien, claim or balance.” It is true that he afterwards says—“As a general principle,

there can be no doubt that consignees of goods, being in advance to the consignors or under acceptances for them, may insure in their own name and on their own account to the full value of the goods, and apply the proceeds of the policies to their own benefit, up to the extent of their claims in respect of such advances and acceptances, holding the residue in trust for the consignors.” For this proposition he quotes *Carruthers v. Sheddon* (37), with which I have already dealt, and the American case of *De Forest v. The Fulton Insurance Company* (40). The terms of the policy, which was a fire policy, are set out in 1 *Phillips on Insurance*, § 311, p. 177, and they were “on goods as well the property of the assured as held by them in trust or on commission.” It seems to me that this is no authority for Mr. Arnould's proposition as to consignees of goods on board ship who insure by a marine policy in the ordinary terms. And for the same reason the English cases on fire policies are no authority. The proposition may be correct, if it be applied to consignees under advance or acceptance, who are holders of bills of lading, and thereby legal owners of the goods mentioned therein.

In 1 *Phillips on Insurance*, c. 3, s. 7, subsect. 309, p. 174, the law is thus stated—“A consignee, factor or agent, having a lien on goods to the amount of his advances, acceptances and liabilities, stands in this respect (i.e. as to his insurable interest) precisely in the situation of a mortgagee. A debt is due to him from his principal for which he holds the property as collateral security, and the property is at the risk of the principal, as the debt would still subsist though the property should be lost; and the excess over the proceeds of the goods would be still due to him in case of the proceeds being insufficient to satisfy his claim. He has, therefore, an insurable interest in the goods to the amount of his lien.” And in section 204—“It is a familiar doctrine that a party having a lien on a vessel or cargo under a contract for advances may be rightly considered as the special owner of them to the extent of those advances, and, as such, may protect himself by in-

surance; and that a creditor to whom goods are assigned as collateral security, has an insurable interest in them *not exceeding the amount of his debt.*"

To the elaborate note of Duer, *n.* 2, on section 10, I have already referred. In vol. 2, p. 109, he says—"My researches have not enabled me to discover a single case in the English reports in which a consignee, on an averment of a sole interest in himself, has been permitted to recover *beyond the amount of his own advances.*"

It seems to me to follow from these authorities, and from principle, that a consignee, as such, has no insurable interest at all. "To assert the universal right of a consignee to insure the entire property on the voyage of importation, is to assert that a valid insurance may be made by a person who has no title or interest, legal or equitable, and no authority express or implied"—2 Duer, p. 111. If it is necessary to bring in some advance, or some contract giving an interest, in order to give the consignee a right to insure, it seems to me to follow necessarily, i.e. logically, that the insurable interest is limited to the amount of the advance, or to the amount of the interest under the contract. It cannot be that a consignee without personal interest cannot insure at all, and that a consignee in advance to the extent of 100*l.* can insure to 10,000*l.*, and recover such an amount upon an averment that it is the interest he has. He has no such interest.

It seems to me, therefore, both upon principle and authority, that the plaintiffs in this case, being only consignees to sell, under advance, and with a contract right to earn commission, but not being the legal owners of the cotton, could only properly insure, so as to recover in their own name, the 3,000*l.* for which they were liable on their acceptance and any commission they would have earned by selling.

It was urged that, if that be the law, the plaintiffs could not recover at all, because they intended to insure, not only their own interest, but also the interest of their correspondents. But Duer, vol. 2, p. 45, points out that, in *Wolff v. Horn-*

castle (9), "the judgment of the Court is an express decision that, where a policy is effected on behalf of the consignor, the consignee is at liberty to apply it to his own use to the extent of his own insurable interest, and that his claim is not answered by shewing that, when he effected the insurance, he expected that it was to apply exclusively to the interest of the consignor." Moreover, it may be doubted whether the policy in this case could cover an interest of Bell & Co. or Cursonadas Madhowdass. At the time it was effected, the plaintiffs had no authority, express or implied, to insure on their behalf. It may be, though I think it unnecessary to determine the point, that *Watson v. Swann* (8) is an authority for saying that a policy cannot cover the interests of persons who, at the time of effecting it, are wholly unconnected with and unknown to the person effecting the insurance. If the policy did not and could not cover the interest of Bell & Co. or Cursonadas Mahdowdass, the declaration on the policy, though made with intent to cover those interests, has no effect—*Stephens v. The Australasian Insurance Company* (60).

As I have come to the conclusion that the plaintiffs can recover to the extent of their own interest, and to that extent only, it seems to me unnecessary to determine the controverted question arising upon the third plea by way of traverse. I doubt whether the distinction affirmed by Mr. Duer between the allegation of interest and the allegation with respect to the party for whom the contract of insurance was made, is sound. It may be true to say that *Bell v. Ansley* (6) and *Cohen v. Hannam* (2) do not necessarily overrule *Page v. Fry* (5). But most certainly, in *Cohen v. Hannam* (2), Lord Mansfield intended to overrule it; and the reasons in favour of confining the allegation of interest are, as it seems to me, precisely the same as the reasons for confining the allegation as to the person on whose account the policy was made. It is equally objectionable to have a person interested on the jury, as to have a person who is a party to the contract. It is

equally just that the defendant should have the opportunity of interrogating a party interested as a party to the action. The present case is a remarkable instance. It was of the utmost importance to the defendants, if their suspicions were well founded, to have the opportunity of interrogating Bell and Curson das Madhowdass. I am of opinion that the rule should be made absolute to reduce the damages.

BOVILL, C.J.—My brother Keating, who is also absent upon the circuit, concurs in the judgment of my brother Brett, which I have just read.

The Court being equally divided in opinion, the rule to enter the verdict for the defendants or to reduce the damages will be discharged, and the defendants will be at liberty to appeal to a Court of Error.

Rule discharged. The defendants to be at liberty to appeal.

Attorneys—Parker & Clarke, for plaintiffs; Waltons, Bubb & Walton, for defendants.

1873. } ALLISON v. THE BRISTOL MARINE
June 3, 4. } INSURANCE COMPANY.

Marine Insurance—Freight—Prepayment of Part of Freight—Insurance on Freight—Interest Insured.

The term "freight" in a policy of insurance may be limited by the assured to such freight only as he has an insurable interest in at the time of effecting the assurance.

By a charter-party under which the plaintiff's vessel was chartered to carry a cargo of coal from Greenock to Bombay, freight was to be paid on the right delivery of the cargo at a certain rate per ton on the quantity delivered, and such freight was to be paid half in cash on signing bills of lading and the remainder on the right delivery of the cargo. The vessel left Greenock with her chartered cargo and was wrecked on the voyage, and half its cargo was totally lost, but half was saved and delivered at Bombay the port of destination, but as the freight in respect of such was less than the freight which had been

paid in advance on signing the bills of lading, the plaintiff received no freight on the delivery of such half but totally lost the same:—Held, that the freight which the plaintiff so lost was recoverable as a total loss under an insurance of "freight" by the said vessel on the said voyage which the plaintiff effected after the charter-party, although at the time the underwriters were not informed of such charter-party and that part of the freight was payable in advance, since the plaintiff at the time of effecting such insurance had only an insurable interest in so much of the freight as was payable on the delivery of the cargo at the port of destination.

Action on two policies of insurance, effected by the plaintiff with the defendants on freight by the *Merchant Prince*, on a voyage from Greenock to Bombay. By one of such policies, dated the 13th of April, 1867, 500*l.* was stated to be insured on "freight valued at 2,000*l.*," and by the other, dated the 23rd of April, 1867, the insurance was 700*l.* on "freight payable abroad, valued at 2,000*l.*" The defendants paid upon the basis of the loss of half the freight insured, and at the trial before Brett, J., at the London sittings after Michaelmas Term, 1872, the question was whether there had been a loss of the entire freight insured or only a loss of such half.

The plaintiff's vessel, the *Merchant Prince*, was chartered on the 7th of March, 1867, by Mr. W. N. De Mattos to carry a full cargo of coal from Greenock to Bombay, and there deliver the same as ordered by the consignee. The stipulation in the charter-party as to the payment of freight was as follows—"The freight to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* sterling per ton of twenty cwt. on the quantity delivered in full of all port charges," &c., "and such freight is to be paid, say one-half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than 5 per cent. per annum, 5 per cent. for insurance and 2½ per cent. on the gross amount of freight in lieu of consignment at Bombay, and the remainder on the right delivery of the

cargo agreeably to bills of lading less cost of coal short delivered in cash at current rate of exchange for bills on London at six months' sight."

The *Merchant Prince* loaded a cargo of coal, consisting of 2,178 tons, under the above charter-party. Bills of lading for this quantity of coal were signed on the 15th of April, 1867, to the order of De Mattos, who thereupon paid the plaintiff 2,286*l.* 18*s.* as an advance of half freight on the shipment, the total amount of freight being estimated at 4,573*l.* 16*s.* The vessel sailed from Greenock with her said cargo on the 22nd of April, and was stranded in the course of her voyage on a reef about eight miles from Bombay, where she became a complete wreck, but about half her cargo, namely, 1,050 tons of coal, was saved and brought to Bombay and the rest was totally lost. The plaintiff received no freight, since the freight in respect of the coal which had been saved was less than the freight which had been paid in advance in England. The plaintiff having therefore lost freight which would have been earned by his vessel but for the wreck, sought to recover such as a total loss under the said policies.

There was no evidence that the terms of the charter-party as regards the payment of the freight were communicated to the defendants when either of the policies were effected. The facts were taken by admissions at the trial, and a verdict was entered for the plaintiff with leave to the defendants to move to set the same aside and to enter instead the verdict for the defendants if the Court should think there was no loss of freight beyond what the defendants had paid, the Court having power to draw all proper inferences. A rule *nisi* to that effect was accordingly obtained, against which

Watkin Williams and McLeod shewed cause.—What happened on the stranding of the vessel constituted a total loss of the freight insured by the policies. If there had been no insurance at all the plaintiff would have received nothing from the charterer on the delivery of the half cargo which had been saved, because the charterer had already satisfied any claim

for freight in respect of such delivery by the prepayment which had been made at Greenock. Taking the entire freight at 4,000*l.* and that the ship earned 2,000*l.* by the delivery of half the cargo, the plaintiff had been satisfied, his claim to such 2,000*l.* by the 2,000*l.* which had been paid in advance. The plaintiff therefore really lost the whole of the freight which was at risk, namely, the half which had not been prepaid. Then the freight which was at risk was the freight which was insured by these policies. By the charter-party half of the freight was to be paid beforehand, and half on the unloading and right delivery of the cargo. The half which was to be paid in advance was not to be contingent on the freight being earned, but was a prepayment once and for all, and which would not be recoverable back. Such half is then carried at the risk of the charterer, and not at the risk of the shipowner, and the latter has not any insurable interest in it.

[BOVILL, C.J.—Are we to take it that these policies were effected with respect to this charter-party?]

Yes.

[*O. Russell*, for the defendants.—There was no evidence of any notice of this charter-party to the underwriters.]

It has been considered that that was admitted, but there is certainly no evidence that the charter-party was put before the defendants. The policies certainly do not indicate the existence of a charter-party. It is therefore an insurance upon freight generally. But the assured had at the time only an interest in part of the freight, and was not interested in the whole freight. Then is it not competent to him when a loss takes place to appropriate it to that particular interest which he had? Surely it is competent for a shipowner who has a qualified or partial interest to cover that by a policy in general terms without specifying the nature of his interest. In *Irving v. Richardson* (1) Lord Tenterden left it to the jury to say whether the insurance effected by the defendants was intended to cover the defendants' own interest only as mortgagee or that of the

(1) 2 B. & Ad. 193.

mortgagor also. 2 *Duer Lect.* ix. sec. 18, citing *Dumas v. Jones* (2), *Murray v. The Colonial Insurance Company* (3), and *Rising v. Burnett* (4), shews that the insurance can be applied to the particular interest of the person insured. If the assured can under these general words insure his real interest, then by looking at the charter-party one can see what that interest is. That was in the present case not in the delivery of the first 1,000 tons of the coal which formed the cargo, because freight to that extent had been paid for, but in the delivery of the second 1,000 tons, and of that there was a total loss.

Charles Russell and *Benjamin*, in support of the rule.—There are two questions. First, does the freight insured in these policies mean the entire freight of the voyage? Secondly, is there a total loss of the real interest intended to be insured? The first question turns on the construction of the policies, and it is now an admitted fact that there was no communication to the underwriters of the charter-party, or of its tenor, further than might be gathered from the words in the second policy, "freight payable abroad." The plaintiff was interested in every ton of goods put on board his vessel being carried to its port of destination, for the payment was in respect of the goods generally, and was not appropriated to any specific goods. *Prima facie* "freight" means freight of the entire voyage in respect of the entire goods. In 2 *Phillips on Insurance*, s. 1204, it is stated that "a valuation of the freight of a ship is presumed to be that of a full cargo, or of the charter of the entire ship, and is so applied unless the phraseology of the policy or the circumstances are ground for a different construction. If, therefore, only a part of the freight of an entire cargo is at risk at the time of a loss, the valuation is applied *pro rata* in adjusting the loss"—*Wolcott v. Eagle Insurance Company* (5). Then comes the question what was in fact the real interest which

was insured here, and has there been a total loss of that interest? It is said that the plaintiff was not entitled to be paid freight at Bombay in respect of the portion of the cargo which was delivered there, because there had been a prepayment of such freight. That is a fallacy, and rests on the supposition that there had been a payment of freight in respect of the specific coal which had been lost. There was no such payment, but only a payment of 10*s.* per ton in respect of each ton put on board. That depends no doubt on the construction of the charter-party. The freight was to be paid on the right delivery of the cargo, and was not a lump freight but a tonnage freight, which could only be ascertained after the cargo had been put on board. It is not strictly a prepayment of freight, but a payment which had to be made as a consideration for taking the coal on board, and the interest of the shipowner was still in the carriage of the whole of the cargo to its port of destination. When did the policies attach? *Prima facie* the risk would begin from the loading of the cargo, but according to the other side it would not be until more than 1,000 tons had been put on board. In fact the plaintiff had an insurable interest in the enhanced value of each ton of the cargo put on board spread over the entire quantity, and he had no right to apply the prepayment of freight to that half of the cargo which was lost. [*The Norway* (6) was referred to.]

BOVILL, C.J.—The plaintiff's claim in this case arises on two policies of assurance, effected by the plaintiff with the defendants, one for 500*l.* and the other for 700*l.* The first policy was effected upon freight valued at 2,000*l.*, and the second policy upon freight payable abroad, valued at 2,000*l.* The first policy was effected after a charter-party had been entered into, and before any payment of freight had been made in advance. The second policy was after there had been payment in advance of one half the chartered freight. The rights of the parties depend in a great measure on the true construc-

(2) 4 Mass. Rep. 647.

(3) 11 Johns. 302.

(4) 1 Mars. Rep. 730.

(5) 4 Pick. 429.

(6) 3 Moore P. C. Cas. 245.

tion of the charter-party. That charter-party was made between the plaintiff and Mr. De Mattos, who was the charterer, and was dated 7th of March, 1867. By it the plaintiff's vessel, the *Merchant Prince*, was to proceed to Greenock, and there load a full and complete cargo of coals, and being so loaded was to proceed therewith to Bombay, and deliver the same, with the usual exceptions—"the freight to be paid on unloading and right delivery of the cargo at and after the rate of 42s. sterling per ton of 20 cwts. on the quantity delivered," "such freight to be paid one half in cash on signing bills of lading, and the remainder on right delivery of the cargo agreeably to bills of lading." The shipment having been made, one half the estimated freight was paid by the charterer to the plaintiff. That half was estimated upon the entire quantity of coals which had been shipped. The payment so made was a payment in advance. In the course of the voyage half the cargo was lost by the perils insured against, the remaining half was carried to and safely delivered at Bombay. The question then arises as to what claim the plaintiff had against De Mattos, under this charter-party. He had received one-half the freight upon the quantity shipped, and by the terms of the charter-party it appears to me the freight which was payable was payable only on the coals delivered at Bombay, and that as half only of the coals shipped were delivered at Bombay, the freight that was claimable was only in respect of such half. It seems to me that there was, by the terms of the charter-party, no liability for freight, except in respect of goods delivered. It is said on the part of the defendants that the payment of the half the freight which had been made on signing the bills of lading was a payment in respect of half the freight in respect of each ton put on board, but I cannot assent to that. It was a mere mode of estimating what the payment was to be which was to be made in advance, and when once made by the charterer there was an end of it, for it could never be recovered back. It is the contract which the parties have made, that they shall estimate what may be the

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probable amount of freight when the goods have been delivered, and that half of it shall be paid down in cash. The payment was not a payment of freight in respect of the goods actually shipped, but was a payment in advance of what might be earned for freight, which would depend upon the quantity of goods delivered. Under these circumstances I think that on the arrival and delivery of half the cargo, freight was payable only in respect of what was so actually delivered, and taking the rate at that stated in the charter-party, and calculating it upon the quantity delivered it would be half only of what had been the estimated amount of freight, and which half had already been paid in advance, and consequently the shipowner having been fully paid all that he was entitled to, could claim no more from the charterer upon the charter-party. If the voyage had been performed, and the entire cargo had been delivered, the plaintiff would have received twice the amount he did; he would have received half in advance, and the other half upon the delivery of the goods. Now by the events which happened, and on the construction I take of the charter-party, the plaintiff lost one half of the freight by the perils of the sea, and the question which arises is whether he has insured that loss, that is to say whether the policies on which this action has been brought are sufficient to include it. That necessarily depends on the proper construction to be put on these policies, the first policy having been effected before any payment, but after the charter-party had been made, and the second having been after payment on account of freight, as I have already mentioned. Now at the time when these policies were effected, what was there which could be the subject of a sea risk? The first half of the freight could not be such subject, and it was only the remaining half which could be exposed to risk. Upon the facts before us, and we are to draw inferences of fact, there can be no doubt that it was the intention of the plaintiff to insure what was exposed to sea risk, namely, the half of the entire freight which would be earned when the whole cargo which had been

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shipped had been carried to its destination, and there delivered. It is clear that the plaintiff was interested in the half of that freight, and the only question is whether that is covered by the terms of these policies. There is no specification of what was intended to be insured, by the statement in one policy, that the insurance was on "freight," and in the other that it was on "freight payable abroad." The term "freight" would generally be applied to payment for goods carried in a ship and delivered; but in ordinary commercial language it would equally apply to payment for hire of a ship, whether the charterer shipped goods by it or not. It would include the case of a payment in the nature of dead freight, and so also it would include the case of the increased value of goods to the owner of the ship from carrying his own goods, as was decided by *Flint v. Flemyng* (7), and has been recognised by all text writers. It would include also the case where the actual shipment of the goods, and so the earning of the freight, had been prevented by the perils insured against, and the term "freight" is one which has been always treated by insurance law to have a very wide and general meaning. In *Flint v. Flemyng* (7), Lord Tenterden said, "If it be a necessary ingredient in the composition of freight, that there should be a money compensation paid by one person to another, the benefit accruing to a shipowner from using his own ship to carry his own goods is not freight. But if the term freight, as used in the policy of insurance, import the benefit derived from the employment of the ship, then there has been a loss of freight. It is the same thing to the shipowner whether he receives that benefit of the use of his ship by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from persons who pay him the value of his own goods at the port of delivery increased by their carriage in his own ship. The assured may fairly consider that additional value as freight, and so term it in a policy." In

(7) 1 B. & Ad. 45.

Phillips on Insurance, chap. 3, sec. 11, it is said, "In insurance the term 'freight' signifies the earnings or profits derived by the shipowner or hirer of the ship from the use of it by himself or by letting it to others to be used, or by carrying goods for others." Those terms would be all included in the shorter definition of freight given by Lord Tenterden, and which I adopt, viz., that which imports the benefit derived from the employment of the ship. This being the general meaning of the term "freight" in a policy of insurance, it would include, I think, the present interest of the plaintiff. This general meaning having been attached by underwriters to the term "freight," if they desire to limit it, it is for them to do so, and to so frame the policy by confining it to an insurance of freight of a particular description. The charter-party in the present case seems to be one of an ordinary description, for it is, I believe, usual to require payment of freight in advance when there are long voyages. Therefore, as it seems to me, nothing having been said, the term "freight" in these policies must be taken to include everything which was usual. It would include freight, whether payable under a charter-party or under a bill of lading. Now, the policies do not specify what freight was insured, and therefore what was the subject matter of the insurance would depend upon the facts. The facts shew, according to the construction I have put on this charter-party, what was at risk, viz., half the freight on the entire quantity shipped. That was what was intended to be insured, and that was lost. I think that the policies are sufficient to include such freight and such loss, and that the plaintiff is therefore entitled to recover the whole amount in this action.

BRETT, J.—The plaintiff seeks to recover the balance of a loss of freight, and as half the freight which could have been earned by the voyage had been already paid to him, and as the defendants have paid fifty per cent. into Court, the plaintiffs must shew a total loss of freight or otherwise he cannot succeed. Two reasons have been suggested against there

having been such a total loss. One was that the defendants would have a right to assume that the policies were on freight in respect of all the goods put on board the ship, and as there was only a loss of half those goods, there was only a loss of fifty per cent. on what was insured, and so not a total loss. On the part of the plaintiff it was argued that the defendants had no right to consider the policies upon the freight on all the goods shipped, but only on the freight in respect of which the plaintiff had an insurable interest, and which having been lost there was a total loss. In answer to that, it was urged on the part of the defendants that if even such freight was the only freight insured there had not been a total loss. As to the first point, I have had a doubt for some time, as nothing had been disclosed to the defendants when the policies were effected, whether they were not entitled to assume that the insurance was upon freight in respect of all the goods shipped on board. I agree that where the policy is on freight it is *prima facie* on freight on the whole cargo put on board the vessel; but Mr. Williams has convinced me that, where general terms are used in the policy, the assured may confine the insurance to that which was intended to be assured, although he did not disclose it at the time to the underwriters. If at a time when a policy was effected a charter-party was in existence, and as between the parties it was to be the subject matter of insurance, then, though the policy was on freight generally, it would become, I think, a policy on chartered freight. So if it could be shewn that the assured intended only to insure part of his interest, that might be shewn by either party unless it contradicted the terms of the policy. Therefore, in the present case, the freight insured may be shewn to be limited to freight on less than all the goods put on board. The Court are to draw inferences of fact, and the facts from which they may infer that the insurance was thus limited are, first, that the only interest which the assured could effectually insure was not the prepaid freight, but the freight payable abroad on the goods to be delivered there,

that was 2,000*l.*; and secondly, these policies are upon freight valued at 2,000*l.*, and as the only interest which the plaintiff had to insure was the freight payable abroad, and as he really valued the freight insured at the value of the freight which was payable abroad, I think the inference is irresistible that the fact was that such freight only was what he intended to insure. Now that being so, the real point is what is the proper interpretation of this charter-party. Did the plaintiff, by the risks insured against, lose the whole of the freight he had insured or only a part of it? I confess I have had less doubt upon this point of the case than upon the other. The freight payable, according to the true meaning of the charter-party, is the freight upon the whole cargo delivered at the other end, viz., at Bombay, at 42*s.* per ton; and the proper way to treat such a charter-party as this is on adjusting the freight to discover what is the total amount of freight according to the coals delivered at the other end, and then deduct what has been paid at this end as the estimated half of it, and the difference between what has been so paid, and the amount of the whole freight which would have been payable at Bombay if there had been no prepayment, will be what has to be paid at Bombay. I cannot think that the pre-payment was a pre-payment of one guinea on each ton, but a pre-payment of the estimated half of the whole freight. I therefore think that the only freight insured was that which the plaintiff had at risk, and which was payable at Bombay. The whole of that he has lost, and consequently there has been a total loss of the freight insured.

GROVE, J.—I am of the same opinion. The argument in the first instance proceeded on the ground that the charter-party was known to the underwriters, and that the insurance was effected on the basis of such. That was changed by its appearing to be contrary to the facts, but it seems that such alteration of the facts is immaterial since this was an insurance generally on freight, and is the same as if it had been an insurance on the basis of the charter-party, because if with an in-

insurance in general terms an assured can shew what it was he really insured, then the charter-party becomes material, and it is the same as if the insurance was on the terms of the charter-party. I agree with the rest of the Court that on the construction of this charter-party the plaintiff is to be paid in advance one half of the total estimated freight, and the use of the words "per ton" does not invalidate that construction. The parties cannot know exactly what the amount delivered will be, and therefore as some scale of estimate they say at so much per ton on the quantity delivered; but when they speak of the payment of half, they say "such freight," that is, the whole

freight is "to be paid, one half in cash on signing bills of lading." Then the assured has half the freight paid, and the only interest which he can have to insure is what he might lose, viz., half of the value of the total freight, in round numbers 2,000*l.* and not 4,000*l.* That is the matter insured, and that he is entitled to recover unless he be restrained therefrom by any words in the policy.

Rule discharged.

Attorneys—James Cotterell, for plaintiff; Argles & Rawlings, agents for Marly & Sons, Bristol, for defendants.

END OF TRINITY TERM, 1873.

CASES
ARGUED AND DETERMINED
IN THE
Court of Exchequer,

AND IN THE
Exchequer Chamber
ON ERROR AND ON APPEAL FROM THE EXCHEQUER,

REPORTED BY
HUGH COWIE, Esq., AND JAMES M. MOORSOM, Esq.,
BARRISTERS-AT-LAW;

AND ON APPEAL TO
The House of Lords,

REPORTED BY
EDMUND STORY MASKELYNE, Esq., BARRISTER-AT-LAW.

36 & 37 VICTORIÆ.

MICHAELMAS TERM	1
HILARY TERM	53
EASTER TERM	101
TRINITY TERM:	137

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

MICHAELMAS TERM, 36 VICTORIÆ.

1872. }
Nov. 8. } GARNETT v. M'KEWAN, P.O., &C.

Banker and Customer—Accounts at Separate Branches of Bank—Set-off.

In the absence of any special contract or arrangement, there is no obligation on a banking company to honour the cheque of a customer presented at one of their branch offices where he has a balance standing to his credit, when he has overdrawn his account at another branch office to an amount greater than such balance, so that the company are in fact not indebted to him.

The first count of the declaration in this case was in the ordinary form against the defendant as registered public officer of the London and County Banking Company for dishonouring the plaintiffs' cheques.

The second count alleged that the said banking company carried on the business of bankers at Stoney Stratford and also at Leighton Buzzard, and that the plaintiff employed and retained them as his bankers, and they accepted the said retainer and employment upon

the terms amongst others that they should keep separate and distinct accounts of the plaintiff's transactions and dealings with them as bankers at each of the said places respectively, and of the moneys received and paid by them at each on account of the plaintiff, and should not, out of the moneys of the plaintiff in their hands and received by them at one of the said places, reimburse to themselves any moneys advanced by them for or on account of the plaintiff at the other of such places without first giving the plaintiff due and reasonable notice of the same, and that they would from time to time, out of the balance of the moneys due to the plaintiff on either of the said accounts, irrespective of the state of the other of the said accounts, pay on presentment any cheque which might be drawn by the plaintiff upon them as bankers carrying on business at the same place, and duly presented there for payment by any person lawfully entitled to receive the amount of such cheque, not exceeding the amount of such balance at the time of such presentment thereof; and that afterwards and whilst there was a sufficient balance due

to the plaintiff from the said company upon the account so kept as aforesaid, at Leighton Buzzard, and before the plaintiff had received any such reasonable or any notice as aforesaid, the plaintiff drew certain cheques directed to the said company as bankers at Leighton Buzzard and delivered the said cheques to certain persons (named in the declaration) being respectively the lawful holders of the said respective cheques and entitled to receive the respective amounts thereof respectively, who duly presented the said cheques at Leighton Buzzard aforesaid for payment, and all conditions were fulfilled, &c.; yet the company did not pay the said cheques or any or either of them when so presented as aforesaid, whereby, &c.

Third count—That the plaintiff retained and employed the said company as his bankers at Leighton Buzzard, and they accepted the said retainer and employment upon the terms, amongst others, that they would keep proper and correct accounts of any moneys in their hands, and would from time to time inform the plaintiff of the amount of the moneys of the plaintiff then in their hands and applicable to the payment of cheques drawn by the plaintiff upon them, and would from time to time, out of the amount of the moneys which they so informed the plaintiff were in their hands and applicable to the purposes aforesaid, pay on presentment any cheque or cheques which might be drawn by the plaintiff upon them and duly presented at their said banking-house for payment by any person or persons respectively lawfully entitled to receive the amount of such cheques not exceeding the amount which they had at the time of such presentment so informed the plaintiff was then in their hands and applicable to the payment of cheques drawn by the plaintiff upon them, and the said company afterwards represented to and informed the plaintiff that they had in their hands a large sum of money of the plaintiff's applicable to the purposes aforesaid, to wit, 42*l*. 18*s*. 10*d*., and thereupon the plaintiff drew certain cheques, the amount of which did not exceed the said sum of money, and delivered the same respec-

tively to certain persons named, who, being the lawful holders thereof and entitled to receive the amounts thereof respectively, duly presented the same at the company's banking house for payment, and all conditions were fulfilled, &c.; yet the said company did not pay the cheques or any or either of them, whereby, &c.

Fourth count—That the said company carried on the business of Bankers at Leighton Buzzard aforesaid, and thereupon the plaintiff retained and employed them as his bankers, and they accepted the said retainer and employment upon the terms, amongst others, that they would from time to time, out of any moneys of the plaintiff in their hands applicable to that purpose, pay on presentment any cheque or cheques which might be drawn by the plaintiff upon them, and duly presented at the said banking-house of the said co-partnership for payment by any person lawfully entitled to receive the amount of such cheque or cheques, not exceeding the amount of the moneys of the plaintiff in the hands of the said company applicable to the payment thereof at the time of the presentment thereof, and thereupon the said company, by falsely, fraudulently and negligently representing to the plaintiff that they then had moneys of the plaintiff in their hands to a large amount, to wit, an amount exceeding the amount of certain cheques hereinafter mentioned, and of each of such cheques respectively and applicable to the payment of such cheques, induced the plaintiff to draw and deliver, and the plaintiff, by reason of and relying upon the said representations, did draw and deliver certain cheques as in the other counts mentioned; whereas in truth and in fact the said company had not, at the times of the said representations and when the cheques were respectively drawn and delivered as aforesaid and presented as hereinafter mentioned, moneys of the plaintiff in their hands sufficient to pay or applicable to the payment of the said cheques or any or either of them, and the holders of the said cheques entitled to receive the amounts respectively duly presented the said cheques at the said banking-house of the said company for payment; yet the de-

fendant did not pay the said cheques or any or either of them, whereby, &c.

The defendant by his pleas denied the alleged retainer, and the presentment of the cheques. He also pleaded to the first count that at the time of presentment the company had not sufficient money of the plaintiff's in hand to pay the cheques or either of them; to the second count, that the amount of the cheques and each of them exceeded the amount due to the plaintiff from the company on his account kept at Leighton Buzzard; to the third count, that the amount of the cheques and each of them exceeded the amount of the plaintiff's money in the hands of the company, and that they did not inform plaintiff as alleged; and to the fourth count, not guilty. Issues.

The action was tried before Bramwell, B., at the sittings after Trinity Term, 1872. It appeared that the plaintiff had opened an account at the Stony Stratford branch of the London and County Bank, which on the 23rd of June, 1868, was overdrawn to the extent of 46*l.* 12*s.* 10*d.* He afterwards opened an account at the Leighton Buzzard branch of the same company. The manager of the latter branch having received instructions to debit this account with the balance due from the plaintiff at the Stony Stratford branch, did so, and shortly afterwards cheques drawn by the plaintiff on the Leighton Buzzard branch were presented there and payment was refused, on the ground of the company not having sufficient money of the plaintiff's in hand to meet either of them. At the time when he last saw his Leighton Buzzard pass-book before drawing these cheques, he was not debited therein with the Stony Stratford overdraft, but appeared to have a balance to his credit sufficient to meet the cheques in question.

A verdict was entered for the defendant, with leave to the plaintiff to move to have a verdict entered for him for forty shillings, the amount of damages provisionally assessed by the jury, or for that sum together with the amount of the cheques dishonoured.

W. Graham now moved accordingly.—The plaintiff was entitled to treat the two accounts as entirely distinct and separate,

and the bank had no more right to set one off against the other than they would have had if the overdrawn account had been an account kept with them, not as bankers, but as traders in some other business. In *Hill v. Smith* (1)—where a banking company had placed to the general credit of a customer who had overdrawn his account money which he had paid into their hands for the express purpose of meeting a bill of exchange, and the bill consequently was not paid when due—it was held that the customer's assignees in bankruptcy were entitled to recover from the bank the whole amount of the bill. In the absence of formal notice, neither could the plaintiff have presented at one branch a cheque payable at the other, nor, on the other hand, could the bank fairly combine the two accounts, as they have chosen to do here. In *Cumming v. Shand* (2) it was held that it was for the jury to say whether, in the absence of any such formal notice of an unusual course being pursued, the previous course of dealing between the parties continued or not to exist. By giving him credit for the balance in his Leighton Buzzard pass-book, the bank here led the plaintiff to suppose they would honour his cheques drawn in the usual manner on that account; and he was therefore entitled to have the cheques in question paid—*Shaw v. Dartnall* (3); and the bank are liable to pay damages for the loss to his credit by reason of their having dishonoured them, as well as the amount of the cheques, though the bank may perhaps recover that amount from him in another action.

KELLY, C.B.—I think that there should be no rule in this case. The question is, whether the bank had money of the plaintiff's in hand which they were bound to pay out in honouring his cheques, whether they were in fact indebted to the plaintiff or not. Now, as a matter of fact, they had not in their hands

(1) 12 Mee. & W. 618; s. c. 13 Law J. Rep. (N.S.) Exch. 243.

(2) 5 Hurl. & N. 95; s. c. 29 Law J. Rep. (N.S.) Exch. 129.

(3) 6 B. & C. 56, 65.

any money belonging to him. Therefore, if they are to be held liable to the plaintiff in this action at all, it must be by virtue of some special contract or course of dealing. It may have suited the plaintiff's convenience to pay his money into the branch at Leighton Buzzard or the branch at Stoney Stratford according to circumstances, and although he might not have had a right to present at one branch a cheque payable at the other, it was competent to him to direct the bank to transfer any sum of money from one account to the other. And I therefore think there must be a correlative right on the part of the banker. No doubt it would be reasonable that the bank should give the customer notice before treating the accounts as one, and refusing to honour a cheque drawn on an account where there appeared to be a balance in his favour; but in the absence of a contract to that effect there is, in my opinion, no legal obligation on the bank to give such notice.

In the cases cited, the bankers had no right to deal with the money as they did, for in each case it had been paid into their hands under a special arrangement; none of these cases, therefore, in any way assist the plaintiff.

MARTIN, B.—The case seems to me to depend on a question of fact. The relation of banker and customer is, according to the rule laid down in *Pott v. Clegg* (4), that of debtor and creditor with a super-added obligation arising out of the custom of bankers to honour the customer's cheques on demand. Now, if the plaintiff in this case had brought an action for money lent, it seems to me that the bank might have successfully pleaded a set-off. For the superadded obligation to honour cheques cannot, in my opinion, exist in a case where the banker is not indebted to the customer, except by virtue of some special contract or usage; and the plaintiff in this case, who is in reality himself indebted to the bank, has entirely failed to shew any contract or usage giving rise to the obligation contended for.

PIGOTT, B.—I am of the same opinion. The *onus* lies on the plaintiff of shewing a duty on the part of the bank to honour his cheque under such a state of things as existed at the time it was presented. Now

nothing has been shewn in the way of contract or custom—express or implied—giving rise to a duty on the part of the bank to keep the accounts separate. The “superadded obligation” spoken of in the case of *Pott v. Clegg* (4), exists only where the banker has in his hands a sufficient balance in the customer's favour. I cannot see that the plaintiff has been misled in any way, as he must have known whether he was indebted to the bank or the bank to him.

BRAMWELL, B.—I also think the bank are entitled to keep the verdict, though I am not so confident on the point as the rest of the Court, and if the stake had been larger the rule perhaps ought to have been granted; for if the plaintiff could not call on the bank to honour his cheque at any other office than that on which it was expressed to be drawn, I have had some doubt whether the banker was not also under some correlative obligation to treat the accounts of the different branches as separate and distinct accounts.

If there had been a special understanding that the money paid into one office was to be dealt with there only, the plaintiff might have a right to succeed in this action. But no contract of the kind has been proved in this case, and there is good reason why it ought not to be implied in the plaintiff's favour. A bank of this kind with branches conducted by separate managers could not well carry on business if all moneys received from its customers were payable without notice at any one of its branches, though, as a matter of fact, overdrawn may be allowed at one branch if there is known to be a balance to the customer's credit at the other. No such good reason, however, for keeping the accounts distinct applies to the customer, because he must always know the state of his accounts as a whole.

Whether the plaintiff ought to have had notice or not from the bank before they dishonoured his cheque is another matter. It seems to me rather hard that he did not receive notice in this case; but I cannot see that the bank were under any

(4) 16 Meo. & W. 321, 328; s. c. 16 Law J. Rep. (N.S.) Exch. 210.

legal obligation to give such notice, though as a matter of courtesy they might well have done so. There was then, in my opinion, no duty on the part of the defendant bank to honour a cheque merely because there was an apparent balance in favour of the plaintiff at the one particular branch when there was a larger balance against him at another.

As to the point raised that the plaintiff was misled by the pass-book I think that fails. The bank were no doubt bound to keep their accounts with reasonable accuracy. It does not appear that at the time when the book was made up before the plaintiff last saw it, the manager of the Leighton Buzzard branch knew of the overdraft at the other branch, or that there was an opportunity of debiting the book with the overdraft, and of returning it to the plaintiff again before the cheques were presented.

Rule refused.

Attorneys—William Rogers, agent for W. Stimson, Bedford, for plaintiff; Stevens, Wilkinson & Harries, for defendant.

1872. }
Nov. 9. }

SMITH v. HAILEY.

Taxation of Plaintiff's Costs—7th Direction to the Masters Hilary Term, 1853—Action for Debt or Demand—Nature of the Action—Writ of Trial—Certificate for Costs—30 & 31 Vict. c. 142. s. 5.

If in an action of debt where the writ is endorsed with more than 50l. the plaintiff recovers less than 20l., and the Judge certifies, under 30 & 31 Vict. c. 142. s. 5, that there was sufficient reason for bringing the action in the superior Court, the effect of the seventh direction to the Masters, Hilary Term, 1853, is that the plaintiff's costs must be taxed on the lower scale.

The action was brought for goods sold and delivered, and the writ was endorsed for 50l. 3s.

The pleas were never indebted, the

Statute of Limitations, and a set-off. Issues thereon.

At the trial at the Bedford Summer Assizes, 1872, a verdict was taken for the plaintiff for the amount claimed, subject to the award of an arbitrator, to whom the cause was referred; the arbitrator to have all powers as to certifying and amending pleadings and proceedings and otherwise as a Judge at Nisi Prius; the costs of the cause to abide the event; the costs of the reference to follow the event, notwithstanding the sum certified to be due should be less than 20l. On the hearing before the arbitrator the defendant admitted the plaintiff's claim of 50l. 3s., but proved a set-off, and the arbitrator made his award for the plaintiff for 15l. 12s. 6d., and certified that there was sufficient reason for bringing the action in the superior Court.

The Master taxed the plaintiff's costs on the lower scale, on the ground that the certificate given by the arbitrator was not such as is required by the 7th direction to the Masters, Hilary Term, 1853, to give the plaintiff costs on the higher scale.

The plaintiff having taken out a summons before Lush, J., at Chambers, to review the taxation, the learned Judge was of opinion that the plaintiff was entitled to costs on the higher scale, but referred the matter to the Court.

W. Graham, for the plaintiff, now moved for a rule *nisi* to review the taxation. —In such cases the Masters of the Queen's Bench tax on the higher scale, on the ground that the certificate given here is such as is required by the 7th direction, which says—"In all actions on contract, other than cases wherein by reason of the nature of the action no writ of trial can by law be issued, where the sum recovered or paid into Court and accepted by the plaintiff in satisfaction of his demand or agreed to be paid on the settlement of the action shall not exceed twenty pounds (without costs), the plaintiff's costs as against the defendant shall be taxed according to the lower scale of allowances in the schedule of costs hereunto annexed. Provided that in case of trial before a Judge of one of the superior

Courts, or Judge of Assize, if the Judge shall certify on the *postea* that the cause was proper to be tried before him and not before a Sheriff or Judge of an inferior Court, the costs shall be taxed on the higher scale." The Masters of this Court take the other view. The arbitrator's certificate was under 30 & 31 Vict. c. 142. s. 5, which enacts—"If in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of record the plaintiff shall recover a sum not exceeding 20*l.*, if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the Judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the Court or a Judge at Chambers shall by rule or order allow such costs." This is substantially the same thing as the certificate mentioned in the 7th direction. But it is not necessary to resort to a certificate. This case does not fall under the 7th direction, because the writ being endorsed with more than 50*l.* no writ of trial could be issued. The *ratio decidendi* of *Perry v. Bennett* (1) applies here, though the facts were different. Erle, C.J., there said—"I think those words mean that where the incidents of the action are such that a writ of trial could not be ordered, the case shall fall within the exception. The rule dates its origin from the 17th section of 3 & 4 Will. 4. c. 42, which enacts that—"In any action depending in any of the Superior Courts for any debt or demand in which the sum sought to be recovered and endorsed on the writ of summons shall not exceed 20*l.*, it shall be lawful for the Court in which such suit shall be pending, or any Judge of any of the said Courts, if such Court or Judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such Court or Judge shall think fit so to do to order and direct that the issues joined shall be tried before the Sheriff of the county where the action is

brought, or any Judge of any Court of Record for the recovery of debt in such county.' The power to order a writ of trial to issue therefore is confined to cases where the sum sought to be recovered and endorsed upon the writ of summons does not exceed 20*l.*" The judgment also of Willes, J., is clearly to the same effect. See also *Walesby v. Gouldstone* (2) as to "admitted set-off" under 19 & 20 Vict. c. 108. s. 24.

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BRAMWELL, B.—We think there ought to be no rule, because with the greatest respect for the opinion of my brother Lush, we all entertain a strong opinion the other way. The first question in this case has several times been before the Masters of this Court and before us, and we have privately expressed our opinion to them. It is to be taken that the certificate of the arbitrator has the same effect as if it had been the certificate of a Judge at Nisi Prius. But for that certificate the plaintiff would be entitled to *no costs at all*. It is not a certificate purporting to take the case out of the scope of the 7th direction, the object of which is to provide a lower scale of taxation, for the certificate is not in the terms required by that direction. The certificate of the arbitrator is "that there was sufficient reason for bringing the action in the superior Court," and it is possible that was so, and yet that the certificate required by the 7th direction ought not to be given, namely, that "the cause was proper to be tried before the Judge, and not before a Sheriff or Judge of an inferior Court." Therefore I think this is not such a certificate as is meant by the 7th direction.

On the second point, I think the case clearly falls within the direction. It says—"In all actions on contract" (this is one; I omit the exception for the present) "where the sum recovered . . . shall not exceed 20*l.* without costs" (that is the case here), "the plaintiff's costs as against the defendant shall be taxed according to the lower scale of allowances." This case, therefore, is

(1) 14 Com. B. Rep. N.S. 402; s. c. 33 Law J. Rep. (N.S.) C.P. 45.

(2) 35 Law J. Rep. (N.S.) C.P. 302; s. c. Law Rep. 1 C.P. 567.

clearly within the enacting part. Is it within the exception "other than cases wherein by reason of the nature of the action no writ of trial can by law be issued?" Is this a case in which no writ of trial could by law be issued? Certainly not, because when this direction was framed, a writ of trial could be issued "in any action depending in any of the Superior Courts for any debt or demand." It is true that the statute (3) adds, "in which the sum sought to be recovered and endorsed on the writ of summons shall not exceed 20*l*." But that is no part of "the nature of the action." For if it were, what would be the consequence? Any plaintiff to whom a debt under 20*l*. was due might, by endorsing the writ of summons with more than 20*l*., evade the effect of the 7th direction; because although from the nature of the action it would not fall within the expected class, yet the sum endorsed would bring it within that class.

If a plaintiff endorses his writ with more than 20*l*. it could not under the repealed section 17 of 3 & 4 Will. 4. c. 42, be sent for trial to the sheriff, nor if endorsed with more than 50*l*. could it be sent under 19 & 20 Vict. c. 108. s. 26, to the county Court, but this does not alter "the nature of the action."

But Mr. Graham says this construction is hard on this plaintiff who endorsed his writ properly for more than 20*l*., because his claim was for more than 20*l*. In one sense it is "properly," because he is not compelled by law to admit the set-off in his claim, but if this be a good argument it is answered by this, that a remedy is given by the proviso at the end of the direction which says, that "if the judge shall certify on the *postea* that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior Court, the costs shall be taxed on the higher scale." If, therefore, it had been urged before the arbitrator that the plaintiff had a right to endorse his writ with more than 20*l*., because he was not bound to admit the set-off, and so was compelled to try in a superior Court, the arbitrator would probably have given the

certificate. There is, therefore, no injustice in the direction, because the proviso meets the case where the plaintiff properly endorses his writ with more than 20*l*. I think, then, that the practice of the Masters of this Court is the correct one.

Then, does *Perry v. Bennett* (1) decide anything contrary to this view? I think not. The marginal note in 14 Com. B. Rep. N.S. 404 is correct—"The 7th direction does not apply to an action commenced in a county Court and removed by *certiorari* to a superior Court. The plaintiff in such a case, therefore, is entitled to costs on the higher scale, though he recovers less than 20*l*." Erle, C.J., in that case, says, "Here the nature of the action was such that there could be no endorsement on the writ of summons, because no writ of summons existed. The plaintiff commenced his action by plaint in the County Court. The case, therefore, does not fall within the words of the rule, which never was intended to apply to it." That shews that in the opinion of Erle, C.J., the words, "Nature of the action," refer, not only to the fact that the action is for a "debt or demand," but also to the origin of the proceedings. Willes, J., says nothing contrary to that. He says, "The rule in question applies to a case where the plaintiff has brought his action in the Superior Court to recover a debt or demand not exceeding 20*l*. If the framers of those directions had meant otherwise, they would have said, not 'other than cases wherein by reason of the nature of the action no writ of trial can by law be issued,' but 'wherein by reason of the cause of action,' &c." The expression is larger; not only the cause of action, but the nature of the action must be such that no writ of trial can issue.

CHANNELL, B.—I think there should be no rule. The fact that a different practice has prevailed with the Masters of the Queen's Bench, and that the opinion of my brother Lush is against ours is no reason for granting the rule, because, as Master Pollock informs us, this point has been often before the judges of this Court who have expressed a unanimous opinion.

The 7th direction is divided into three

(3) The 3 & 4 Will. 4. c. 42. s. 17.

parts for consideration, the enacting part, the exception and the proviso. I agree with my brother Bramwell that this action falls within the enacting part, and that it is not within the exception, because there is nothing in "the nature" of this action to prevent a writ of trial from issuing. Any apparent objection on the ground of hardship is removed by the proviso.

In *Perry v. Bennett* (1) the plaintiff commenced his action in the County Court, and it was removed on the application of the defendant by *certiorari* into the Superior Court. Those circumstances clearly distinguish that case from the present.

PIGOTT, B.—I am of the same opinion, and for the reasons given by my brothers.
Rule refused.

Attorney—W. Rogers, agent for W. Stimson, Bedford, for plaintiff.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

1872.	}	MOUFLET v. COLE.
June 22.		
Nov. 30.		

Covenant in Restraint of Trade—Mode of Measuring Distance.

In determining whether there has been a breach of a covenant entered into by the assignor of a lease of premises used for a particular business that he will not be concerned in that business within a certain distance of the assigned premises, the distance is not to be measured along the nearest practicable route between the two places of business, but along the shortest straight line that can be drawn from one to the other as on a map, without regard to the curvature or the inequalities of the surface of the earth.

Declaration on a covenant by the defendant, contained in a deed by which he assigned to the plaintiff the lease and goodwill of the *Lord Holland* public-

house, that in case the defendant should take, keep, or be in any way concerned in the trade, or business, of a licensed public-house, beershop, or place for the sale of wines or spirits, within the distance of one half of a mile of the said premises, called the *Lord Holland*, during the occupancy thereof by the plaintiff or his widow, then that he should and would well and truly return and repay, or cause to be returned and repaid, to the plaintiff the sum of 500*l.*, as liquidated damages, averring that the defendant did keep and was concerned in the said trade and business, within the distance of one half of a mile of the said *Lord Holland* public-house, during the occupancy thereof by the plaintiff, within the true intent and meaning of the said deed, and claiming damages, 500*l.*

The defendant pleaded that he did not keep, nor was he concerned in the said trade, &c., within the distance of half of a mile of the *Lord Holland*. Issue.

At the trial before Martin, B., the controversy was whether the defendant's place of business was or was not situated within half a mile of the *Lord Holland*. Martin, B., was of opinion that the distance was to be measured "as the crow flies;" and a verdict was entered for the plaintiff, subject to the distance being measured upon such principle as the Court should lay down, leave being reserved to the defendant to have the verdict entered for him in the event of its being found, upon the measurement according to the principle laid down by the Court, that the two houses were more than half a mile apart.

A rule, which was afterwards obtained in pursuance of the leave reserved, was subsequently discharged (1) by Martin, B., and Channell, B.—*dissentiente* Cleasby, B. The defendant thereupon appealed.

Garth (with him A. L. Smith), for the appellant, relied on the judgment of Cleasby, B., and on *Woods v. Bennett* (2), and *Leigh v. Hind* (3), the authorities

(1) 41 Law J. Rep. (N.S.) Exch. 28.

(2) 2 Starkie, 89.

(3) 9 B. & C. 774.

cited for the defendant in the Court below.

Parry, Serjt. (with him *Francis Turner*), *contra*, for the respondent, argued in support of the judgment of the Court of Exchequer, relying, as in the Court below, on *Minge v. Earle* (4), *The Queen v. Saffron Walden* (5), *Stokes v. Grissell* (6), *Lake v. Butler* (7), *Jewell v. Stead* (8), and *Duignan v. Walker* (9).

Cur. adv. vult.

On the 30th of November, the judgment of the Court (10) was delivered by—

BLACKBURN, J.—In this case the defendant by deed sold to the plaintiff the public-house called the *Lord Holland* and the goodwill of the business, and covenanted that he should not be in any way concerned in the business of keeping a public-house within the distance of one-half of a mile of the said premises called the *Lord Holland* during the plaintiff's occupancy.

On the trial before my brother Martin, it appeared that the defendant did occupy a public-house so near the *Lord Holland* as to make it a matter of controversy whether it was within the half-mile or not. My brother Martin was of opinion that the distance was to be measured "as the crow flies," and the verdict was entered for the plaintiff subject to the distance being measured "such measurement, to be made upon such principle, as should be laid

down by the Court upon its final decision as to what was the true construction of the said covenant, leave being granted to the defendant to enter the verdict for him in the event of its being found by the said measurement, made upon the principle by the Court laid down, that the said public-houses are more than half a mile apart."

The majority of the Court of Exchequer were of opinion that "the true construction of the language used is that a circle of half a mile radius is to be drawn round the *Lord Holland*, and that if the defendant carries on the business of a publican within this space, he has broken his covenant." My brother Cleasby was of opinion that the distance was to be measured as a travelled distance, and to be measured "by the nearest available mode of access between the two houses." There is a difference, though not generally of any consequence, between the distance as it would appear if measured on a map, without regard either to the curvature of the earth or the differences of level, if any such exist on the spot, and the distance in an actual straight line drawn from the one point to the other. The majority of the Court below have not noticed this; but subject to some remarks, which we shall afterwards make on this, we agree in their judgment.

We agree with what Parke, B., says in *Leigh v. Hind* (3), that the parties to such an agreement do not contemplate the actual distance which a customer would have to traverse in going from one to the other. No doubt their first object was to have protection for the custom of the purchased house by securing that the seller should not set up business so near to it as to affect the custom; and that would involve the consideration of how the customers would travel; but as a covenant to that effect would obviously lead to a constant litigation, they wish those who prepare their contract to lay down a fixed rule that will admit of no dispute, and the words which they have used are to be construed in their ordinary sense, bearing in mind that such is their object, and their object is best made

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(4) Cro. Eliz. 212.

(5) 9 Q.B. Rep. 76; s. c. 15 Law J. Rep. (n.s.) M.C. 115.

(6) 14 Com. B. Rep. 678; s. c. 23 Law J. Rep. (n.s.) C.P. 141.

(7) 5 E. & B. 92; s. c. 24 Law J. Rep. (n.s.) Q.B. 273.

(8) 6 E. & B. 350; s. c. 25 Law J. Rep. (n.s.) Q.B. 294.

(9) Johns. 146; s. c. 28 Law J. Rep. (n.s.) Chanc. 867.

(10) Byles, J.; Blackburn, J.; Keating, J.; Lush, J.; and Brett, J. The Right Hon. Sir James Shaw Willes, J., was present during the argument, but died on the 2nd of October, before judgment was delivered.

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effectual by measurement on the map. And we think the matter is now concluded by the balance of authority in favour of that construction.

In *Woods v. Dennett* (2), in 1817, Lord Ellenborough, C.J., laid down, at *Nisi Prius*, a rule contrary to this; and in *Leigh v. Hind* (3), where there were two practicable modes of going between the houses which were both less than the stipulated distance, and a third mode which was greater, the whole Court of King's Bench thought the contract broken; but Lord Tenterden, C.J., and Littledale, J., assigned as their reason, that the distance should be measured by the nearest mode of access, and Parke, J., that it should be as "the crow flies," which of course was shorter than either. At that time the weight of authority was probably in favour of the defendant's construction. But then arose a series of cases—*The Queen v. Saffron Walden* (5) decided in 1846, *Stokes v. Grissell* (6) in 1854, *Lake v. Butler* (7) in 1855, *Jewel v. Stead* (8) in 1856, and *Duignan v. Walker* (9) in 1857, which all adopted the other rule. It is true that most of those cases related to the construction of statutes, not of contracts. We do not however think that there is any sound distinction between statutes and contracts in this respect. In each, the object is to substitute a certain distance, capable of easy determination, for a reasonable distance, which being uncertain would be a trap for litigation. And the object of a draftsman who prepares either an Act of Parliament or a contract, where it is necessary to specify a distance, ought to be to use words that give a fixed and easily ascertained guide.

In *Lake v. Butler* (7) Crompton, J., says—"If this question were quite new, the convenience would be all in favour of construing the distance as that measured in a straight line; and the words would be, to say the least, capable of bearing that construction. In common language, if you enquire how far it is from one place to another, it often happens that before answer you are asked—'Do you mean by the road, or by the fields, or as the crow flies?' The recent authorities, however, being all in favour of this construc-

tion, and the decision in *The Queen v. Saffron Walden* (5) being precisely in point, we ought to adhere to it at any rate, so that the Legislature may know how such general words in an Act will be construed, and use them in that sense."

Since that case, *Jewel v. Stead* (8) has been decided in the Queen's Bench, and *Duignan v. Walker* (9) in the Court of Chancery, where Wood, V.C., applies the same rule to a contract as we think should be applied here.

We therefore adopt as our own the judgment of Crompton, J., only slightly altering the last sentence—"The recent authorities being all in favour of this construction, and the decision in *Duignan v. Walker* (9) being precisely in point, we ought to adhere to it at any rate, so that parties framing a contract may know how such words in a contract will be construed, and use them accordingly."

It is to be observed that the phrase used in the judgment of the majority of the Court below is that a circle of half a mile radius is to be drawn round the *Lord Holland*; and Crompton, J., in the passage I have cited, uses the phrase, "in a straight line."

This, we think, would be understood by anyone to mean that the circle is to be drawn, and the line measured, on a map; and this is, we think, the true meaning of the contract. It is a very simple matter to take the ordnance map and with a pair of compasses measure the distance between any two points, and then by the scale ascertain what that distance is. And we think this is what in ordinary language is meant when people speak of a circle round a particular point. But—inasmuch as in laying down a map, the surface is treated as if projected on a plane, whilst in reality the general surface of the earth is the surface of a very large sphere, and the surface in particular parts varies in its level or its distance from the centre of the sphere—this distance, measured in an actual straight line between the points, is not precisely the same as that measured on a map, or (as the Legislature have expressed it in 6 & 7 Vict. c. 18, s. 76) "the

distance measured in a straight line on the horizontal plane."

In so short a distance as half a mile the difference arising from the curvature of the earth would be not more than a fraction of an inch, and may clearly be neglected as insensible. But that arising from the inequalities of the surface, though never great, may be perceptible. If, for instance, the distance measured on the map between two places was half a mile, and there was a difference in level of 130 feet, the actual distance in a straight line would be half a mile and a yard. But to ascertain this slight difference, it would be necessary to call in a surveyor, and incur trouble and expense. And we cannot think that people in speaking of the distance round a point do contemplate such minute accuracy.

We think therefore that the distance should be measured on the map. I may observe that where in any case it is desired to adopt another rule, words can easily be used to express it as was done in *Atkins v. Kinnear* (11).

One other point is to be disposed of. We think in measuring the distance it should be taken from the nearest point of the one house to the nearest point of the other, without regard to where the doors are situated.

The judgment of the Court below therefore must be affirmed.

Judgment affirmed.

Attorneys—Stileman & Neate, for plaintiff respondent; Shum & Crossman, for defendants appellants.

1872. }
Nov. 22. }

DILLON V. CUNNINGHAM.

Feme Covert—Order on *Feme Covert* to pay Debt by Instalments under the Debtors Act, 1869, s. 5.

Judgment having been obtained against a married woman in an action in which she does not plead coverture, a judge has jurisdiction under the Debtors Act, 1869, s. 5, to order her to pay the debt by instalments, without being satisfied that she has the means of paying.

The plaintiff having sued on a promissory note obtained judgment by default for 54*l.* 4*s.* 6*d.* in August, 1872. The defendant was a married woman but did not plead her coverture.

On September 9, Quain, J., at chambers made an order that the defendant pay the plaintiff the judgment debt, with interest and costs, by two instalments, on January 20 and July 20, 1873. The affidavits before the learned Judge shewed that the defendant had an estate of more than 1,500*l.* a year settled to her separate use without power of anticipation, and that the dividends were payable to her every January and July, but that she was then entirely without means.

Willis obtained a rule *nisi* to set aside the order on the ground that there was no evidence before the learned Judge of the defendant having had since the date of the judgment, or of her having at the time of the order, the means to pay the sum in respect of which she had made default, and further that being a married woman she was not within the 32 & 33 Vict. c. 62.

Anstie, for the plaintiff, shewed cause. —Before the Debtors Act, 1869, a married woman arrested with her husband on a *ca. sa.* was not discharged if she had a separate estate, and if when sued as a *feme sole* she did not plead coverture, she was not discharged even if she had no separate estate—*Poole v. Canning* (1), and there is nothing in the Act to except married women. The defendant is estopped from alleging that she is covert.

(11) 4 Exch. Rep. 776; s. c. 19 Law J. Rep. (N.S.) Exch. 132.

(1) 36 Law J. Rep. (N.S.) C.P. 166.

Willis, for the defendant, in support of the rule, contended that married women were not within the Act, that before the Act the Courts never proceeded actively against a married woman, a *ca. sa.* being the act of the party—*Newton v. Rowe* (2), and that under section 5 of the Act a Judge has jurisdiction to make an order to pay by instalments only where it is proved to his satisfaction that the debtor has the means of paying.

KELLY, C.B.—The question whether a married woman can be ordered to pay money and be arrested in default might at first appear to be of some importance, but on considering the Act the question is seen rather to be, since the Act was passed for the relief of debtors, why should a married woman not be included in that relief? The object of the Act was to abolish imprisonment for debt in a great variety of cases, some of which would include a married woman arrested for debt. It is clear that the intention was that every description of person should enjoy their liberty and never be imprisoned except for wilful default.

The second question is whether before making this order a Judge ought to be satisfied that the woman has the means of paying. There is nothing in the Act to make that a condition precedent. The whole matter came before the learned Judge, he found she had 1,500*l.* a year, and instead of making an order for immediate payment, with the liability of committal in default, the Judge in expectation that dividends sufficient to discharge the debt would be paid to the debtor in January and July made this order which is for the indulgence of the debtor, and which he had clearly power to make under the Act.

MARTIN, B.—I am of the same opinion. Nothing has been said to shew that this is not a legal order. If a judgment has been obtained against a married woman in an action in which she has not pleaded her coverture, she is not at liberty to shew afterwards, for the purpose of relieving herself from the consequences, that

(2) 7 Man. & Gr. 329; s.c. 14 Law J. Rep. (N.S.) C.P. 132.

she is a married woman, for she ought to have pleaded it. Therefore the debtor has no *locus standi* here to shew that she is a married woman.

As to Mr. Willis's objection that the husband might seize the dividends as soon as they were paid to her, equity would protect her trustee and herself from the husband.

BRANWELL, B., and CHANNELL, B., concurred.

Rule discharged with costs.

Attorneys—Vizard, Crowder & Co., agent for Brian, Plymouth, for plaintiff; A. Drew, agent for B. Fowler, Plymouth, for defendant.

(In the Second Division of the Court.)

1872. }
Nov. 25. } PHILPS v. HORNSTEDT.

Act of Bankruptcy—Pledge of Trader's Property—Fraudulent Conveyance, Gift, Delivery or Transfer.

Traders verbally pledged their goods, which formed substantially the whole of their property, as security for a previously contracted debt to a creditor, who already had possession of the goods and a lien on them for money advanced. The debtors were in fact insolvent, but the jury found that the transaction was entirely bona fide:—Held, that the pledge was not "a fraudulent conveyance, gift, delivery, or transfer," within the Bankruptcy Act, 1869, section 6, subsection 2.

Action by the trustee of the property of certain bankrupts.

First count, for conversion of the bankrupt's goods before the bankruptcy.

Second count, for conversion after the bankruptcy of the goods of the plaintiff as trustee.

Third count, for money received for the use of the bankrupts, and for money due on accounts stated between the defendant

the bankrupts before the bankruptcy.

Fourth count, for money received for use of the plaintiff as trustee, and money due on accounts stated between the defendant and the plaintiff as trustee.

Fifth count, to the first and second counts, respectively, not guilty, and a denial that the goods were the property of the bankrupts, or of the plaintiff as trustee, respectively.

Sixth count, to the third and fourth counts, never pleaded.

Seventh plea to the third count, a set-off in respect of money due before suit from the bankrupts to the defendant on a bill of exchange for 302*l.* 14*s.* 5*d.* overdue before suit, and in respect of money due on accounts stated between the bankrupts and the defendant. Issues thereon.

At the trial before Mr. Hawkins, Q.C., sitting as commissioner at the Guildford Summer Assizes, 1872, the following facts were proved.

In May, 1871, three persons, M'Farlane, Henry and Vernon, entered into partnership as general merchants. In June, they agreed by charter party with the defendant, a shipowner and shipbroker, to hire a ship from him, the freight to be 494*l.* per month by fortnightly payments in advance in cash; in default of payment of hire when due, the defendant to be at liberty immediately to resume possession of the steamer, and to claim damages. In July, they bought on credit 600 cases of brandy at Bordeaux, for about 450*l.* On the 17th of August, Henry gave the defendant the bill of lading for the brandy which had then arrived in London, requesting him to clear the brandy at the Custom House and warehouse it in the defendant's name, and to pay the charges. The defendant did so, paying for the charges about 47*l.* On August 30, a bill of exchange accepted by the firm, and payable to the defendant in respect of a fortnight's freight, was either overdue or about to become due, and on that day, M'Farlane being unable to meet it, asked the defendant if he would take a new bill at fourteen days. The defendant declined, but said he would take one at seven days

on the security of the brandy. M'Farlane agreed to this, and said that the new bill would be duly met, but that the defendant might do what he liked with the brandy if the bill was not met. A bill at seven days for 302*l.* 14*s.* 5*d.* was then drawn by the defendant, and accepted by the firm. The evidence did not clearly shew how this sum was made up. The bill was dishonoured at maturity, and the defendant ultimately sold the brandy for about 360*l.* On August 30, the firm were in fact insolvent, and on October 9, they were adjudicated bankrupt on a petition filed on September 12. The plaintiff was afterwards appointed trustee.

In answer to the learned Judge, the jury found that the transaction of August 30, between M'Farlane and the defendant, was a *bona fide* arrangement honestly entered into and honestly carried out; that on that day the brandy was substantially the whole of the property of the firm, and that its value was 400*l.* The learned Judge then entered the verdict for the defendant, reserving leave to the plaintiff to move to enter it for him for 400*l.*, if the transaction was void in law.

A rule *nisi* having been obtained to enter the verdict for the plaintiff for 400*l.* on the ground that the transfer of the brandy from the bankrupts to the defendant was an act of bankruptcy, and that upon the facts proved the plaintiff was entitled to the verdict for 400*l.*; or for a new trial on the ground that the judge should have told the jury that the plaintiff was entitled to a verdict on the above grounds—

Garth (Grantham with him) shewed cause.—The defendant had possession of the brandy and a lien on it for the 47*l.* Though the firm was insolvent, the defendant did not know it, and after the finding of the jury the transaction cannot be said to be an act of bankruptcy within the Bankruptcy Act, 1869, section 6, sub-sect. 2, which makes it an act of bankruptcy if "the debtor has in England or elsewhere made a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof."

Prentice and *R. G. Williams* in support

of the rule.—What occurred before August 30th did not give the defendant a lien on the brandy, but even if it did, the transaction of August 30th is void as an act of bankruptcy, being a transfer of all the debtor's property to secure an antecedent debt. Such a transaction was always held to be an act of bankruptcy under the old law.

[MARTIN, B.—Because the conveyance of all a trader's property brought him to a standstill. That was not the case here. No one but the defendant knew anything about the brandy.]

That was the test under the old law, but since *Ex parte Luckes, in re Wood* (1) has decided that section 6, sub-sect. 2, of the Bankruptcy Act, 1869, applies equally to non-traders, it can no longer be the test. The real test is whether the debtor obtains an equivalent divisible among his creditors—*Ex parte Hawker, in re Keeley* (2). Those two cases determine the present question. In *Woodhouse v. Murray* (3) the creditor was already in possession of the goods, and yet a pledge by the debtor of the goods as a security for a past debt was held an act of bankruptcy.

[BRAMWELL, B.—There was in that case a “conveyance or transfer” by deed.]

The present case, if not a “conveyance or gift,” was either a “delivery or transfer” within the Bankruptcy Act, 1869, section 6, sub-sect. 2. There may be a “delivery or transfer” of the right of property in goods to one who already has possession. The transaction is in direct contravention of the spirit of the bankruptcy laws.

MARTIN, B.—I think this rule ought to be discharged on two grounds: First, because the defendant had a lien on the goods for money paid by him, and until a tender of that money had been made no action of trover would lie. And secondly, because there was no act of bankruptcy. The decision in *In re Wood* (1) is perfectly clear and correct. There a bill of sale was given, the consideration being

294*l.* That was a “conveyance,” ordinarily and properly so called, of all the trader's property with the purpose of passing it all. I am not prepared to say that every transaction which, without any intention to pass all the trader's property, turns out afterwards to be a conveyance of all his property, is necessarily an act of bankruptcy. None of the cases where the conveyance has been held an act of bankruptcy were of that kind. In all of them the property was intentionally conveyed by the owner knowing it to be the whole of his property. But here there was neither a “conveyance, gift, delivery or transfer,” but merely an agreement between the bankrupts and the defendant to permit the defendant to sell the property in the defendant's possession if the debt was not paid, neither of the parties supposing that it was an act of bankruptcy. No one would call such a transaction by any of those four names.

BRAMWELL, B.—The rule must be discharged.—I do not think the lien alone for the 47*l.* would be a sufficient answer, because if the defendant had only that lien he would have no right to sell, but only a right of possession. What took place afterwards was that the bankrupts gave the defendant no further possessory rights, but a right to sell the goods and pay himself. Such a transaction cannot be a “conveyance, gift, delivery, or transfer.” It may be that if the legislature had contemplated the present case they would have used words to include it. If they had added “charge upon” it is clear those words would have comprehended this case; but if those words are apt for that purpose, it is manifest that the existing words do not comprehend it. But I am not sure that the Legislature did not intend to exclude cases where there is no actual fraud, but the transaction is an ordinary mercantile one, the creditor in possession of the debtor's goods with a lien on them being told by the debtor he may sell them for their joint benefit and pay himself the original debt and a further debt incurred. If the goods in this case had been worth 1,000*l.*, the bankrupts would have been entitled to the balance. I think, therefore, that

(1) 41 Law J. Rep. (N.S.) Bankr. 21.

(2) 41 Law J. Rep. (N.S.) Bankr. 34.

(3) 36 Law J. Rep. (N.S.) Q.B. 289; and in error, 38 *ibid.* 28.

the legislature did not intend to include such a case.

I doubt if such a transaction is "fraudulent" within the meaning of the Act, though the trader parted with all his property. The goods were in the defendant's possession, and the bankrupts could not obtain them without paying the money due. The bankrupts were in difficulties with a bill coming due which it would be disastrous for them not to meet, because the defendant would have a right to withdraw the ship which the bankrupts had chartered. Under these circumstances how can it be said that when the bankrupts gave the defendant the right to sell the brandies they received no equivalent? The word "fraudulent" in the Act is a most unfortunate and ambiguous expression. But if the legislature had intended to include cases where there is no actual fraud they should have said so.

CLEASBY, B.—How could it be said that a transaction where the bankrupt gives the defendant an authority, a privilege to sell the goods already in his possession with a lien, is "a conveyance, gift, delivery or transfer?" Moreover there is no authority which shews that the giving a right to sell the goods in satisfaction of a further claim is within the Act. I think it would be extending the word "fraudulent" if we held that it included such a case as the present.

Rule discharged.

Attorneys—Evans, Laing & Eagles, for plaintiff;
W. H. Waller & Handson, for defendant.

1872. { THE GUARDIANS OF THE POOR
Nov. 20. { OF THE WEST HAM UNION v.
OVENS.

Pauper—12 & 13 Vict. c. 103. s. 16—
Judgment—Valuable Security for Money.

A pauper, while in the receipt of relief, brought an action in this Court, and signed judgment for a sum of money. After he had ceased to receive relief, the judgment

debtor paid him the judgment debt:—Held, that the judgment was a "valuable security for money belonging to" the pauper, within 12 & 13 Vict. c. 103. s. 16, so as to enable the guardians of the relieving union to recover from the pauper the relief given during the twelve months prior to the proceeding for the recovery.

[For the report of the above case, see 42 Law J. Rep. (N.S.) M.C. p. 29.]

1872. }
Nov. 22. }

RICHARDSON v. WILLIS.

Jurisdiction—Nul tiel Record—Evidence—Certified Copy of Record of Acquittal.

The issue of nul tiel record is tried by the Court and not by a jury.

An action in a superior Court is a "proceeding" in which a certified copy of a record is admissible as evidence of the record under 14 & 15 Vict. c. 99. s. 13.

Declaration, that after the passing of 6 & 7 Vict. c. 96, the defendant, then being a private prosecutor within the meaning of the Act, appeared at the assizes holden in and for the county of Essex, and indicted the plaintiff upon the charge of falsely and maliciously publishing a defamatory libel concerning the defendant, and as such private prosecutor preferred a bill of indictment therefor against the plaintiff before the grand jury, and gave evidence before the petty jury on the same; that the petty jury acquitted him of the premises in the indictment so charged upon him as aforesaid, and found him "not guilty" upon the same, whereupon judgment was given for the plaintiff, and he was duly discharged of and from the premises in the indictment specified; whereby and by reason of the aforesaid statute and of the premises the plaintiff became entitled to recover from the defendant the costs sustained by him, the plaintiff, by reason of such indictment; and the costs were duly taxed by the proper officer of the Court before which

the indictment was tried as by the statute is directed, and the same were allowed at the sum of 52*l.* 8*s.*; and all conditions have been performed, and all things have happened, and all times have elapsed necessary to entitle the plaintiff to the payment of the same, yet the defendant has wholly neglected and refused to pay the said sum so taxed and allowed, and the same is still unpaid and owing to the plaintiff.

First plea, that there is no record of the said supposed judgment.

Replication, that there is a record of the said judgment remaining in the said Court of Assizes of Oyer and Terminer and General Gaol Delivery, as the plaintiff hath above alleged, and the plaintiff prays that the said record may be inspected by the Court here; and hereupon the plaintiff is commanded that he have the same here on Friday, the 22nd of November, 1872, and the same day is given to the defendant at the same place, &c.

Philbrick, for the plaintiff, moved for judgment, and produced to the Court a copy of the record in the replication mentioned. The copy purported to be certified under the hand of the Deputy Clerk of Assize.

Willis, for the defendant, moved for judgment for him, and contended, first, that the issue was triable by a jury, not by the Court; and secondly, that the record itself must be produced, because section 13 of 14 & 15 Vict. c. 99 applied to proof in criminal proceedings only.

KELLY, C.B.—The plaintiff is entitled to judgment. There is no authority for the proposition that this issue must be tried before a jury. The books of practice lay it down as a decided rule that it is for the Court to try, and not for a judge and jury. That objection, therefore, is not maintainable.

The second question is, whether the acquittal obtained in another Court must be proved in this Court by the production of the record itself, or whether it is sufficient under 14 & 15 Vict. c. 99. s. 13 to prove it by a copy certified by the officer of the Court. The preamble of that section says, "Whereas it is expedient as far as

possible to reduce the expense attendant"—not on criminal proceedings—but "upon the proof of criminal proceedings." Mr. Willis argued that this certified copy was only sufficient in a criminal proceeding. But the statute says, "whenever in any proceeding *whatever*." The words are as large as they can be, and there is nothing in that objection. Is there anything in the subsequent part of the statute to restrict the operation of the first part? There is not, and this is clearly a proceeding in which it is necessary to prove an acquittal within the meaning of the section.

MARTIN, B., concurred.

BRAMWELL, B.—I am of the same opinion. The books of practice are against Mr. Willis on his first point that the issue cannot be tried before the Court. Another difficulty—perhaps only one of form—has occurred to me. On this record in our Court there is a direction to the plaintiff to have the record here, so that we have already said we would do what Mr. Willis says we cannot do. Therefore, he ought first to have moved to set aside that direction as improper.

As to the second point, there is no limitation in the section to "criminal" proceedings. The words are general, "any proceeding whatever."

A third point did occur to me. The first part of the section only mentions the proof of "the trial and conviction or acquittal," and I thought it might have been argued that these words would not include proof of a "judgment," which is what the declaration alleges. But the latter part of the section furnishes the answer to this, for it speaks of "the record of the indictment, trial, conviction *and judgment*, or acquittal." The former words in the section therefore include a judgment.

CHANNELL, B., concurred.

Judgment for the plaintiff.

Attorneys—Oldman for plaintiff; Evans, Laing & Eagle, for defendant.

72.*
3, 5, 8. { MORRISON v. THE UNIVERSAL
MARINE INSURANCE COMPANY,
LIMITED.

Prima facie Insurance—Slip—Policy—Concealment of Material Facts—Lloyd's Lists—*Concealment*.

There is no presumption of law that rewriters are acquainted with the contents of Lloyd's Lists, so as to discharge an underwriter from the duty of communicating material facts known to himself and published in those lists.

Underwriters having agreed upon the terms for a marine insurance with the owner of the assured, initiated the slip, debited the broker with the premium, in ignorance of a fact material to be communicated to them and known to the broker. Shortly afterwards the underwriters discovered the concealment and mentioned it to the broker, but raised no objection, and afterwards at the usual time executed and delivered to the broker in silence a stamped policy in accordance with the slip. News of total loss having arrived, they repudiated their liability on the ground of the concealment, and the assured sued them on the policy. It was conceded that in effecting marine insurances, when the slip is initiated, the contract is considered concluded; and it was proved to be the usage to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initiated.

BLACKBURN, J., directed the jury that the underwriters were bound within a reasonable time after discovering the concealment to elect whether they would avoid the contract on that ground, and asked the jury whether the underwriters had so elected:—

Held, per MARTIN, B., and BRAMWELL, B., that this was a misdirection.

And per MARTIN, B., the proper direction would be that if the conduct of the underwriters would naturally lead the broker to suppose that the policy was delivered to him as a binding contract, it was a binding contract.

Per BRAMWELL, B., the proper direction would be that the conduct of the underwriters, if unexplained, shewed that they were

treating the contract as subsisting, and *prima facie* was evidence of an election not to avoid it, and that it was for the defendants to shew from some accompanying circumstances that the broker had no right so to understand their conduct.

Held, per CLEASBY, B., that the direction was right.

The declaration was on a policy of insurance dated the 12th of October, 1870, made between the plaintiff's agents and the defendants for 500l. on chartered freight in the plaintiff's ship during a certain voyage, and alleged a total loss by the perils insured against.

Pleas—1. That the defendants were induced to become assurers to the plaintiff, and to subscribe and execute the policy by the fraud of the plaintiff.

2. That at the time of the defendants becoming such assurers to the plaintiff, and subscribing and executing the policy, the plaintiff and his agents misrepresented to the defendants a fact then material to be known to the defendants, and material to the risk.

3. That at the time, &c., the plaintiff wrongfully concealed from the defendants certain facts then known to the plaintiff, and unknown to the defendants, and material to the risk.

Joinder in issue on all the pleas.

At the trial before Blackburn, J., at the Liverpool Winter Assizes, 1871, the following facts were proved (1).

The plaintiff, a merchant at Liverpool, was sole owner of the ship *Cambria*, which sailed from Bahia on the 18th of August, 1870, for New Orleans, as set forth in the letter of that date from the master to the plaintiff. On the 9th of September, the plaintiff entered into a contract by charter party with certain merchants of Galveston, by which the ship was to proceed to the South-West Pass for charterer's orders, and thence to Galveston in Texas, or to New Orleans or Mobile, and there take a full cargo of cotton for Liverpool. The S.W. Pass is one of the passes into the Mississippi river, and at some distance

(1) This statement of facts is taken from the case on appeal, set down for argument before the Exchequer Chamber at the next sitting.

* The report of this case has been unavoidably delayed.

below New Orleans. It is a usual place of call for orders for vessels going to load cotton at any of the ports in the Gulf of México. Galveston in Texas and Mobile are, as well as New Orleans, ports in the Gulf of Mexico, from which cotton is exported. On the 3rd of October the *Cambria* arrived at the S.W. Pass, where the master received orders from the charterers to proceed to Galveston for a cargo of cotton, and on the next day he sailed for that port, and on the 6th of October the vessel arrived off the harbour of Galveston, and got ashore on the north breakers off the entrance of the harbour, and was there totally lost.

On the same day the master went ashore and despatched a telegram announcing the loss to the plaintiff at Liverpool. This telegram reached Liverpool on the 7th October, but the plaintiff denied having received it, and the issue on this point was decided in his favour by the jury.

On the 6th October, the agent at Galveston of Lloyd's Liverpool and London Underwriters' Association despatched to the agent for Lloyd's at New York, a telegram, stating that the ship was ashore on the North Breaker and probably lost; and on the 7th October, a telegram was received, addressed to Lloyd's, London, from the agent for Lloyd's at New York, in consequence of which the following announcement was made in *Lloyd's List*: "New York, 6th Octr.—The *Cambria* (probably *Cameo*) from New Orleans, grounded on North Breaker."

The last-mentioned telegram was received by Lloyd's in London, in time for transmission and receipt of the news at Liverpool at 38 minutes past noon on the 7th October, and one minute later was entered on the loss book at the rooms of the Underwriters' Association at Liverpool.

The telegram as received at Liverpool was—

"*Cambria*, query *Callao*, from New Orleans, aground North Breaker."

The plaintiff is not a member of or subscriber to the underwriters' rooms, to which only subscribers or members are admitted.

The secretary to the Liverpool Lloyd's Association afterwards searched *Lloyd's*

List, and more than one hour after making the above entry, he added at the foot of it in the loss book, the following words in parenthesis "(Memorandum, *Cambria*, Owen, 1,177 tons, left Bahia 18th August, for New Orleans)." Not being able to find anything about a ship named *Callao*, he telegraphed to the London Lloyd's on the same day to enquire into the meaning of the words "Qy. *Callao*," and the answer was received the same day, at 5.50 P.M., after the rooms were closed, in the following words:

"*Cameo* from New Orleans is supposed to be the name of the ship aground on the North Breaker." On that evening at the hour for closing the rooms to subscribers the secretary, according to his custom, sent for publication to the *Liverpool Mercury*, a daily journal published in Liverpool, a copy of the telegram first received from the London Lloyd's, but added the word "qy." after the words "New Orleans," so that in the *Mercury* of the 8th October, the publication among the shipping news was in these words—

"*Cambria* qy. *Callao* from New Orleans qy. aground North Breakers."

After the above telegram had been sent to the *Mercury* for publication the secretary having received the telegram secondly received from the London Lloyd's searched *Lloyd's List*, in order to ascertain something about the ship *Cameo*, and then made the following entry in the loss book—"The vessel on the North Breaker reported yesterday as the *Cambria* is stated to be the *Cameo* from New Orleans. Memorandum, the ship *Cameo* from Antwerp arrived at New Orleans on the 26th September." This entry was sent to the *Mercury*, on the morning of Saturday, the 8th October, and was published in that paper on Monday, the 10th October.

The secretary stated that he added the above memorandum relative to the ship *Cameo* from Antwerp, as being tantamount to a statement that the ship on the North Breakers could not be the *Cameo*, because, as he said, "the *Cameo* having arrived on the 26th September, she could not have got her cargo discharged and loaded and come out again to be lost on the 6th October." He how-

did not in any way communicate to d's in London that he had come to conclusion.

On Saturday the 8th October, the plaintiff, who up to that time had no information on the *Cambria* or her freight, telegraphed from Liverpool orders to Messrs. Previté & Greig, London, insurance brokers, to effect insurance for 5,000*l.* on the ship, and 5,000*l.* on chartered freight.

The plaintiff bought a copy of the *Mercury* of the 8th October, but he swore that he did not see the entry above mentioned till late that afternoon at his own house, and after his letter had been posted. The plaintiff also bought a copy of the *Mercury* of the 10th October, on his way to his office, where he went earlier than usual. In consequence of the announcement in the *Mercury* of the 8th. Immediately on his arrival at his office, the plaintiff sent a telegram to Previté & Greig—

“Since writing Saturday, paragraph in *Mercury*—*Cambria* Query *Cameo* from New Orleans aground on North Breaker. To-day's *Mercury* says, ‘The vessel on the North Breaker, reported yesterday as the *Cambria*, is stated to be the *Cameo*, from New Orleans.’ Can you find out at Lloyd's? Let me know by wire before acting.”

Later on the same day the plaintiff wrote to Previté & Greig—

“This morning we telegraphed you as under: ‘Since writing Saturday, paragraph in *Mercury*—*Cambria* query *Callao* from New Orleans aground North Breaker. To-day's *Mercury* says, ‘The vessel on North Breaker, reported as the *Cambria*, is stated to be the *Cameo*, from New Orleans.’ Can you find out at Lloyd's? Let us know by wire before acting. It is our impression that it cannot be the *Cambria*, or our captain would certainly have telegraphed us, and we have received none. If it is not the *Cambria*, should like the insurance done on good terms, as she is rather long on the voyage. We have sent you all the particulars we have received, and must leave you to act as best for our interest. She may have been detained on the line, but have not seen her spoken, which makes us uneasy. All we know is the above extracts from *Liverpool Mercury* newspaper sent you

at once by telegram, and are awaiting any information you can give us about her from Lloyd's. Your telegram to hand as under: ‘Vessel on North Breaker appears to be *Cameo*, not *Cambria*,’ to which we replied by wire. Your telegram received, and a great relief; nevertheless have been so frightened, that we wish insurance done on the best terms. We will not run a yard if not insured any more. Trusting you will succeed in getting all done either to-day or to-morrow.”

No information was given to the underwriters of the memorandum published in the *Liverpool Mercury* of 10th October.

The above letter of the plaintiff, with the captain's letter of the 18th August, and the charter-party and telegram of the plaintiff of the 10th October, were received together by the brokers when they reached their office on the morning of the 10th October, and Previté, a member of the firm, went to Lloyd's, for the purpose of searching the books, and endeavouring to ascertain whether the vessel reported to be lost was *Cambria* or *Cameo*.

At the London Lloyd's there are, in an inner room known as the reading-room, to which brokers and underwriters have free access, very large and heavy volumes, containing an index to the entries in *Lloyd's Lists*. In these index-books Previté discovered an entry relating to the *Cambria*, and this entry referred him to *Lloyd's List* of the 8th October, where he found the announcement, “the *Cambria* [probably *Cameo*], from New Orleans, grounded on North Breaker,” published as having been received from New York, as stated above.

Lloyd's List, to which the broker was referred by the index-books, is a daily shipping gazette, containing several hundreds of entries, giving the shipping news from all parts of the world, and these gazettes are received every morning by underwriters, and were actually received by the defendants, who carry on their business in London. The entries in *Lloyd's Lists* are indexed by clerks at Lloyd's into the index-book.

Previté also searched at Lloyd's for information about the *Cameo*, and found that there was news of her arrival at New Orleans on the 26th September,

and not finding any news of the arrival of the *Cambria* at New Orleans, or at the S. W. Pass, as was to be expected if she had arrived there, he concluded that the vessel reported to be ashore on the Breakers must be the *Cameo* and not the *Cambria*.

On cross-examination he admitted that when coming to that conclusion, it did not occur to him to think how a ship that had arrived in New Orleans on the 26th September could have loaded there and been lost on the North Breaker on the 6th October.

Having come in good faith to the above conclusion, he applied on behalf of the plaintiff to various underwriters on the 10th, 11th and 12th October for insurance, as directed by the plaintiff's letter of the 8th October. He took in his hand the captain's letter and the charter-party, and stated to the underwriters when and from where the vessel sailed, and what the voyage was. Beyond this he gave them no information.

On cross-examination, he admitted that he refrained from communicating anything on that subject to the underwriters, because of his conviction that the vessel ashore was the *Cameo* and not the *Cambria*. It was not suggested by either party that Previté was acting otherwise than in good faith, and it was conceded that in making the insurances hereinafter set forth he had no dishonest intention.

On the 10th of October, after making the above examination, Previté applied for insurance by making out a slip in the ordinary form used by insurance brokers, and he effected on that day with underwriters other than the defendants insurance on the freight for 1,350*l.*, at the premium of six guineas per cent., and on the same day he exhibited to the defendants' underwriter, Fisk, the slip initialed at a premium of six guineas per cent., and proposed that the defendant company should take a line on the freight at the same rate. Fisk, after hearing from Previté that insurance on the vessel was also desired, declined to insure the ship at all, but offered to take a line in the freight at eight guineas premium.

On the 11th of October Previté effected further insurance on behalf of the plain-

tiff on the freight of the *Cambria* at eight guineas per cent.; and on the 12th of October proposed to the defendants' assistant underwriter, Pritchett (in Fisk's absence), to take a line on the freight at eight guineas per cent., stating that Fisk had given him a quotation at that rate. Pritchett without asking for or receiving any information from Previté beyond the date of the sailing of the vessel, and the facts stated in the slip hereafter mentioned, initialed the slip on behalf of the defendants.

The material parts of the slip were: "Amount 500*l.* on chartered freight valued at 5,000*l.* Voyage—Bahia to the South-West pass for orders thence to a port in the Gulf of Mexico, while there, and thence to Liverpool."

The same day and soon after having initialed the slip, Pritchett visited Lloyd's Rooms and there saw the loss book lying open on the stand on which it is always kept open for the information of visitors to the room. In the loss book there had been entered that morning for the first time the announcement from New York mentioned above, viz., "The *Cambria* (probably *Cameo*) from New Orleans has grounded on North Breaker. Agent, New York per cable." This entry should in ordinary course have been made in the loss book on the same day as it appeared in *Lloyd's List*, the 8th of October, but owing to some negligence at Lloyd's it had been omitted.

Immediately on seeing this entry, Pritchett saw Previté in the room, and said to him, pointing to the loss book, "This looks uncommonly like the *Cambria* which I have just written for you;" to which Previté replied (according to the evidence of the defendants' witness, Pritchett), "I know all about this; this is the *Cameo*;" or words to that effect. Previté, a witness for the plaintiff, said that his reply was, "I have known about that for some days, and I do not think anything of it," he having come, as he said, to the conclusion that it was the *Cameo*. Previté then shewed Pritchett the entries which he (Previté) had examined as above stated.

It was conceded that in effecting marine insurances "until the slip is initialed

the matter is considered merely in negotiation. When initialed, contract is considered concluded."

It was proved to be the usage of underwriters to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initialed.

On the 13th of October Fisk returned to London, and was immediately informed by Pritchett of all that had taken place between himself and Previt . Fisk stated that he was the person whose duty it would be, on ascertaining that there had been a concealment, to determine whether the defendants would carry out the insurance.

The business of the defendants' office is conducted in two departments, one of which is the underwriting department, and the other that of the secretary and adjuster of claims. After slips are initialed in the underwriters' department, they are passed into the secretary's department, and thenceforward the underwriters' department has nothing further to do with them. All the slips taken are forthwith given to the policy-writers, and the head of the policy-writers obtains the necessary stamps, and the policies are then filled up on the proper stamped forms. This work usually occupies about two days, that is to say, on the day but one after the slips are initialed the policies are signed by the directors, and are then placed in pigeon-holes under the letters of the alphabet in the outer office for delivery. The policies are always dated as of the day of the date of the slip, no matter what delay may occur in filling up the policies.

In this case a policy was filled up according to the terms of the initialed slip. It was dated on the 12th of October, 1870, but not executed by the directors until the 14th or 15th, and having been deposited in the pigeon-holes was taken away by a clerk of Previt  on the 14th or 15th.

On the 19th of October, a telegram was received and posted on the loss book at Lloyds', shewing unquestionably that the vessel lost on the North Breakers was the *Cambria*, and a notice was given by the defendants on the 20th of October, that in consequence of information which had reached them concerning the *Cambria*

they considered themselves free from any liability on the insurance.

The defendants made no objection or protest in respect of the insurance effected with them between the date of initialing the slip and the time when they sent the notice.

No premium of insurance had been received by the defendants prior to giving the notice. The premium, though debited at once to the broker, would only become payable on the 8th of November. The premium was tendered by the broker on behalf of the plaintiff to the defendants in due time after the 20th of October, but the defendants refused to receive it.

At the trial various defences were set up, a main contention being that the plaintiff had received a telegram from his captain announcing the loss before directing his brokers to insure on the 8th of October.

The direction of Blackburn, J., to the jury, so far as is material to this report, was as follows—

When a man discovers that there has been a concealment or misrepresentation he cannot keep the contract and get rid of it too. He has a right at his election to say, "take back your premium and make the contract a nullity." He has also a right to say, you have done what entitles me to get rid of the contract, but I will keep the premium and go on. He cannot say, "I elect to go on," and then when he hears that there is a loss say, "now that I hear there is a loss I will not recognise the policy."

When he has got notice of the concealment he is bound to make his election, not in desperately hot speed, but within a reasonable time, because perhaps suddenly may come a telegram to say the ship has come safe into harbour. It would not do for a man to wait some days and then say, "now I will keep the premium." In this case the telegram on the 19th of October was, "It is quite sure the ship *Cambria* has been lost." A man cannot wait to take his chance, he must elect within a reasonable time. This is a matter for you to consider.

After discussing the evidence as to the communication between Previt , Fisk and Pritchett, the learned Judge continued—

On the 13th of October Fisk knew all that Pritchett had discovered, and was aware that he had a right to return the premium and say, he was not liable. No doubt if he had offered to return the premium, Previté's answer would have been, "I will not take it;" but still Fisk had no right to continue to hold the premium, and to play fast and loose; he must either adopt or refuse it. It has been correctly stated that the initialing the slip is considered in fair dealing and mercantile understanding as being the contract, as if it were made on that day. What I have said would equally apply if the contract had been made at first on a stamped policy; on learning the concealment the underwriter would have a right to say—"You shall take back the premium, and the policy is at an end." In ninety-nine cases out of a hundred the concealment is not known until the news of the loss has come. In this case the concealment was known to Pritchett on the 12th and to Fisk on the 13th; the news of the loss came on the 19th; knowing of the concealment they did not do anything or take any steps until the news of the loss came. The question comes to be—taking into account that the defendants had the opportunity, and ought to make the election within a reasonable time—do you think that they elected to go on with the contract? If so, that puts an end to this part of the defence. On this I express no opinion, but leave it entirely to you.

Four questions were left to the jury by the learned Judge—

First. Had the plaintiff received the telegram addressed to himself from Galveston by the master?—Answer, No.

Second. Was it material to the underwriters, in calculating the premium or determining whether to take the risk, to know of the telegram which arrived and was in *Lloyd's List* and the *Mercury*?—Answer, Yes.

Third. Had the broker a right to suppose that the underwriters were acquainted with the contents of *Lloyd's List*?—Answer, No.

Fourth. Did the defendant company, after knowledge that the broker had not disclosed this fact, elect to treat the policy as subsisting?—Answer, No.

The learned Judge thereupon directed the verdict to be entered for the defendants on all the pleas except that of fraud.

The plaintiff afterwards obtained a *nisi* for a new trial on the ground of misdirection, in that the Judge ought to have told the jury that the defendants were to be presumed to know the contents of *Lloyd's Lists*, and that the plaintiff was not bound to communicate information contained in them; and also that on the facts proved with reference to the execution of the policy, without protest after knowledge of the alleged concealment the Judge ought to have directed the jury to find for the plaintiff; and that on the question of election the verdict was against the weight of the evidence.

Butt, Benjamin and J. R. Mellor, for the defendants, shewed cause.—First, the concealment by the plaintiff of the memorandum published in the *Mercury* of the 10th October is sufficient to support the verdict, for this never was communicated to the defendants; second, the telegrams concealed by the broker were material. There is no presumption of law that underwriters know the contents of *Lloyd's Lists*, or if there be any it may be rebutted, and here the defendants did not know—*Arnould on Marine Insurance*, vol. i. p. 539 (3rd edit.), *Phillips on Insurance*, par. 603, *Duer on Insurance*, vol. ii. p. 480, 481, 555; *Friere v. Wodehouse* (2), *Ellon v. Larkins* (3), *Mackintosh v. Marshall* (4), *Bates v. Hewitt* (5); third, when the slip is initialed the contract is made, and binding in good faith, though not in law—*Cory v. Patton* (6), *Ionides v. The Pacific Insurance Company* (7), *Xenos v. Wickham* (8).

(2) 1 Holt's N.P. 572.

(3) 5 Car. & P. 385.

(4) 11 Mee. & W. 116; s. c. 12 Law J. Rep. (n.s.) Exch. 337.

(5) 36 Law J. Rep. (n.s.) Q.B. 282; s. c. Law Rep. 2 Q.B. 595.

(6) 41 Law J. Rep. (n.s.) Q.B. 195n.

(7) 41 Law J. Rep. (n.s.) Q.B. 33; Law Rep. 6 Q.B. 674, and in error, 41 Law J. Rep. (n.s.) Q.B. 190; s. c. Law Rep. 7 Q.B. 517.

(8) 36 Law J. Rep. (n.s.) C.P. 313; s. c. Law Rep. 2 E. & I. App. 296.

The delivery of the policy is merely in pursuance of the honourable understanding, and to give the assured the legal means of enforcing the contract if enforceable, and is therefore not a waiver of the concealment nor any evidence of an election. It cannot be that underwriters must be judges in their own case, and be forced to determine whether the concealment is such as to justify them in refusing to deliver the policy. The policy was delivered on the condition that the vessel on the North Breaker was not the *Cambria*, and that if it were the *Cambria* the policy was to be void.

Holker, Herschell and M'Connell, for the plaintiff, in support.—First, the non-communication of the memorandum, which was published in the *Mercury* of 10th of October, was not treated during the trial, nor did it go to the jury as a concealment, and the verdict cannot therefore be supported on that ground. Second, the direction was wrong. Underwriters are presumed in law to know the contents of *Lloyd's Lists*, and the assured need not communicate facts therein—*Friere v. Wodehouse* (2), *Elton v. Larkins* (3), *Bates v. Hewitt* (5), *Gandy v. The Adelaide Marine Insurance Company* (9), *Harrower v. Hutchinson* (10), *Arnould on Marine Insurance*, vol. 1, 3rd. ed. pp. 520, 538. Third, a slip is not a contract—*Maackenzie v. Coulson* (11), and 30 & 31 Vict. c. 23. ss. 4, 7, 9. Fourth, the direction should have been that the defendants were bound to protest when they issued the policy, if they meant to dispute their liability on the ground of the concealment of the telegrams.

Cur. adv. vult.

The following judgments were delivered on the 8th of February—

MARTIN, B.—I think there ought to be a new trial. The first point urged against the rule was the concealment by the plaintiff himself of the memorandum which appeared in the *Liverpool Mercury*

of the 10th October. That, if established, would be a concealment of a material fact, and would put an end to the plaintiff's case. But my brother Bramwell and myself think that it was not put before the jury as it should have been, or in such a way that we can say they really discussed it.

The next concealment was the concealment by the broker of the telegram, and it was admitted that it was material to be communicated. But it was urged that the defendants could not take advantage of that, because they were bound to know, and must be presumed to have known, of the telegram which had been received at Lloyd's. I think that question was rightly left to the jury, for it must be a question of fact whether the defendants knew; it cannot be assumed as a matter of law that they saw everything which appeared in *Lloyd's Lists*.

But there is a serious question behind. The broker knew of the telegram, but did not communicate it to the defendants, I think probably because he honestly believed that the vessel on the rocks was not the *Cambria*. But that concealment became known to the underwriters soon after, and without any notice to the broker of any intention to dispute their liability they delivered to him the policy stamped. The question is whether, when the news of the loss arrived a few days later, the underwriters are at liberty to say that they are not bound by the policy on the ground of that concealment.

My own impression is that they are estopped. If with knowledge of the concealment they think fit without notice to deliver the policy, as if it were binding on them (which would induce any man to suppose they considered it binding on them), and especially if they have either received the premium, or there is a contract for the payment of the premium, my impression is that they are estopped, and cannot be allowed to wait until the loss is known, and then elect to return the premium or rescind the contract for the payment of the premium, and thus prevent the assured from insuring elsewhere. I think the proper direction to the jury would be that if the delivery of

(9) 40 Law J. Rep. (N.S.) Q.B. 239; s. c. Law Rep. 6 Q.B. 746.

(10) 39 Law J. Rep. (N.S.) Q.B. 229; s. c. 10 B. & S. 469; Law Rep. 5 Q.B. 584.

(11) Law Rep. 8 Eq. 368.

the policy, and the retaining the premium or the non-rescinding of the contract for the payment of the premium would naturally lead the broker to suppose that the policy was delivered to him as a binding contract, it is a binding contract. That being my view, I think there ought to be a new trial.

BRAMWELL, B.—I think there must be a new trial, but with great reluctance, for I believe substantial justice was done by the verdict. First, I think the defendants cannot, for the purposes of this rule, rely on the concealment by the plaintiff himself of the memorandum. My brother Blackburn, to whom I have spoken, says his view is the same as that expressed by my brother Martin, that that question was not really left to the jury, nor can they be taken to have expressed an opinion on it. Therefore the verdict cannot be supported on that ground.

The next question arises on the concealment by the broker of the telegram which was undoubtedly material to be communicated. In answer to this, it was urged that there was no occasion for the broker to communicate it because the underwriters were bound to take notice of the contents of *Lloyd's Lists*; it is suggested either that the underwriters were to be presumed to know those contents, or that at all events there was no duty to communicate a matter on which the underwriters could inform themselves, if they thought fit. I do not agree with that. It is impossible to say there is any rule of law either in principle or upon authority which binds the underwriter and affects him as it were with notice of whatever may be in *Lloyd's Lists*. I quite agree that there are some things the underwriter must take notice of. I shall not attempt to define and describe them, that would be a difficult matter; but I agree with my brother Cleasby, that they may be described somewhat in this way—those things which are matters of general knowledge and which are not applicable to any particular ship. But to hold that the underwriter is bound to carry in his head all that has appeared in *Lloyd's Lists* for an indefinite period of time, he not being particularly interested to re-

member more about one ship than another, rather than to hold that the owner of the ship must inform the underwriter of the particulars which do or may relate to that ship or which may affect ships of a similar name, seems monstrous. It would impose a difficult and needless burden on the underwriter, while there would be no difficulty at all in the ship-owner making the communication. I think that this was a fact material to be known, that the defendants did not know it, that the broker was bound to communicate it, and that there was a concealment by him.

The underwriters became aware of this concealment soon after the slip was initialed and before the policy was issued, and the question then arises, can you look to the time of initialing the slip as the time when the rights of the parties were fixed? Independently of authority, I should think you could, whatever may be the effect of the Stamp Acts, because you are not talking of any particular document, but of a time—the time when the slip was initialed. In so holding there seems no repugnance to the actual contract, for without using the doubtful term “condition” it is certain that the liability of the underwriter on the policy is affected by something which does not appear in the policy; that is, if there has been a concealment of a material fact not known to the underwriter he may elect to avoid the policy. That is not mentioned in the policy in any way, and therefore the written obligation contained in the policy is controlled by something which does not appear on its face. That being once admitted, the time at which the parties are to date their rights may be put any number of days before or at the instant of the policy. There is no contradiction in the policy, or adding to its terms in one case more than another.

Moreover *Cory v. Patton* (6) seems to be decidedly in point, for it was there held that the assured were not bound to communicate a material fact which became known to them after the slip was initialed and before the policy was given. And why? Because the time of initialing the slip was the time at which the rights of the parties were fixed. If that were true

in that case it is equally so in this, and therefore the defendants might shew that though they knew the material fact before giving the policy they did not know it before initialing the slip, at which time their rights and obligations were fixed. There is no difficulty as to that either on principle or on authority.

Then comes a question as to which I feel a great difficulty, and one on which I do not quite agree with the ruling of my brother Blackburn. The underwriters having become aware of this material fact, and that the broker had concealed it, would have had the right—even if the policy had been issued the moment the slip was initialed—to say to the assured, within a reasonable time, “We have found out a material concealment, and we elect to avoid the policy. We therefore return you the premium, or release you from any obligation to pay it, and we give you notice that we shall treat it as a non-enforceable insurance.” They not only would have had that right, but if they chose to avail themselves of the concealment to avoid the contract, they would have had the duty cast on them of saying this within a reasonable time after the discovery, and if they did not say it within a reasonable time the policy would be binding on them. That seems to me to be clearly the law, and to be consistent with reason and commonsense. And if it be true, supposing the policy to be given out, it must be equally true if the policy was not given out. There is great force in the argument of Mr. Herschell that if it were not so underwriters would have greater power under an innocent concealment of this sort than under a fraudulent concealment, where there is no doubt that within a reasonable time the election to avoid must be made known. It appears to me that when the time arrives for the next step in furtherance of the contract, then is the time for the party who is to take the step to declare his election. It is not necessary to seek other illustrations, this case presents a sufficient example. In effect the contract here, whether enforceable or not on the ground of the Stamp Acts, was, “We will become your insurers upon initialing the slip, and we will deliver you out a policy, but if we discover at

any time that there was a material concealment we have the right of avoiding the contract, or we have the right of going on with it and keeping your premium.” When the time arrived for the second step to be taken by the defendants in furtherance of the engagement they had entered into, they should then have declared their election, and if they took that step without at the same time intimating, “You are not to understand that we waive our right, or that we elect not to exercise our right to declare this void”—if they took that step in silence—the assured is entitled to treat it as a notification to him that the underwriters have elected not to avoid the contract, but to go on with it. But if the defendants had said, “We will not give you a policy, we elect to avoid this contract on the ground of the concealment, and the plaintiff had replied, “That is not fair because I deny the materiality of the concealment, or I propose to contest the question with you,” then the defendants might have said, “We will give you the policy, but with a protest that it is subject to our right to avoid the contract on the ground of concealment.” I think if they neither refused to give the policy nor gave it in those terms it was an election, or such an act done that the assured would be entitled to treat it as an election not to avoid the contract.

It is said, in answer, that the underwriters could not avoid giving out the policy because *Xenos v. Wickham* (8) shews that the policy is the property of the assured from the time it is executed. In the first place *Xenos v. Wickham* (8) does not shew that the policy is the property of the assured if it was voidable on the ground of concealment. In the next place it only alters the form of the objection; instead of saying they ought not to have given out the policy, it comes to this that they ought not to have *executed* the policy. It is in fact the same thing. Again it was argued by the defendants that those who prepared this policy had no authority to prepare it. No doubt they were clerks who had nothing to do with underwriting, and had not of themselves power to elect not to rely upon this objection, but they had authority given to them by virtue of their

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office to make out the policies in accordance with the slips, and if it was intended to revoke that authority, the clerks should have been told not to make out this policy in conforming with the particular slip. Therefore I say they had authority to make out this policy.

It comes in truth to this: If the under-writing officials of the establishment, who had the power to elect to avoid this insurance, had been minded to do so, they should have told the clerks not to make out the policy, or the directors not to execute it; and if by the effect of *Xenos v. Wickham* (8) the policy vested in the assured from the time it was executed, then it should either not have been executed without a protest, or it should not have been executed at all.

Then it was said, and I understand this to be my brother Cleasby's difficulty, that the delivering out of this policy was a thing which the defendants could not help because they had engaged to do it, and how can a man be said to elect by an act which he does under compulsion? A proposition so stated is difficult to deal with, but in truth, in one sense, it is not done under compulsion. No doubt it is done under compulsion in the sense that as men of honour they must do it, but still as men of honour they may do it with a qualification; they may say, "we refuse to deliver this to you in furtherance of the contract unless you insist upon it with the view to try the question between us, and then we will deliver it with a protest." Moreover it is not binding upon them in point of law, and therefore if they do it as a matter of honour surely they may do so under such circumstances as will not cause them to lose any right which they may have. When therefore the time arrived for the giving out of the policy, or perhaps for the execution of it, it should either have been refused or given with an intimation that the defendants elected to avoid the contract.

I think, therefore, that there was a misdirection in that respect, and that there must be a new trial. I think I should leave the question in this way to the jury: "Here is an act, which, unexplained, shews that the defendants are treating the contract as a subsisting one, but if in the

surrounding circumstances, or in any way, you can find out that the assured was not warranted in so considering it, then you may find for the defendants; but *prima facie* it is an election by the defendants not to avoid the contract, and it is for them to shew from some accompanying circumstances that the broker had no right so to understand it."

As to the evidence I cannot but think that Fisk and Pritchett intended to go on with the insurance. I do not think they cared for that telegram of which they had notice, and I should doubt extremely whether the verdict was not against the weight of evidence on that point. I mention that to shew how reasonable it is to suppose that Previté the broker took the same view of the telegram, and how hard it is that he should be induced by the defendants' conduct not to exercise the power he had of insuring elsewhere, for that he could have done so is abundantly clear upon the evidence.

CLEASBY, B.—As to the first point, I have looked very carefully through what took place at the trial, and I have come to the conclusion, that the concealment by the plaintiff himself of the memorandum published in the *Mercury* of the 10th of October went to the jury, that they entertained it and founded their judgment upon it. I think that the finding of the jury that there was a material concealment is warranted by the evidence, and there is sufficient to satisfy me that they came to that conclusion upon the evidence of the memorandum being concealed, the whole question of concealment having gone to them. That being so, I do not think that because the learned Judge may not have distinctly left the concealment of the memorandum to the jury, we ought to interfere. The only question for us is, is there a finding by the jury on the matter? At the same time I may say, that if this were the only question in the case, my brothers being of opinion that this matter was not sufficiently entertained by the jury, I might be influenced by their opinion to the extent of not insisting on my own. But as there is another question of vast and general importance on which I differ

from them, I have felt bound to state my opinion on both questions.

The great question is the question of election. Did the giving out of the policy without saying anything, operate as a waiver of the defendant's right to avoid the contract? I quite agree that a man may either by agreement or by his conduct elect to waive any objection there may be to a voidable contract, and that, if he does so by his conduct in any way, he cannot afterwards set up that as a defence. The conduct here, was the giving out the policy without any indication that the underwriters reserved any right to insist upon the objection which they now raise. That depends upon what the effect of giving out the policy is.

Now, what was the real position of the parties when the telegram was known to the defendants? I cannot for a moment believe that there was any intention on the part of the defendants of insuring against the contingency of the *Cambria* being the vessel on the rocks. Previté's subsequent letters and the whole nature of the case shew that. The insurance had been taken before there was the least idea of any vessel being on the rocks. The premium of eight guineas was attributed to the class of vessel, to its character which could be easily ascertained, and to the fact of a very considerable period having elapsed. The premium was fixed upon that footing, and I cannot entertain the idea that it was a sort of wager upon the ambiguity of the telegrams. When Previté's attention was called to the telegram, he said, "Oh! I knew of all that before, that is nothing;" and I read what took place as an assurance by Previté, that this was information which did not affect in the slightest degree the slip which had been executed. Upon that footing, it appears to me the transaction really went on, that is, upon the old footing, and if so, it is conclusive against the notion of an election, which would introduce a new idea altogether, viz., the idea of the *Cambria* being the vessel upon the rocks. That seems to me to throw the case out of the area of election altogether.

But, supposing it to come within the

area of election, and supposing this information to be a real disclosure of a material fact, then what is the effect of giving out the policy? The contract, and the only contract, is made by the slip. It may be said, that a written contract is afterwards made by the policy, but there is no fresh contract. A contract is the concurrence of intention in two parties, one promising something to the other who on his part accepts such promise. The contract itself is made, and is in one sense binding at the time when the parties separate with this idea in the mind of each. Section 17 of the Statute of Frauds says, "No contract for a sale shall be allowed to be good except it be in writing," &c., and in section 4 what takes place by word of mouth is spoken of as the contract. The question as to its being good in point of law or enforceable is different altogether. The contract here was made, and was binding in one sense, as a matter of right and conscience. That is not a matter in which it can be supposed that there is one law in one country and another law in another. The obligation is universal, and is one upon the influence of which all the transactions of life depend.

The case falls under the class of acts which must be consecutive, but which are intended and supposed to be contemporaneous, acts which are taken to be done *uno flatu*. If the slip is initialed, and the premium paid or engaged to be paid, then whenever the policy is given out, whether an hour after, or two days after, or put in some place of deposit, it is as between the parties to be taken as done *uno flatu* with the time when the contract was entered into, and it will operate in that way. It might be merely going from one room to another, and then everybody would say it was one act.

This seems to me to be agreeable to the view taken of this matter both in *Cory v. Patton* (6) and in *Xenos v. Wickham* (8). In *Cory v. Patton* (6) the Court regarded the policy as given out—I may say—*uno flatu* with the slip, for though a material fact became known to the assured after the slip was initialed and before the policy was given out, yet the Court held that the assured was en-

titled to consider the matter as concluded by the slip, and was under no obligation whatever to communicate the fact so as to place the underwriter in the position of making an election. Therefore they held that the policy and the slip must be taken to be the same document so far as regards the time when they were agreed to.

The House of Lords in *Xenos v. Wickham* (8) dealt with the question in a manner which, I think, justifies the conclusion which I have arrived at. They considered that the actual delivery of the policy was not requisite, but that if it were placed in a pigeon-hole it would have the same effect, being nothing more than the formal conclusion and completion of the contract entered into before.

That being so, I think the doctrine of election does not apply at all. The mind is not at that time directed to any other idea than that of giving the formal document for the purpose of carrying out the previous contract. The policy is delivered out as a matter of course. Can that which is done as a matter of course be regarded as an act which is to operate as an election whether the contract is to go on or not? I think, therefore, the learned Judge was quite right upon this part of the case in not telling the jury that the giving out of the policy was of itself an election not to avoid the contract, but leaving the question generally to them whether the defendants had elected to go on with the contract; and upon that I think the verdict of the jury was right. I think, therefore, that there ought not to be a new trial.

Rule absolute.

Attorneys—Chester & Co., agents for Lace, Banner & Co., Liverpool, for plaintiffs; Thomas & Hollams, for defendants.

1872. }
Nov. 14. }

BRADBURY AND OTHERS v.
HOTTEN.

Copyright—Infringement—Engravings—Fair Use by one Author of another's Publications.

Between the years 1849–1867 there appeared in the weekly numbers of "Punch" many woodcuts caricaturing Napoleon III. In 1871 the defendant published a book, of which Part I. consisted of a letter-press history of Napoleon's life. Part II. was called, "The same story as told by popular caricatures of the last thirty years," and consisted of woodcuts copied from many English and foreign publications. Nine of these were exact copies in reduced size of the whole or part of nine woodcuts which had appeared in nine separate numbers of "Punch" during the above period, and were inserted without any acknowledgement that they had appeared in "Punch." The registered proprietors of "Punch" brought an action for this infringement of their copyright in the above nine numbers, each of which was described in the declaration as a "book or sheet of letter-press."

The Court finding as a fact that the defendant's book was published with the same object as "Punch," namely, to amuse the public and to make a profit by the sale, held that there had been an infringement.

The first count alleged that the plaintiffs were the proprietors of a subsisting copyright in a book or sheet of letter-press separately published entitled *Punch, or the London Charivari*, and numbered 391, and the defendant, after the passing of 5 & 6 Vict. c. 45, did wrongfully and without the consent in writing of the plaintiffs print or cause to be printed for sale divers copies of certain parts of the said book or sheet of letter-press contrary to the statute.

The remaining eight counts contained similar complaints as to Nos. 416, 546, 603, 604, 688, 738, 913, 1,347 respectively. Plea, Not guilty. Issue thereon.

At the trial, before Bramwell, B., in Middlesex, on June 14, 1872, it was admitted that the plaintiffs are the owners of the copyright in *Punch*, and were so during the period when the nine numbers

were published containing the woodcuts, the copying of which is complained of. In 1871 the defendant published a book entitled, "The Man of his Time. Part I., The Story of the Life of Napoleon III. by James M. Haswell. Part II. The Same Story as told by Popular Caricatures of the last Thirty Years. London: John Camden Hotten, Piccadilly."

This book was put in evidence, and it appeared that the preface contained, *inter alia*, the following remarks—"The reader will not be able to complain that a one-sided view of the life of Napoleon III. has been set before him in this work. The text forms one chronicle, the illustrations another, and certainly a very different one. Between the two the reader will doubtless arrive at an opinion not very far from the truth."

"The publisher takes upon himself whatever responsibility rests in the selection of the pictures illustrating this volume. After he had looked over what Mr. Haswell has written about the Emperor, he felt that there still remained a part of the story untold, namely, that part which is contained in the public caricatures appearing immediately after each important event in our hero's career."

Part I. consisted of more than 300 pages of letter-press, and for all that appeared to the contrary was original matter. Part II. consisted of a great number of woodcuts, with explanatory letter-press, printed on leaves which were inserted at intervals between the leaves of Part I. There was no connexion between Part I. and Part II. nor any reference in the one to the other, except that Napoleon III. was the subject of both, and that the dates of the woodcuts and the events they illustrated corresponded to the dates and the events related in those portions of Part I. where the woodcuts were respectively inserted. Of these woodcuts nine were copied in reduced size from the large cartoons which appeared in *Punch* from the 6th of January, 1849, to the 4th of May, 1867. One instance will suffice to shew the mode of copying. In No. 604 of *Punch* appeared a cartoon representing the Emperor as an eagle dressed in an ermine robe, bending

over the Empress; on her lap the eagle places one foot, of which she is cutting the claws with a pair of scissors. At the bottom of the cartoon were the words, "The Eagle in Love." In one corner were "February 5, 1853," and in the other the initials of a well known artist. The words and the whole of the picture, except the artist's initials and "February 5," were exactly reproduced in reduced size in the defendant's book, and there were added the following words not taken from *Punch*—"A season of sunshine. We have already ventured to make a cursory allusion to the susceptible temperament of the *Prince*. It was considered expedient that the *Emperor* should find a suitable consort for the Imperial throne;" and so on for two or three paragraphs in the same style. The other eight instances resembled this, except that in some the defendant had exactly reproduced only a portion of a cartoon and some of the words at the bottom. In none of the nine instances was there any acknowledgement that the pictures were taken from *Punch*.

It was admitted that to obtain illustrations the defendant had employed a person to search *Punch* for thirty years back, the *Illustrated London News*, and several comic and illustrated periodicals; also the *Paris Charivari*, and many other French, German, Italian, and American publications, and that his book contained many illustrations copied from these publications. The whole series of *Punch* from 1848 to the present date was put in, and it was admitted that during that period *Punch* had published many caricatures of Napoleon besides those which the defendant had copied. The nine illustrations copied from *Punch* bore a very small proportion to the number of illustrations copied from the other publications.

The defendant's counsel contended that the defendant had made only a fair use of *Punch* for the purpose of illustrating a distinct and original work.

The verdict was entered for the plaintiffs for 40s., by consent, leave being reserved to the defendant to move to enter it for him, if the Court, sitting as a jury, should think there had been no infringement of the plaintiffs' copyright.

Parry, Serjt., having obtained a rule nisi accordingly (1),

Manisty and *R. G. Williams*, for the plaintiffs, shewed cause, and relied on *Bogue v. Houlston* (2).

Parry, Serjt. and *J. O. Griffiths*, in support of the rule.—The defendant's book is, to use Lord Eldon's words in *Wilkins v. Aikin* (3), "a legitimate use of the plaintiffs' publication in the fair exercise of a mental operation, deserving the character of an original work." This test was approved by Lord Cottenham in *Bramwell v. Halcomb* (4). In *Cary v. Kearsley* (5), Lord Ellenborough said, "That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action: a man may fairly adopt part of the work of another. . . . The question will be, was the matter so taken used fairly . . . and without, what I may term, the *animus furandi*?" That ruling was approved by Wood, V.C., in *Spiers v. Brown* (6). In *Martin v. Wright* (7), Shadwell, V.C., said, "any person may copy and publish the whole of a literary composition, provided he writes notes upon it, so as to present it to the public connected with matter of his own." The defendant's book is, in the words of Maule, J., in *Sweet v. Benning* (8), "a different work and made with a different object and result from the work of the plaintiff." See also

Murray v. Bogue (9). *Punch* is a collection of comic, satirical, sentimental comments on the innumerable topics of the day, and is a work of infinite variety. The defendant's book is a work with one single object, and in composing it the author is entitled to use contemporary histories.

KELLY, C.B.—I think the plaintiffs are entitled to our judgment. The general question is one of great interest and importance, but it is difficult to lay down any fixed rule or principle for this or any other case, for it is no doubt to some extent a question of degree.

Let us clear the way by shewing that there is no technical difficulty as regards the language of the statute and the thing pirated. The statute 5 & 6 Vict. c. 45, protects a "book or sheet of letter-press." Now the plaintiffs' publication is one sheet, which by folding is made into the shape of a book, and consists partly of letter-press and partly of what may be called by the generic term of "pictures," whether they be woodcuts, or etchings, or any other form of engravings. Therefore *Punch* consists of a "book," within the meaning of the statute, and of pictures most of which were accompanied by a small portion of letter-press. Nine of these pictures, which appeared in nine several publications during the years from 1849 to 1867, the defendant copied into his own book in the form of woodcuts, accompanied in some instances by explanations of his own.

It was argued that to take a single picture illustrated by letter-press would not be such an infringement of the copyright as would give a right of action. It is not safe to lay down any general rule on the subject, but I can imagine a case where the copying of a single picture would not be piracy. To take the case put by my brother Bramwell, where you would have to take into consideration the intention of the copyer, and the nature of the two works—if a man who published his travels in distant countries gave an account of some Chinese dish,

(9) 1 Drew. 353; s. c. 22 Law J. Rep. (n.s.) Chanc. 457.

(1) The ground stated in the rule itself was, "that there was no evidence of any infringement of copyright," but on the argument it was agreed that the real question was that reserved at the trial as stated above.

(2) 5 De Gex & S. 267; s. c. 21 Law J. Rep. (n.s.) Chanc. 470.

(3) 17 Ves. 427.

(4) 3 Myl. & Cr. 738.

(5) 4 Esp. 169.

(6) 6 W. R. 353.

(7) 6 Sim. 27.

(8) 16 Com. B. Rep. 485; s. c. 24 Law J. Rep. (n.s.) C.P. 180.

and another writer publishing a cookery book containing accounts of various dishes, in order to illustrate Chinese cookery copied the first man's account of the Chinese dish, no one would say that was piracy. So if any one published a history in which were likenesses of different kings in etchings or woodcuts, and some one else, publishing a history of another character, and for another purpose copied a likeness of one of the kings, no jury would be justified in holding it piracy.

But on the other hand I can imagine the copying of a woodcut, though only a single one, under circumstances which would make it manifest piracy. Suppose a work contained a meritorious engraving of the likeness of some distinguished person—for instance, of Mary Queen of Scots, taken from an original authentic picture, and an undoubted perfect likeness, and the only one published, some persons would give any price for a book with such an engraving. If under these circumstances another person copied the engraving into a work of his own, though of another character and for another purpose, yet a jury would be justified in holding it piracy.

That would be the case of copying a single picture, but the question here is whether the defendant has not appropriated a substantial portion of the plaintiffs' publication for his own work, and for the purpose of obtaining that profit for himself which the plaintiffs' publication would naturally obtain for the plaintiffs. It is undeniable that the plaintiffs must have paid largely for these cartoons, which are often very meritorious as works of art. On what principle can the defendant entitle himself to the profit which he may obtain by publishing these pictures of great value?

As my brother Pigott observed, the plaintiffs might themselves at some time, perhaps when Napoleon returned to these shores an exile after the German war, wish to publish the caricatures of him which had appeared in previous years in *Punch*, and they might wish to include the cartoons the subject of this action. Is it not possible that many people who might think of buying such a republica-

tion from the plaintiffs, might be told that they would find all the best pictures ridiculing Napoleon in the defendant's publication, which perhaps they might buy at less price than the plaintiffs' republication? Would not that be a direct money loss to the plaintiffs?

Without laying down any general rule, the principle on which I give my decision is, that when anyone transfers, not mere extracts, but a substantial portion of another person's published work, from which the original author might derive profit, and does this with a view to his own profit, no jury ought to hesitate to find that it is piracy.

Bogue v. Houlston (2) seems to me to be directly in point. There the plaintiff had published a book, illustrated by woodcuts. The defendant published another book, and inserted copies of some of the plaintiff's woodcuts. How does that case differ from this? An injunction was there granted, and a Court of Chancery does not grant injunctions except where the matter is free from doubt. Had the case been doubtful, the Court would have left the plaintiff to his remedy by action at law.

Therefore, on principle and authority, I think the plaintiffs entitled to our judgment.

BRANWELL, B. — I have come to the same opinion, though not without some doubt. Some amount of taking from the works of another person is allowable. The question is one of quantum, and this seems to be one of the cases that lie on the border.

The plaintiffs are the proprietors of this "book or sheet of letter-press," as it is described. Now when a man publishes anything which adds to the general stock of knowledge, the rule is, that everyone else has a right to avail himself of it. To take the illustration I put during the argument, if a man sees some fact on the subject of food mentioned in a book of travels, he may fairly take the statement of that fact, and transfer it to a book he himself is writing on food. So here, if the defendant had said, "I propose to illustrate the career of Napoleon III. by quotations from satirists," and

with regard to the period of 1848 and 1849 had said in his book, "*Punch* at that time said, 'France has got a new toy,'" (10); nay, more, if he had quoted the letter-press of *Punch* to a reasonable extent, that would have been no piracy. So, if he had gone on, and with regard to a later period had said, "At this time the opinion in England of Napoleon seems to have been more favourable, for he was represented in *Punch* as meeting with Prince Albert, and smoking a cigar with him" (11); and if he had gone on to quote the letter-press in moderation, that would have been no piracy.

The defendant, therefore, might have borrowed from *Punch* to a certain extent. But he was not content to do that, but reproduced the pictures published in *Punch* for the same purpose as that for which they were published in *Punch*, namely, to make people laugh, and that is piracy; and therefore I think the plaintiffs are entitled to judgment.

I cannot help adding—what does not indeed involve any general principle—that I much doubt if the plaintiffs could prove that they had suffered 40s. damage.

(10) The first of the nine woodcuts was published in *Punch* of January 6th, 1849, and represented (*inter alia*) a French soldier playing with a mannikin toy in the likeness of Napoleon. Underneath were the words, "Young France's new toy." The defendant copied this part of the picture, and added, "1848-9—The Prince-President: This is young France's new toy, from the pencil of an English caricaturist, who cleverly sums up the situation. The popularity of the Prince was then considerable, for, as delineated in the sketch, he was ready at that moment to ump whichever way France should please to pull the string"

(11) In another of the nine cartoons (Sept. 1st, 1855) *Punch* represented the Empress of the French stroking the British lion, Queen Victoria playing with the French eagle, and Prince Albert lighting his cigar at the Emperor's. Underneath were the words, "La Belle Alliance, 1855." The defendant copied the whole of the picture and the words, and added other explanatory words.

FIGOTT, B.—I am of the same opinion. The only question here is one of degree, and that is a question which in each case must be judged by its own circumstances. The publication of *Punch* is evidently a valuable property to the plaintiffs, and the vital part of each number—that part which attracts most attention, to which people look first—is the large cartoon in the middle. These cartoons are the result of original labour and skill, and of much expenditure of money, and they must be valuable to the plaintiffs, not only in their present form, the original sheet, but to republish by themselves. The question for us is, whether the appropriation by the defendant of nine of these cartoons is piracy, and this would be a question for the jury. I think that, beyond all doubt, it is piracy.

If, instead of this, the case had been that of an anecdote told in a biography, and a person introducing into a novel of his own composition the anecdote in the very words of the biographer, that would not be piracy. If, on the other hand, some weekly publication which was issued later in the week than *Punch*, appropriated and published one single cartoon which had been published in *Punch* a day or two before, that would be a substantial piracy. The present is said to be an intermediate case, but I cannot distinguish it from the case I last put.

The object of *Punch* is to amuse, and by satire to instruct, and it is sold for profit. The defendant had all those objects in view when he published his book. I think, therefore, the defendant is guilty of an infringement of the copyright of the plaintiff's publication.

Rule discharged.

Attorneys—Chester, Urquhart, & Co., for plaintiffs; Hughes & Son, for defendant.

1872. }
Nov. 18. } PRESTON v. DANIA AND ANOTHER.

Payment into Court—Bond for Payment of Money by Instalments—Penalty—Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 25—8 & 9 Will. 3. c. 11. s. 8.

The plaintiff sued for the penalty in a bond conditioned for avoidance if half the penalty with interest were paid by instalments on several fixed days, and alleged as a breach the non-payment of one of the instalments, the time for the payment of the subsequent instalments not having arrived. The defendants pleaded payment into Court of the sum due in respect of the one instalment with interest:—Held, a bad plea, such a bond not being within section 25 of the Common Law Procedure Act, 1860.

Declaration on a bond, dated the 23rd of March, 1868, for 5,000*l.*, subject to a condition that the same should be void if the defendants or either of them, their or either of their heirs, executors or administrators, should pay to the plaintiff, his executors or administrators or assigns, 2,500*l.*, with interest after the rate of 5*l.* per cent. per annum, by the instalments and in manner following, that is to say, 400*l.* on the first day of January in each of the several years of 1869, 1870, 1871, 1872, 1873, 1874, and 500*l.* on the 1st day of January, 1875, together with interest after the rate aforesaid on each of the said days of payment for the principal sum of 2,500*l.*, or so much thereof as at or immediately before the payment of such instalments respectively should be due and owing, without any deduction or abatement whatsoever. Breach—Non-payment on the 1st day of January, 1872, or at any other time, of the instalment of 400*l.* which became due on that day under the terms of the condition, together with interest at the rate aforesaid, upon so much of the principal sum of 2,500*l.* as was then due and owing, whereby the bond became forfeited. And the plaintiff claims 5,000*l.*

Plea—That before suit the defendants had paid to the plaintiff and the plaintiff had accepted and received from the defendants 229*l.* 1*s.* 6*d.* in satisfaction

and discharge of so much of the said instalment and interest; and that at the commencement of this suit there was due to the plaintiff in respect of the instalment and interest as aforesaid 210*l.* 18*s.* 6*d.* only, and no more; and the defendants bring into Court 213*l.* 10*s.*, and say that that sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

The replication set out the bond, and averred that the instalment in the breach and plea respectively mentioned was and is the instalment of 400*l.* which, under the terms of the condition, became and was due on the 1st day of January, 1872, and that the sum of 213*l.* 10*s.*, though enough to fully satisfy all moneys due and recoverable by the plaintiff in respect of the instalment in the breach mentioned, is nevertheless insufficient to satisfy, and the payment into Court thereof affords no answer to or satisfaction of, the claim of the plaintiff in the declaration made, and his (the plaintiff's) rights under 8 & 9 Will. 3. c. 11.

There were demurrers to the plea and replication, and joinders therein.

C. W. Wood (J. Edwards with him), for the plaintiff.—The question is whether money can be paid into Court in answer to an action on a bond for the payment of money by instalments. The statute 4 Anne, c. 16, s. 12, enacted that "where an action of debt is brought upon any bond which hath a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain," payment before action of the principal and interest due by the defeazance or condition might be pleaded in bar, though such payment was not made strictly according to the condition or defeazance. And section 13 enacted, "That if at any time pending an action upon any such bond with a penalty, the defendant shall bring into the Court where the action shall be depending all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits, in law or equity, upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the

Court shall and may give judgment to discharge every such defendant of and from the same accordingly." The Common Law Procedure Act, 1860, s. 25, following the above words of s. 12, enacts, "In any action brought upon a bond which has a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain, with a penalty, it shall be lawful for the defendant, by leave of the Court or a Judge, and upon such terms as they or he shall think fit, to pay into Court a sum of money to answer the claim of the plaintiff in respect of such bond." But these statutes do not apply to a bond such as the present for the payment of money by instalments—1 *Wms. Saund.* p. 46, note *n* (ed. 1871), for such a bond is within 8 & 9 Will. 3. c. 11. s. 8—*Willoughby v. Swinton* (1), cited in 1 *Wms. Saund.* p. 70, note *b*. The plaintiff is at least entitled to sign judgment for the penalty—*Darby v. Wilkins* (2).

Holker (*W. R. Kennedy* with him), for the defendants.—The plea is good.

[*BRAMWELL, B.*—If the defendants have judgment, what becomes of the plaintiff's security for the remaining instalments?]

Perhaps, under 4 Anne, c. 16, all the money due must be brought into Court, though in *Bridges v. Williamson* (3), the defendant had leave to bring in the arrears of one instalment only. But under the Common Law Procedure Act, 1860, s. 25, "to answer the claim of the plaintiff," it is only necessary to pay "a sum of money," that is the instalment sued for; and the Court can impose such terms as they think fit. This bond is within the definition of that section. In *Bonafous v. Rybot* (4), Lord Mansfield said such a bond was clearly within 4 Anne, c. 16.

BRAMWELL, B.—I have a very strong opinion on this case. If one looks at the history of the law the matter is quite plain. Originally, as now, on a bond of this kind a penalty incurred was a debt. From that the Courts of Equity gave relief. The legislature finding that was

the state of things, thought it was a pity that the parties should be driven, first to an action and then to equity for relief. They therefore enacted by 8 & 9 Will. 3. c. 11. s. 8, "that in all actions . . . upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit." The section then enacts that the jury shall assess damages for such of the breaches as the plaintiff upon the trial of the issues shall prove to have been broken; that the like judgment shall be entered on the verdict as had been usually done before the statute; and that the judgment shall remain as a further security to the plaintiff for damages he might sustain by further breaches.

In the notes to *Gainsford v. Griffith* (5), it is said, "This statute was meant to meet the case of non-performance of covenants and agreements secured by bonds or indentures, and which covenants are to be performed at different times, or the moneys paid by instalments." And in note *b* the editors say this statute does not extend "to common money bonds, against the penalty of which the Courts give relief by 4 Anne c. 16, s. 13. . . . But all other bonds, either for the payment of money by instalments, or of annuities, or for the performance of any covenants or agreements, are within the statute."

It is clear to demonstration that this bond is within 8 & 9 Will. 3. c. 11, and that a common money bond was not, and that the legislature intended that 4 Anne, c. 16, should apply to such bonds as were not within 8 & 9 Will. 3. c. 11, and not to bonds where the plaintiff might bring a fresh action for a further breach.

Now if the Common Law Procedure Act, 1860, s. 25, intended to deprive a plaintiff suing on such a bond as the present of the benefit of 8 & 9 Will. 3. c. 11, why should it not also intend to deprive of that benefit all plaintiffs suing on a bond conditioned for defeazance? If the Common Law Procedure Act applies to a bond for the payment of money

(1) 6 East 550.

(2) 2 Str. 958.

(3) 2 Ibid. 814.

(4) 3 Burr. 1370.

(5) 1 *Wms. Saund.* p. 68 (ed. 1871).

by instalments, there is no reason why it should not also apply to a bond given to secure the fidelity of a clerk; and yet such a bond as the latter is clearly not within the Common Law Procedure Act. And why? Because that Act was not intended to apply to cases which fell within 8 & 9 Will. 3. c. 11, but to cases within 4 Anne, c. 16. The words of the Common Law Procedure Act are, "a bond which has a condition or defeazance to make void the same upon payment of a *lesser sum*." Is a bond with a condition to make void the same on payment of several instalments within those words literally? Certainly not. Therefore this bond is not within the reason or the letter of the words of the section. It is impossible to suppose that the legislature intended to take away by a side wind the benefit of 8 & 9 Will. 3. c. 11, from such bonds.

In *Land v. Harris* (6), the obligee of a bond for the payment of money by instalments having sued for the penalty because one of the instalments was not paid, the Court refused to stay the proceedings on payment of the instalment and costs. The marginal note says that 4 Anne, c. 16, "relieves only on payment of the whole principal." But in a later case, *Bridges v. Williamson* (3), the report says, "The condition of a bond was to pay 40*l.* by 5*l.* per annum; and the defendant had leave to bring the arrears of the 5*l.* per annum into Court on the Act for the Amendment of the Law, viz., 4 Anne, c. 16. And the report adds, "ante 515, *contra*," being a reference to *Land v. Harris* (6). How far the matter was discussed we cannot tell; but we may set off those two cases against each other.

Then as to *Bonafous v. Rybot* (4) the *dictum* of Lord Mansfield is entirely *obiter*. The rule obtained by the defendant to stay the proceedings was discharged on the ground that the defeazance was void because the instalments had not been punctually paid, but Mr. Holker relied on the extra-judicial opinion of Lord Mansfield. I dissent entirely from that opinion. It seems that what was passing in Lord Mansfield's mind was that it is desirable

to violate the letter of the law for the sake of expediency. I consider such a view most mischievous. If the law is unjust the remedy should be supplied by the legislature who can provide for all contingencies without the entanglement and confusion which always occurs when judges, halting and doubting how far they shall go, attempt to alter the law to suit their own ideas of justice. These opinions are sometimes called narrow-minded, but I think on consideration they will be found to proceed from a very different mind.

"It is surprising," says Lord Mansfield (7), "that after the Statute of Usury, 37 Hen. 8, which excepts obligations with condition, *made upon a just and true intent*, the courts of law did not consider the just intent of a *bond* to be principal, interest and costs secured by a penalty, and suffer the party at any time to save the forfeiture by *performing the intent*." That is, it is surprising the Courts did not hold that parties to a bargain did not mean what they said they meant. He goes on—"It is more extraordinary that after this was settled in a Court of *Equity* to be the nature of a bond, and therefore every party to a bond *understood* it in *this* sense, the Courts of law did not follow equity, but still continued to do *injustice* as of course." That is, it is injustice to suppose that the parties meant what they said. Lord Mansfield entirely lost sight of the remedy for injustice (if there be any) which is provided by the legislature. He adds, "I cannot see a doubt upon bonds conditioned for payment of money by instalments, and I am glad to hear that it has been so determined." Now I cannot see a doubt the other way, and I therefore hold that this bond is not within 4 Anne, c. 16, nor within the Common Law Procedure Act, 1860, s. 25, and that the plea is therefore bad.

CHANNELL, B.—I think the plaintiff is entitled to judgment. It is conceded that he is, unless this is a bond within the Common Law Procedure Act, 1860, s. 25. I think that it is neither within the letter nor the spirit of that Act.

(6) 1 Str. 515.

(7) 3 Burr. 1373.

PIGOTT, B.—I am of the same opinion. It is not necessary to discuss the question whether the statute of Anne is confined to bonds for the payment of one sum only, but it clearly applies only to cases where the payment into Court satisfies all that is due.

Judgment for the plaintiff.

Attorneys—G. E. Forster, agent for H. Standing, Rochdale, for plaintiff; Milne, Riddle & Mellor, agents for John Richardson, Manchester, for defendants.

1872. }
Feb. 7, 8. } EADON AND OTHERS v.
June 11. } JEFFCOCK AND OTHERS.*

Mine—Mining Lease—Support of Surface by subjacent Land—Liability for Subsidence.

When the owner of surface and minerals beneath grants a mining lease of the minerals for a term, there is not, outside the contract, an implied reservation of any right to have the surface supported by the minerals. The contract itself must be looked at, and construed with regard to the subject-matter in order to arrive at the extent to which the owner authorises the minerals to be removed.

Therefore, where such a mining lease upon the proper construction thereof authorised the removal of all the coal beneath the surface except certain portions, and subject to a covenant to work the mine in a good and workman-like manner,—Held (per MARTIN, B., and CLEASBY, B., dubitante BRAMWELL, B.), that the lessees, doing only what the lease authorised them to do, were not responsible to the lessor for the subsidence of the surface caused by their mining operations.

Dugdale v. Robertson distinguished.

SPECIAL CASE stated in an action to recover damages for injury done to the plaintiffs' land and houses by subsidence caused by mining operations carried on by the defendants.

1. The defendants are assignees of a

* The report of this case has been unavoidably delayed.

lease, dated the 24th of June, 1840, by which T. H. Sotheron being seized in fee of the Carbrook Hall Estate, near Sheffield, and of the mines and minerals underneath the same, granted and demised to B. Hounsfield, W. Jeffcock and T. Dunn, their executors, administrators and assigns (in this CASE called the lessees), "all that mine, vein, bed or stratum of coal, commonly called the High Hazle Bed," lying under twenty-one closes which formed part of the Carbrook Hall Estate, and contained 108a. 3r. and 1p., and were in the several occupations of G. Bradford, B. Sayles and J. Fowler, with liberty "to enter upon the said lands and premises or any part thereof, and to occupy so much and such parts thereof as may be necessary for carrying on the works of the said mines, or for exercising all or any of the powers and authorities" granted by the lease; giving notice and making compensation, as mentioned in the lease, "to the respective tenants or occupiers for the time being of the said lands and premises so entered upon and taken possession of by them or any of them as aforesaid, for all injury or damage to be done to buildings and to corn and other crops then standing or growing thereon." And with liberty "from time to time, and at all times during the continuance of this demise, at his and their will and pleasure, and at his and their costs and charges, to open and sink, dig, drive, work and make any pits, shafts, adits, canals, watercourses, fences, soughs, tunnels, drains, ways, paths, roads, railways or wharves, in and upon the said lands and hereditaments or in and upon any part thereof," excepting the gardens then in the respective occupations of G. Bradford, B. Sayles and J. Fowler, "doing thereby as little damage as may be." And "to win, get, work, raise up, stack, carry away, sell and dispose of all that the said mine or bed of coal, and to make coke upon the said lands and premises or any part thereof, and to sell and dispose thereof;" and also "to raise, dig and get clay, brick-earth, loam, sand, fire-clay or stone, in any convenient part or parts of the said lands or grounds hereinbefore described, and to make and manufacture the same respectively into bricks

and other articles, for the purpose of erecting or constructing in and upon the said lands, hereditaments and premises hereinbefore described or any part thereof, any erections, works, railways, engines, machinery and other conveniences for the prosecution of the colliery and works intended to be carried on" by the lessees pursuant to the lease, and for altering and repairing the same, or otherwise to appropriate the said substances and materials respectively to the use of the said colliery and works; and to build and maintain "all such engines, gins, whimsies, machinery, kilns, sheds, huts and other erections and machines whatsoever upon the said lands, as may be deemed necessary or expedient for the raising, getting and working the said mine, delf and vein of coal, and for drawing, raising and discharging the water therefrom, and generally to do and perform all such other acts as may be necessary to be done and performed for the purpose of bringing, placing, stacking, shewing, exposing to view, selling and disposing of, coking and carrying away all such coal and slack and coke to be gotten or made upon the said hereditaments to the greatest advantage."

To have, hold, use, occupy and enjoy the said mine or bed of coal, and all the powers and other the premises thereby granted and demised, from the 1st of June, 1840, for a term of thirty-one years, but determinable as thereafter mentioned.

Yielding and paying therefor every year during the term unto T. H. Sotherton, his heirs and assigns (in this case called the lessor), "the certain yearly rent or sum of 200*l.* sterling as for 2*a.* 1*r.* 16*p.* of the said mine or bed of coal, by two equal half-yearly payments in each year, on the 1st day of December and the 1st day of June, without any deduction for taxes or otherwise, the first payment thereof to be made on the 1st day of December next, the same rent to be payable whether the" lessees "shall get that quantity of coal or not from the said mine or bed of coal. And also yielding and paying unto" the lessor (over and above the said certain yearly rent of 200*l.*) "the sum of 85*l.* for every statute acre, and so in proportion for any greater or less quantity than a statute

acre of the said mine or bed of coal hereinbefore demised, which shall or may be got in each year of the term over and above the said 2*a.* 1*r.* 16*p.*, including all ribs and pillars left in working the said coal except the pillars for the support of the shafts, the pillar between the deep and counter level, the pillar all round the estate, and the pillar under the homestead or farm buildings hereinafter severally mentioned." And also yielding and paying every year during the term unto the lessor "for every acre, and so in proportion for any greater or less quantity than an acre of the surface of the said closes and hereditaments hereinbefore described, which shall be occupied or used by the" lessees, "in pursuance of the liberties, powers and authorities hereby granted, the yearly rent or sum of 4*l.* by half-yearly payments in each year, the first payment thereof to be made at the end of the half year from the time at which such occupation shall be first taken. And also yielding and paying unto" the lessor on the last day but one of the term "for every statute acre, and so in proportion for any greater or less quantity than an acre of the surface of the said closes and hereditaments hereinbefore described, which shall be occupied or used by the" lessees, in pursuance of the liberties, powers and authorities hereby granted, and which shall not be levelled fit for tillage, according to the custom of the country, so far as conveniently may be, and shall on the said last day but one of the said term be injured or damaged thereby, the further sum of 30*l.* Provided "that in case any fault or failure of coal shall occur in the said mine or bed of coal hereby demised or any part thereof, or in case any part of the said coal contained in such mine or bed, shall be unsaleable by reason of the inferiority or badness thereof, then the" lessees "shall pay the said coal rents hereinbefore reserved, only in proportion to the extent of the works of the said mine or colliery to which such fault or failure or bad coal shall not extend." And further, that in working the mine the following pillars shall be left by the lessees during the whole of the term "in the said mines; that is to say, a pillar for the support of the shafts; a pillar of four yards in breadth

at the least, between the deep and counter level of the said mines; a pillar of ten yards in breadth at the least, all round the estate; and a pillar, of one acre at the least, under the homestead and farm buildings now in the occupation of the said G. Bradford." And that it should be lawful for the lessees, at the expiration of the term, to remove engines, machinery, &c.

The lessees covenanted that they would pay the rents before reserved without any deduction whatsoever, and all rates, taxes and expenses whatsoever, parochial, parliamentary or otherwise, in respect of the demised hereditaments, or of so much of the said closes or parcels of land as should, for the time being, be in the occupation of the lessees; and would "at all times during the said term fence out or cause to be fenced out, with good and substantial posts and rails, such part or parts of the said lands and hereditaments as they may dig, open or use, for the time being, for the purpose of the said mines, or of making railroads or other works, and shall and will at all times during the said term, keep and preserve such fence and fences in good and substantial repair." And further, that they "shall and will during the continuance of this demise, work, manage, get, carry away, sell and dispose of the said mine of coal hereby demised, and dig, drive and sink such pits, shafts and openings as may be requisite or necessary or tend to the discovery, commencing and getting of the said coal, according to the best of his or their judgment, skill and discretion, and in a good and workmanlike manner. And also shall and will drive and sink the engine-shaft in such a situation to be approved in writing by the" lessor, "or his or their agents for the time being, upon the said lands as will effectually drain the whole of the said mine, or as near thereto as may be. And also shall and will, in case the" lessor "shall by writing under his or their hand request the same, fill and level all and every such of the said pits or shafts as by reason of the exhaustion of the mines or veins shall have become useless, and arch the same with bricks in a workmanlike manner, throwing therein the soil and rubbish which shall have been gotten out of the

said pits or shafts, and cover over the mouths of the said pits or shafts with good earth or soil, and will and shall at the same time level the land or ground immediately adjacent to and surrounding the same pits or shafts, and the land or ground connected therewith, fit for tillage according to the custom of the country;" the lessees, nevertheless, to be at liberty from time to time, or at any time during the term, "to fill up and level any of such pits or shafts which shall have so become useless as aforesaid, without the consent of the" lessor. And that the lessor might enter and inspect at any reasonable time.

And further that the lessees "shall and will from time to time on demand pay the several occupiers and tenants for the time being of the said lands, under which the said mines hereby demised are situate, reasonable satisfaction for any damage that may be commenced or occasioned on their respective lands or the crops growing thereupon by working the said mine, or carrying or not carrying away the produce thereof, or any materials to or from the said premises," the amount to be settled by arbitration. And that the lessees would not assign or underlet without consent.

Provided that in case all or any of the rents, reservations or sums of money payable should be unpaid in part or all for twenty-one days after the days of payment, the lessor might after demand stop the sending of coal off the premises, and distrain on the coal, &c., and on the engines, carts, materials, goods, &c., and repay himself for the arrears; and also in default of payment after demand at the end of the twenty-one days, and in default of sufficient distress might re-enter and re-possess the demised premises.

Then followed a provision for reference of disputes to arbitration, and a covenant for quiet enjoyment, and lastly it was agreed that in case the lessees should be minded and desirous at any time during the term "to get any of the lower beds of coal lying and being in and under the said several closes at Carbrook aforesaid," they should be permitted so to do on paying such sums of money per acre by way of royalty, yearly

or half yearly or otherwise, and performing such covenants as might be fixed upon by two indifferent persons in the manner prescribed, such royalty, rent and conditions to be fully fixed upon before the lessees "begin to seek for and work such lower beds of coal."

2. The plaintiffs derive title to the land and houses in question as follows—

By deed dated 9th of November, 1847, T. H. Sothron conveyed to S. Roberts the whole of the Carbrook Hall Estate (including the land in question belonging to the plaintiffs as aftermentioned), with the mines and minerals thereunder, including the said High Hazle bed of coal, subject to the lease of 24th of June, 1840.

3. By deed, dated April 27, 1857, between first, S. Roberts; secondly, H. Briggs; thirdly, H. Briggs, G. Adsetts, J. Williamson and W. Siddall, after reciting that by the deed of 9th of November, 1847, "the messuage, land and hereditaments hereinafter described and conveyed along with other land and hereditaments and the mines and minerals within and under the same were conveyed" to S. Roberts, subject to the lease of June 24, 1840, and to certain rights of way, and after reciting in part the said lease, S. Roberts, in consideration of 6,700*l.*, appointed, granted and conveyed to H. Briggs, G. Adsetts, J. Williamson and W. Siddall, their heirs and assigns (in this case called the parties of the third part) all those the messuage or dwelling-house, closes or pieces of land and hereditaments (part of the Carbrook Estate) containing together 52a. 1r. 34p. or thereabouts" (the situation being described) together with all houses, gardens, ways, &c., "mines, minerals (other than the veins and beds of coal, clay and other minerals hereinafter excepted)," rights, easements, &c., "save and except as after reserved," and all the estate, right, title, &c., excepted, and reserving to the Lord of the Manor of Attercliffe all right, title, &c., to any mines, ores, minerals, or coal under such parts of the said hereditaments as were allotted under an Inclosure Act.

"And also excepted and reserving to the said S. Roberts, his heirs and assigns, the said mine, vein, or stratum

of coal called the High Hazle, part of which is demised by the said recited indenture of lease of the 24th day of June, 1840 (except out of this exception and reservation so much thereof as is under the part coloured dark green on the said plan, and which part contains one acre or thereabouts). And also excepting and reserving the mines, veins and beds, or stratum of coal, fire clay and other clay, stone and other minerals lying under the said bed called the High Hazle Bed, as were (*sic*) within and under the said closes and other hereditaments hereinbefore described, granted and conveyed, or mentioned or intended so to be. Together with full and free liberty, power and authority to and for the said S. Roberts, his heirs and assigns and his and their tenants and lessees, miners, agents, workmen and servants, from and after the expiration of the term granted by the said hereinbefore recited indenture of lease, to enter upon the said closes and hereditaments and closes under which the said excepted coal and minerals, so reserved to the said S. Roberts, his heirs and assigns as aforesaid or any part thereof, do lie, and to occupy so much and such parts thereof as may be necessary for the carrying on the works of the said mines, and getting and carrying away the said fire clay and other clay, stone and other minerals lying under the said bed of coal called the High Hazle Bed, or for exercising all or any of the powers and authorities to him or them excepted or reserved by these presents;" and at his and their costs "to open, sink, dig, drive, work and make any pits, shafts, adits, canals, water courses, fences, soughs, tunnels, drains, ways, paths, roads, railways, or wharfs, in and upon the said closes and hereditaments under which the said coal and minerals so reserved to the said S. Roberts, his heirs and assigns as aforesaid do lie, or in or upon any part thereof, doing thereby as little damage as may be:" and "to win, get, work, raise up, stack, carry away, sell and dispose of all the said hereinbefore excepted mines, veins, beds, or stratum of coal, fire clay and other clay, stone and other minerals under the said bed of coal, called the High Hazle Bed; and to build and maintain, "all such engines, gins, whimsey machinery,

sheds, huts and other erections and machines whatsoever, upon the said hereditaments under which the said beds of coal, fire clay and other clay, stone and other minerals, so reserved to the said S. Roberts, his heirs and assigns as aforesaid, do lie, as may be deemed necessary or expedient for raising, getting or working so much of the veins or beds of coal, fire clay and other clay, stone and other minerals as are hereinbefore reserved to the said S. Roberts, his heirs and assigns, and for draining, raising and discharging the water therefrom, and generally to do and perform all such other acts as may be necessary to be done and performed for the purpose of bringing, placing, stacking, shewing, exposing to view, selling and disposing of and carrying away all such coal, fire clay and other clay, stone and other mineral as is hereinbefore reserved to the said S. Roberts, his heirs and assigns as aforesaid. The said S. Roberts, his heirs and assigns, well and truly performing, fulfilling and keeping the several covenants, and agreements hereinafter on his and their parts contained with reference to the said beds of coal and the several powers, liberties, privileges and authorities in and by these presents excepted, reserved or given."

To have and to hold the said hereditaments, &c., with the appurtenances, &c. — ("except and reserved as aforesaid) and also reserving to the said S. Roberts, his heirs and assigns, the coal rent reserved by the said lease, or which may become due and payable under or by virtue of any of the provisions therein contained, and also all powers, privileges and remedies for the recovery thereof, as also all other powers, privileges and authorities which the said S. Roberts, his heirs or assigns, would have been entitled to exercise or carry into execution with reference to the said lease in case these presents had not been executed, with their and every of their appurtenances, subject nevertheless to the hereinbefore recited indenture of lease so far as the same affects the same hereditaments and premises, and to the powers, privileges and liberties thereby given or reserved—unto the parties of the third part."

Then followed (*inter alia*) covenants

by S. Roberts that he had good right to assure, &c., "in manner and subject and reserved as aforesaid;" and for quiet enjoyment, "without any interruption or denial from or by the said S. Roberts or any person or persons rightfully claiming or to claim under or in trust for him, except in reference to the said lease and the beds of coal, fire clay and other clay, stone and other minerals, rights, liberties and privileges hereby excepted or reserved," free from incumbrances; and for further assurance; and that "excepting under the powers contained in or reserved with reference to" the lease, "S. Roberts, his heirs, or assigns, or his or their lessee or lessees, miners, agents, workmen, and servants will not enter upon the said hereditaments under which the said beds of coal, fire clay and other clay, stone and other minerals so reserved to the said S. Roberts, his heirs and assigns as aforesaid, do lie without giving notice in writing" as therein provided; and that S. Roberts, his heirs and assigns, would also make reasonable satisfaction and compensation to the parties of the third part, "and to the tenants or occupiers for the time being of the hereditaments and premises hereinbefore described and hereby conveyed for all injury or damage to be done to buildings now erected or which may hereafter be erected on the land and hereditaments, hereinbefore described, granted, and conveyed, which may be required, taken down or removed by the said S. Roberts, his heirs and assigns, or his or their tenants or lessees for the purpose of opening, sinking, digging, driving, working and making any pits, shafts, adits, canals, water courses, fences, soughs, tunnels, drains, ways, paths, passages, roads, railways or wharfs, or any of those purposes, as also for all injury or damage to the corn and other crops, for the time being standing, growing, or being thereon, by carrying on the works of the said mines, getting the said fire clay and other clay, stone and other minerals, or by exercising all or any of the powers and authorities hereby excepted, reserved or given (except as after mentioned)".

"Provided nevertheless, and it is hereby expressly agreed and declared by and between the parties to these presents, that the

said S. Roberts, his heirs or assigns, tenants or lessees, shall not be liable or responsible to the said Henry Briggs, George Adsetts, Joseph Williamson and William Siddall, their heirs or assigns, tenants or lessees, or to any person or persons whomsoever, for any damage, injury or loss which may be caused, occasioned or sustained to any dwelling-house or dwelling-houses or other erections or buildings which shall hereafter be erected or built upon the land or ground and hereditaments hereby conveyed or intended so to be, or upon any part or parts thereof, by or in consequence of or which can be attributed or attributable to the settling, sinking or lowering of the said land or ground and hereditaments or any part or parts thereof which may be caused or occasioned by the opening, sinking, driving, working and making any pits, shafts or other works, or to the winning, getting, working and raising the coal, clay, stone and other minerals hereby excepted and reserved."

And that S. Roberts, his heirs or assigns, would pay to the parties of the third part "for every acre and so in proportion for any greater or less quantity than an acre of the surface of the said hereditaments under which the said beds of coal and minerals so reserved to the said S. Roberts, his heirs and assigns as aforesaid, do lay (*sic*), which shall be occupied or used by the said S. Roberts, his heirs or assigns, or his or their tenants or lessees, agents, workmen or servants, in pursuance of the liberties, powers and authorities hereinbefore excepted and reserved, the yearly rent of 4*l*." And would within a reasonable time, and from time to time after any land so occupied or used as aforesaid, should cease to be occupied or used as aforesaid, level and make such land fit for tillage according to the custom of the country.

Then followed clauses similar to those in the lease of 1840, that S. Roberts, his heirs or assigns, should pay rates and taxes and fence and keep up fences and fill and level useless pits or shafts; and that S. Roberts, his heirs and assigns, and his and their tenants and lessees, might remove engines and machinery, &c. A clause giving to the parties of the third part powers of entry and distress, in respect of any of the sums therein made

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payable which should be due and unpaid for twenty-one days, on "all goods, chattels and effects whatsoever being or which shall be found on the premises then occupied by the party or parties getting the coal, fire clay and other clay, stone and other minerals;" and arbitration clauses.

4. By deed dated the 9th of April, 1860, H. Briggs, G. Adsetts, J. Williamson and W. Siddall, and their mortgagees conveyed to C. Robinson a portion of the land conveyed to them by the deed of 1857, and by deed dated the 8th of November, 1865, C. Robinson conveyed a portion of the land so conveyed to him to R. White.

By building leases dated respectively the 8th of May and the 5th of September, 1866, R. White demised to J. T. Hall certain portions of the land so conveyed to him for terms of 800 years; and by deeds dated inclusively the 17th of August and the 11th of October, 1866, these leases were mortgaged by J. T. Hall to the plaintiffs. The land and buildings comprised in those leases were the land and buildings in question.

5. The plaintiffs and the several persons through whom they derive title to the land and buildings in question, had, at the respective times of their becoming owners of the same under the said assurances, notice of the terms of the lease of 1840, and of the deed of the 27th of April, 1857.

6. The buildings on the land now belonging to the plaintiffs consist of twenty-four houses, which were first erected in 1865. Parts of the said land and buildings were at and have been since the time of the subsidence hereinafter-mentioned, in the possession of the plaintiffs, and the rest in the possession of their tenants.

At the time of the granting of the lease of 1840, the land under which the bed of coal thereby demised lay was agricultural land without any houses or buildings thereon, except the homestead and farm buildings mentioned in the lease of 1840, none of which stood upon the said land now belonging to the plaintiffs.

7. After the lease of 1840 became vested in the defendants, they worked the coal thereby demised under the powers of

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the lease, and between the 1st of May, 1868, and the commencement of this action, they advanced and extended their workings under and near to the said land and buildings of the plaintiffs.

8. By reason of such workings the land and buildings subsided and sank, and thereby the plaintiffs sustained damage.

9. The said land would have subsided and sunk without the weight of the buildings.

10. The demised bed of coal was worked under the lease of 1840 from the time of the same being so demised, and the several pillars stipulated for in the lease are left as thereby provided, but these pillars are not near the said land and buildings of the plaintiffs.

11. There was nothing in the course adopted by the defendants in their coal workings contrary to the usual course of mining in use in the district. It would have been possible to leave pillars which would have supported the surface, but in that event the coal forming such pillars and supports would have had to be paid for by the defendants under the lease, and would have been lost to the defendants.

The questions for the opinion of the Court are—

First—Are the defendants liable to the plaintiffs for any damage caused by the subsidence?

Second—If so, are they liable for any damages caused by the subsidence to the houses of the plaintiffs?

If the opinion of the Court is in favour of the plaintiffs on the first question, judgment is to be entered for the plaintiffs for such damages (to be assessed according to the opinion of the Court on the second question) as shall be found by an arbitrator.

If the opinion of the Court is in favour of the defendants on the first question, judgment is to be entered for the defendants.

Field (*Gainsford Bruce* with him), for the plaintiffs, relied on *Humphries v. Brogden* (1), *Smart v. Morton* (2), *Haines*

(1) 12 Q.B. Rep. 739; s. c. 20 Law J. Rep. (N.S.) Q.B. 10.

(2) 5 E. & B. 30; s. c. 24 Law J. Rep. (N.S.) Q.B. 280

v. Roberts (3), *Browne v. Robins* (4), *Hamer v. Knowles* (5), *Dugdale v. Robertson* (6), *Rowbotham v. Wilson* (7), *Proud v. Bates* (8), *Duke of Buccleugh v. Wakefield* (9).

Manisty (*Komplay* and *Gould* with him), for the defendants, relied on *Taylor v. Shafto* (10), and referred to *Harris v. Ryding* (11).

Cur. adv. vult.

The following judgments were read on the 11th of June.

CLEASBY, B.—This case was argued before my brothers Martin and Bramwell and myself, and the judgment which I am about to read is that of my brother Martin and myself. The question is, whether the plaintiffs can recover against the defendants for damages to their houses or their land caused by the subsidence of the latter. It must be taken as a fact in the case, that the subsidence was caused by the working of the coal mines underneath by the defendants.

When the property in the soil and in the minerals underneath belongs to different persons, the general rule is, no doubt, that each must use his property so as not to injure that of the other. It does not appear to be well settled what the exact nature of the right of the owner of the soil to the support of the subjacent or adjacent minerals is. Lord Wensleydale says in *Rowbotham v. Wilson* (12), "Whether the right to the support given by the land below to the land of the owner of the surface, when the strata belongs to different persons, properly is to be called 'an easement,' as it is by Mr. Gale in his excellent treatise on easements, 'a

(3) 7 E. & B. 625; s. c. 25 Law J. Rep. (N.S.) Q.B. 353; in error, 27 Law J. Rep. (N.S.) Exch. 49.

(4) 4 Hurl. & N. 186; s. c. 28 Law J. Rep. (N.S.) Exch. 250.

(5) 6 Hurl. & N. 454; s. c. 30 Law J. Rep. (N.S.) Exch. 102.

(6) 3 Kay & J. 695.

(7) 8 H.L. Cas. 348; s. c. 30 Law J. Rep. (N.S.) Q.B. 49.

(8) 34 Law J. Rep. (N.S.) Chanc. 406.

(9) 39 Law J. Rep. (N.S.) Chanc. 441.

(10) 8 B. & S. 228.

(11) 5 Mee. & W. 60; s. c. 8 Law J. Rep. (N.S.) Exch. 181.

(12) 8 H.L. Cas. 359.

natural easement,' or whether it is to be termed a *right, ex jure naturæ*, to that support, or whether the owner of the surface has merely a right to enjoy his own land in its natural state and condition with a right of action against the owner of the land adjoining or subjacent when the act of his neighbour does him an injury, are questions immaterial to the decision of this case; though the last proposition appears to be fully established by the judgment of the Court of Exchequer Chamber in *Bonomi v. Backhouse* (13).

In many of the cases the analogy of the owners of the separate flats or stories of a house is referred to and it places the matter in a clear light where there has been a separate ownership of the two without its being known how they became separated, or where there has been a conveyance of the land with a reservation or rather exception of the mines. And in such cases we must look to those rights which by law are annexed to the property in each.

But it appears to us that this analogy does not exist where the transaction is an ordinary mining lease, which is a contract entered into between the owner of both surface and minerals, and a lessee or a licensee for the purpose of removing and making saleable minerals which form in part what is called the natural support of the soil. This is a contract made by the owner of both for his own profit, and in order that the coal may no longer lie valueless merely supporting the soil above it, but may be sold by him at a price usually in the form of an acreage rent, which may enormously increase the value of his property.

It appears to us, that outside of this contract there is no reservation of any right to support, whatever the exact nature of that right may be, but that we must look at the contract itself, and by a proper construction of it, having regard of course, as in all cases, to the subject matter, arrive at the extent to which the owner authorises the minerals to be removed.

In addition to the reservation of a certain acreage rent for the coal got (in

(13) 28 Law J. Rep. (N.S.) Q.B. 378, affirmed in H. L. 34 Law J. Rep. (N.S.) Q.B. 181,

the present lease 85*l.* an acre), it is an ordinary clause in such leases to have a minimum rent reserved to the lessor, that is to say, the lessee absolutely binds himself to get at least, or if not got to pay for, one or two acres or some other quantity of the coal as the case may be (in the present lease 2*l.* 1*l.* 16*p.*). It is obvious, that for such advantages as these, the lessor may at the same time that he grants to the lessee the seam of coal, expressly authorise him to take the whole of it, or to take certain parts only, or he may expressly place the lessee under certain restrictions as to the mode of working.

It strikes us very strongly, that in all these cases the contract would regulate the obligations and the rights of the parties. The lessor has made the mines and the working and removing them from under the surface, and his rights connected therewith, the subject of contract. He has dealt with his rights whatever their nature may be, as he was at liberty to do, and he cannot afterwards revert to them as the foundation of a claim as if they were of a nature not capable of being dealt with by contract, and as if they must continue to exist *jure naturæ* or under some other title.

No one, we conceive, would dispute, if the lessor placed the lessee under a covenant to remove the whole of the coal in a specified manner, and to pay a royalty of so much a ton for the whole, that in that case there would be no responsibility if in consequence of this being done the surface subsided, or that such a case need be complicated by any question whether the lessor had intended to give up his right to support. The only question would be, whether the lessee had done what the lessor authorised him and placed him under covenant to do. This and the other cases put, seem to shew that in all such transactions *inter partes* the contract between them must determine what acts are lawful (as between those parties), so far as its proper construction extends to those acts.

Where there is a lease and license to take the coal at an agreed acreage rent with a minimum rent reserved, if the terms of the lease are that the lessee

should work in a specified manner leaving certain described supports, then, if the lessee works in that manner, he would only have done what he was authorised to do, and would not be responsible if the surface subsided in consequence; and the same would be the conclusion if the covenant was, that he should work according to the usual mode of working coal mines in the district, or if having placed the lessee under certain restrictions as to the working, and so made the mode of working the subject of contract, the lease made no provision as to the mode of working in general. In the latter case we think the lessee must conform to the usual and approved manner of working in the district (which would probably be the result of experience), and that if he did so, he would not be responsible for the consequences.

The lessee would then know what he was about, and how to proceed. He has to conform to the matters prescribed in the lease, and to the usage, and can go on during the whole period of his lease to get the coal from the whole area leased, but if he has no guide but the necessity to avoid subsidence, he must throughout be proceeding as an experiment to ascertain how much can be got with security, and in case some partial subsidence should take place, we do not see whether he is to stop or to go on as a matter of right, from time to time, perhaps, causing further subsidence. We regard a mining lease, not merely as a transfer of property, but as a contract under which something is to be done, and the question is what it authorises to be done.

If the authorities were clear that under a mining lease the right of the owner to have the soil supported by the minerals was impliedly reserved in the absence of something which shews clearly that he gives it up, we should not offer our opinion in opposition to them. But, although there are many authorities which have settled the right to support when the soil and minerals were held under different titles, or where there has been a conveyance of the land reserving the minerals, or where the surface and minerals are severed by an award under an Inclosure

Act—*Harris v. Ryding* (11), *Humphries v. Brogden* (1), *Smart v. Morton* (2), *Rowbotham v. Wilson* (7)—the cases are few where the question has arisen upon a mining lease.

In the case last referred to there had been an award under an Inclosure Act which the parties interested had all executed, and Lord Wensleydale considered that the award being so executed might operate as a grant of a right to work the minerals. He used (14) the following language, which seems applicable to such leases as the present—"The rights of the grantees to the minerals by whomsoever granted must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed." And after pointing out that some right to get the minerals is incident to the grant or reservation where there is no express limitation to get them, he adds—"But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired, and then the only question would be, as to the construction of that deed, which may vary in each case."

The case of *Dugdale v. Robertson* (6), was much relied on by the plaintiffs. In that case, in which the minerals had been leased at certain rents and royalties, with a provision that they should not be taken from underneath certain specified places, the Vice-Chancellor (Wood) was of opinion that in a lease of that description there was a presumption that the right to support was reserved unless it appeared distinctly by express words upon the instrument that it was intended to be given up. Upon that case, it may be observed, as distinguishing it from the present, that the demise there was of all the minerals of any description under the land and not of one seam of coal called the High Hazle Bed as in the present case, and further, that it does not appear what the reservation of rent was, whether of an acreage rent or in any other form. We may assume, however, that there was not a minimum rent as for two acres got, or so important a feature would not be omitted from the report of the case and of the judg-

(14) 8 H.L. Cas. p. 360.

ment. The Vice-Chancellor in the judgment refers to the case of the under-story of a house being conveyed, as analogous, which, as we have before stated, seems to us a different case.

But this decision appears to us to be qualified by the subsequent cases of *Shafto v. Johnson* (15), decided by the same learned Judge (of which there is a full report in 8 *Best & Smith*, p. 252) and *Taylor v. Shafto* (10). Both these cases involved the same question, viz., whether lessees of coal mines under a certain lease who had so worked the mines as to let down the surface, had committed an actionable wrong, in which case the mining lease would not have been an incumbrance to the title to the surface afterwards conveyed, or had only done acts which the lease authorized them to do, in which case the lease would have been an incumbrance.

In *Shafto v. Johnson* (15), Vice-Chancellor Wood came to a different conclusion from that which he had arrived at in *Dugdale v. Robertson* (6), and though there were no words distinctly reserving the right to support, he held in effect that the lessees were not responsible for the subsidence caused by getting the minerals. He commences his judgment as follows — "I have carefully considered the lease, and I cannot arrive at the conclusion, that any act has been done by the lessees which is unlawful and contrary to the stipulations contained in it."

This embodies the view which we take of such a case as the present. In the subsequent part of the same judgment, in which the subject is gone into very fully and the whole of which is well worthy of consideration, the learned Judge refers to the case of *Dugdale v. Robertson* (6), as one which went to the full extent of the authorities, and in which the case was put as strongly as it well could be against the view which he was entertaining in the case under consideration. No doubt the case of *Dugdale v. Robertson* (6) is not disapproved of, but it does appear to us, that the principle of the two decisions is not the same, and that the correct view is that taken at the beginning of the

judgment in *Shafto v. Johnson* (15) which we have given above.

The judgment of the Exchequer Chamber, in *Taylor v. Shafto* (10), agrees with that of the Vice-Chancellor in making the terms of the lease decisive as to the extent to which the lessees were justified in going in working the mines. The case is not referred to as decisive of the present case, because the terms of the lease were different and there were other covenants, but as shewing the proper principle of decision.

We must now refer to the terms of the lease in the present case, which seem to us to be sufficiently clear and precise. It first contains a demise of all the seam of coal, called the High Hazle Bed, lying under certain closes containing 108a. 3r. 1p. It then contains certain powers over the surface, for the exercise of which compensation is to be paid. It then gives power and authority to dig pits, &c., and to win, get, work, raise up, stack, carry away, sell and dispose of all that the said mine or bed of coal. It then gives authority to take clay, brick, earth, &c., from the surface, and to make bricks for necessary buildings.

It will be seen presently that the authority to take all the mine is afterwards qualified by certain express exceptions. We have then the clauses for payment of rent, according to which there is a minimum rent of 200*l.* a year, as for 2a. 1r. 16p. got, and in addition 85*l.* for every additional statute acre, including all ribs and pillars left in working the coal, with the exception of certain specified pillars.

The meaning of this appears clearly to be that as the coal cannot be worked without leaving certain ribs and pillars as the work is proceeding, those ribs and pillars though not removed are to be included in the half-yearly measurement from time to time of the acreage to be paid for. The pillars referred to are pillars left in working the mine which have not reference to the support of the surface, but to prevent the mine from being blocked up by what would fall from the top of the mine and interfere with the working.

There follows afterwards the important

(15) 8 B. & S. 252. n.

clause of exceptions out of the mine which the lessees are to be allowed to take, and which exceptions are not to be measured in and paid for, namely, that the following pillars shall be left *during the whole of the term*. And they are then specified. This appears to us conclusive to shew that the other pillars which are necessary for working the mine and measured in as the work proceeds need not be left during the whole of the term, but may be removed when not wanted for working the mine in the usual manner.

There follows afterwards another important clause regulating the manner of working the mine, by which the lessees covenant *inter alia* during the continuance of the demise to work and manage the mine according to the best of their skill and discretion, and in a good and workmanlike manner.

It appears to us that, upon the reasonable and proper construction of this lease, it authorises the removal of all the coal with the exception of that which is covenanted to be left during the whole term, and subject to the mine being worked and managed during the whole term in a good and workmanlike manner.

If there existed any usual and approved mode of working mines in the district we should further think the lessees were bound by it, though not expressly mentioned.

We have only then to consider the facts of the present case to see whether the defendants have made themselves responsible for what they have done; and upon this we think the statement in paragraphs 10 and 11 of the case are sufficient to absolve the defendants from liability.

It appears from the previous paragraphs that in consequence of the defendants' workings the land and buildings subsided, and that the land would have subsided without the buildings; and then paragraph 10 states that all the pillars provided for by the lease had been left; and paragraph 11 adds that there was nothing in the course adopted by the defendants in their coal workings contrary to the usual course of mining in use in the district. It would have been better if instead of this negative statement there

had been a positive statement that the mine was worked in a good and workmanlike manner and according to the usage of the district, but we think the actual statement necessarily amounts to this. What follows in paragraph 11, namely, that enough pillars might have been left to support the surface is the statement of an obvious truism, and ought to have no effect.

We think, therefore, that the defendants have only done what they were authorised to do by this lease, and that for the reasons above given they are entitled to the judgment. This makes it unnecessary to consider the other questions argued before us, namely, to what extent the plaintiffs are entitled to recover.

BRAMWELL, B.—In this case the defendants have a lease of a seam of coal. It may not appear of much consequence by what name their interest is called, but the word "lease" may in such cases have helped to a particular conclusion. For by that word we commonly understand a temporary estate granted in something which at the end of the term is to be restored to the lessor in the condition in which it was delivered to the lessee, fair wear and tear excepted, as in a lease of land, house or moveable chattel. But that is not the intention of a lease of a seam of coal. That is more a sale of the coal or grant of a right to take and remove it within a certain time, and it is not to be restored at the end of that time to the grantor. Treat it as a sale of the coal, provided the vendee gets it all within a certain time, and why should the grantor be at liberty to say, "though in terms I sold the whole of it, yet by implication I reserved as much as was necessary to support the surface in its natural condition?" Why should not the argument be good, "If you meant that exception you should have said so in words?" Suppose a sale of brick-earth or gravel by metes and bounds, and suppose the vendee took it all, and suppose then the soil of the vendor outside the boundary crumbled in for want of lateral support, would the vendee be liable to a claim in respect thereof by his vendor? And if he would, why?

With great respect, such a dealing with a seam of coal is more like selling the materials of an intermediate floor than letting or selling the floor. Suppose a man with a three-storied house sold the materials of the second floor, would he have a right to say, "But you must leave enough to support my third story or you must prop it up?" It is true a lessee of a mine may take all the coal and artificially prop the surface, but practically this is impossible owing to the expense, and the same argument applies, namely, why did not the grantor stipulate for it?

It may be said that if this argument is true of a lease or grant of coals to be taken in a certain time it would be equally so of a grant to be taken whenever the grantee thought fit, and if so of all cases where the ownership of mines and surface was severed, and that the authorities are overwelming the other way. But in the first place the argument is not so strongly applicable where the grant allows the grantees to take at any time, because a grantor may well allow his land to be let down, provided it is to be done within a certain time, where he would object if he could not tell for all futurity when it might happen. In the next place, where the terms of severance are not known, but only that there is a severance, then it may as well be presumed one way as the other. That is a case of ownership, not contract as this is. Here the terms of the contract, that gives the right to take the coal are known, and the question is, why does not the general principle apply, namely, look at what is said in the deed and add nothing except from a necessity for doing so? Then those terms give the defendants the whole of the coal, for there is no difference between the words, "the coal," and "all the coal," and indeed the words here are "all that seam." Then what necessity is there for implying a matter contradictory thereto, namely, that the right is not to the whole of the coal, but only to part, leaving enough to support the surface?

But supposing these would be right principles on which to decide this case—and I am not sure they would—I have great difficulty in applying them to this case, and in adopting the forcible

arguments of my brothers Martin and Cleasby. For the cases have established that where there is a severance of mines from the rest of the soil, however it may have been created, what the learned counsel for the plaintiffs called the natural right is, that those entitled to the mines and those entitled to the residue of the soil, must each so use his part as not to injure the other; probably on the basis of the maxim, *sic utere tuo ut alienum non lœdas*. This rule was alleged by the plaintiffs, and indeed admitted by the defendants' counsel, to apply to cases where the mines were leased. And it was agreed that the question must depend on the terms of the lease, and whether from them this natural or ordinary right had been given up by the lessor. For these positions *Harris v. Ryding* (11), *Humphries v. Brogden* (1), *Smart v. Morton* (2), *Rowbotham v. Wilson* (7), *Dugdale v. Robertson* (6), *Taylor v. Shafto* (10), and other cases were cited. It seems to me that *Dugdale v. Robertson* (6) is not easily distinguishable from this case.

Assuming this rule to apply to leases, we must examine the deed to see if there is anything to take away this so-called natural right. Now the lessees are to pay by an acreage rate no doubt, and so if they have to leave pillars they will pay for what they do not take. It may be they have allowed for this in calculating the rent. It is expressly provided that the measurement is to include "all ribs and pillars left in working the said coal," except certain named pillars. They will therefore have to pay for something included in the acreage which they must or may have to leave for any reason, and why not then for pillars to support the surface? Further it was said that the obligation which is in the lease to leave certain named pillars, precluded the necessity of leaving others on the principle of *expressio unius est exclusio alterius*. But this is not so. That maxim only applies where the expressed matter would be superfluous if the implied were expressed or assumed. That is not the case here. The named pillars are to be left for wholly different purposes than the general support of the surface. This was decided in *Dugdale v.*

Robertson (6). (See per Wood, V.C., 8 B. & S. 255-257). In the result I find nothing to limit that natural or ordinary right, if it exists in cases of leases of mines, and so far I should have great difficulty in deciding against the plaintiffs.

Taylor v. Shafto (10) and *Shafto v. Johnson* (15), are in no way contrary to *Dugdale v. Robertson* (6). In those cases it was held, both at law and in equity, that the lessor of the mines had made the lessee covenant to do what was inconsistent with leaving supports for the surface. The Vice-Chancellor says (17), "I can come to only one conclusion, viz., that there was an intention that *all* the coal that could be got, regard being had to the safety of the mine, should be got."

The second question is this—the defendants' lessor, Mr. Sotheron, conveyed the whole of the premises, including the reversion in the mines, to Roberts. Roberts reserving to himself the rent and reversion of the mines, fire clay, other clay, stone and minerals, granted and conveyed the residue of the soil to the plaintiffs. And it was contended by the defendants that by this conveyance the grantees took without a right to support for houses built over the mines, and without a right to recover damages for injury to houses arising from the surface being let down by mining operations. This undoubtedly is so, if those mining operations were carried on by Roberts or by his lessees under leases granted subsequently to the conveyance to the plaintiffs. But it was said by the plaintiffs not to apply to the defendants, who were lessees at the time of the conveyance to the plaintiffs. I think it does. The lease of June, 1840, under which the defendants have the right to work, is mentioned in the conveyance to the plaintiffs, and the words are general and unqualified—"Roberts, his heirs or assigns, tenants or lessees, shall not be responsible" for damages caused to dwellings, which shall "*hereafter*" be erected, by mining operations. And it is clear that as the mines and the reversion of the mines were separated from the rest of the soil, Roberts covenants with the plaintiffs for the performance of the same matters for the

benefit of the surface owners that the lessees had covenanted with Sotheron to perform for their benefit. And it is also clear that a power of distress which is given to the plaintiffs would enable them to distrain on the defendants' goods.

It is asked, why are the defendants to have the benefit of an arrangement to which they are not party or privy? The answer is that the very foundation of the plaintiffs' case is a right to support as against the defendants, and if the plaintiffs have taken their estate without that right, the defendants incidentally get a benefit perhaps not contemplated. It may be that Roberts thought the defendants entitled to work so as to cause subsidence of the surface. It may be, though we cannot see why, that he wished them to be so entitled. Be that as it may it seems clear to me that the plaintiffs have taken their estate subject to a right in Roberts and his tenants, including the defendants, to damage the surface houses without a liability to compensate the plaintiffs and their tenants.

It is as though a man owned farms A. and B., and granted B., reserving a right of way over it to himself as owner and his tenants of A. This would operate as a grant by the grantee of B., and would enure for the benefit of an existing lessee of A. It would be strange if the defendants could surrender their lease, and then on the grant of a new one have the right and yet not have it now.

But there is nothing in the conveyance to the plaintiffs to take away their natural or ordinary right of support to the land if it exists, and therefore if there is any damage to land by subsidence, and the defendants are not right on the first question, the plaintiffs are entitled in respect of it. This is probably of small consequence, and having regard to the opinions of my brothers Martin and Cleasby I answer both questions in favour of the defendants.

Judgment for the defendants.

Attorneys—Pattison & Wigg, for plaintiffs;
Singleton & Tattershall, agents for Herbert
Bramley, Sheffield, for defendants.

1872. } DAWSON v. THE MIDLAND RAIL-
Nov. 7. } WAY COMPANY.

Railway—Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20. s. 68—Duty to Fence adjoining Lands—Liability to Persons not Owners or Occupiers.

When a railway company have neglected the duty imposed on them by the Railways Clauses Consolidation Act, 1845, to fence their line from the adjoining lands, and in consequence of such neglect cattle in the adjoining lands pass on to the line and are injured by the company's trains, an action for the injury may be maintained against the company by the owner of the cattle, though he has no more interest in the adjoining lands than a license from the occupier thereof to graze the cattle there.

Action for a breach of the duty imposed on the defendants by the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20. s. 68(1), to fence their line from the lands adjoining, whereby the plaintiff's mare strayed on to the line and was killed by the defendants' train.

At the trial before Blackburn, J., at the Warwick Summer Assizes, 1872, the following facts were proved. The plaintiff's mare was kept in a stable which he hired from a friend, who occupied also the field in which the stable stood and which adjoined the defendants' line. The plaintiff was also permitted without payment to graze the mare in the field. One night the mare escaped (without, as the jury found, any negligence on the part of the plaintiff) from the stable, passed into the field and thence through a gap in the fence on to the defendants' line, where she was killed by a train of the defendants. The de-

(1) That section enacts—

"The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway (that is to say) . . .

"Also sufficient posts, rails, hedges, ditches, mounds or other fences for separating the land taken for the use of the railway, from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands and not towards the railway, and all necessary stiles."

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endants admitted that they were bound under the statute to repair the fence as to owners and occupiers, but not as to the plaintiff. The verdict was entered for the plaintiff for 31l. 10s., the value of the mare, with leave to the defendants to move to enter it for them on the ground that the duty imposed by the statute was only as regards "owners and occupiers," and that the plaintiff was neither.

Field moved for a rule in accordance with the leave reserved.—The plaintiff was not the owner or occupier of the adjoining land and cannot maintain the action. The statute does not give a right of action to the owner of agisted cattle, or at least not to the owner of cattle straying on to the adjoining land, if such owner is not the owner or occupier of the adjoining land.—*Dovaston v. Payne* (2), *Ricketts v. The East and West India Docks Railway Company* (3). The plaintiff cannot even claim the position of a licensee, for it was at night, and the mare was not exercising the license of grazing, which was confined to the day-time. She was a trespasser, and that is enough to prevent the plaintiff from recovering.

KELLY, C.B.—The mare was lawfully in the close, out of which she escaped on to the railway through a defect in the fence which the railway company were bound to keep in repair. It was argued that only the owner or occupier of the close could maintain this action, but the mare was in the close by the license of the occupier, and it would be against common sense if we were to construe the statute to mean that under these circumstances the owner of the mare could not maintain this action.

MARTIN, B.—I am entirely of the same opinion. I think the duty imposed by the statute is as to all cattle lawfully on the adjoining lands.

BRAMWELL, B.—I am of the same opinion. If Mr. Field be right, then supposing an occupier has two fields adjoining the railway, in one of which the fences are sound and in the other there is

(2) 2 H. Black. 528; s.c. 2 Smith L. C. 124 (5th edit.)

(3) 12 Com. B. Rep. 160; s.c. 21 Law J. Rep. (N.S.) C.P. 201.

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a gap, and a horse belonging to the occupier leaps out of the first field into the second, and so escapes through the gap on to the railway and is killed by a train, the company would not be liable. But Mr. Field would say "no; there is a difference in the two cases, because here the plaintiff is neither owner nor occupier." But I think—without saying whether the plaintiff was an occupier or not—that the duty of maintaining the fences is for the benefit of all those who have the right to have their cattle on the lands in question.

PIGOTT, B.—I am of the same opinion. The statute is for the benefit of owners and occupiers, and one use which an occupier may make of the lands is to let the cattle of a friend—as was done here—graze on the land.

Rule refused..

Attorneys—Robinson & Preston, agents for Rowlands, Bagnall & Rowlands, Birmingham, for plaintiff; Beale, Marigold & Beale, for defendants.

1872. } THE PLUMSTEAD BOARD OF WORKS
Nov. 11. } v. INGOLDBY AND OTHERS.

Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 102. s. 77)—Paving Expenses—Apportioned Amount of Expenses payable by Future Owners—Charge on Land.

The effect of the 77th section of the Metropolis Local Management Act, 1862, is to make the apportioned amount of paving expenses incurred under the Act a charge on the premises in respect of which the amount has been apportioned; and the district local board may recover the amounts so apportioned from subsequent owners of the premises accordingly, although no arrangement be made for payment by instalments.

This was a SPECIAL CASE stated in an action brought to recover 57l. 10s., under the circumstances hereinafter set forth.

The Board of Works for the Plumstead-district derive their authority from, and act under the Metropolis Local Man-

agement Acts 1856 and 1862 (18 & 19 Vict. c. 120 and the 25 & 26 Vict. c. 102). In pursuance of the powers vested in them by s. 105 of the former of the said Acts, the board at a meeting duly held on the 25th of March, 1868, resolved that a certain new street within their district, called Granville Mews North, in the parish of Lee, was not paved to their satisfaction, and that it was expedient that the same should be paved throughout the whole of the breadth of the carriage-way and footpaths thereof, in accordance with a certain plan and estimate of their surveyor, and that the owners of the several houses forming the said street and the owners of land bounding and abutting on the said street, should pay the sum of 170l. 13s. 4d., being the amount of the estimated expenses of the said paving, and they further apportioned the said amount of 170l. 13s. 4d., between the several owners, according to a certain schedule appended to the said resolution.

At the same meeting the plaintiffs passed a further resolution with regard to another new street, called Middle Granville Mews, and apportioned the expense of paving the same among the owners of houses forming, and of land bounding and abutting upon the same.

A house with stables and land in respect of which apportionments were respectively made as aforesaid, were then the property of William C. Banks now deceased.

No separate apportionment was made in respect of the said land, but the same was included in that made in respect of the said houses and stables, the total amount being 57l. 10s.

No notice was given to the said William C. Banks of the intention of the plaintiffs to pave the said street, nor was any part of the amounts mentioned in the said apportionments, and now sought to be recovered, ever paid by the said William C. Banks or by anyone else.

On the 3rd of December, 1868, the said William C. Banks mortgaged the said houses, stables and land to the defendants, the trustees of the Planet Building Society, and having subsequently made default in paying the moneys secured by the mortgage deeds, the defendants as such

trustees entered into and took possession of the said houses, stables and land on the 25th December, 1869.

Until the 3rd of December, 1868, the said defendants had no interest or estate whatever in the said houses, stables and land, and they received no notice of or information respecting the said apportionments, until the 15th of November, 1870; and they refused to pay the same, whereupon this action was commenced.

The question for the Court was—whether the action was maintainable against the defendants as owners in respect of all or any of the said apportionments.

Barrow, for the plaintiffs, contended that the words found in the 77th section (1) of the later Act (25 & 26 Vict. c. 102), enabling the board to recover the costs and charges “either before the work shall be commenced, or during its progress, or after its completion,” removed all difficulty that might have stood in the plaintiffs’ way if they had to rely only on the 105th section of the earlier Act (18 & 19 Vict. c. 120), directing deficiencies to be made good by the owners; that the

effect of the later Act was to make these costs a charge on the land, and that this view was supported by *The Vestry of Bermondsey v. Ramsey* (2), where it was held that an unsatisfied judgment against a former owner was no bar to an action for such expenses against a tenant under a subsequent owner.

E. G. Wilberforce (with him *H. E. Prest*), contended that the effect of the later Act was only to permit the apportionment to be made, either before the commencement, or during the execution, or after the completion of the works, but not to alter the persons liable, who were to be the owners at the time of the apportionment; that the introduction of the words, “present or future owners,” in that clause of the 77th section relating to payment by instalments, shewed that the Legislature did not intend the earlier portion of the section to apply to subsequent owners; for if they did so intend, the introduction of those words was superfluous; and that the 96th section did not authorize the board to transfer the liability to a subsequent owner, but simply enabled them to elect between the owner and the occupier at the time of apportionment.

Barrow was not called on to reply.

(1) The 77th section is as follows—

“Where any vestry or district board shall, under the powers given by the one hundred and fifth section of the firstly-recited Act, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the costs of paving at the points of intersection of streets, and all other incidental costs and charges shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress or after its completion; and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board.”

The 96th section empowers the vestry or district board to require payment of the costs and expenses from the owner or occupier.

KELLY, C.B.—I am of opinion that the plaintiffs are entitled to recover by force of these two statutes, either from the owner at the time of the apportionment, or from a subsequent owner. Under the earlier Act the power of the local boards to recover from subsequent owners was limited to cases where the expenses actually incurred exceeded the estimated expenses; but the inconvenience arising from this limitation was remedied by the later Act of 1862, the 77th section of which provides that these costs and expenses shall be apportioned and shall be recoverable either before the work be commenced, or during its progress, or after its completion; and further that the local board may accept payment of the “amount apportioned” by instalments, and recover “such amount” from the present or any future owner. This shews, in my opinion, that the word “amount” in the clause as

(2) 40 Law J. Rep. (N.S.) C.P. 206.

to recovery means the "whole amount apportioned," whether payable by instalments or not. The premises have been benefited by the expenditure, and it is only reasonable that the apportioned cost should be—what the Act of 1862 makes it—a charge upon the premises.

BRAMWELL, B., CHANNELL, B., and PIGOTT, B., concurred.

Judgment for the plaintiffs.

Attorneys—J. M. Dale, for plaintiffs; Ingle, Cooper & Holmes, for defendants.

1872. }
Nov. 22. } WELSH v. MERCER AND ANOTHER.

Practice—New Trial in Liverpool Court of Passage—Verification of Assessor's Signature to Notes.

In moving in this Court for rules for a new trial or to enter a nonsuit in cases tried in the Liverpool Court of Passage, a rule to shew cause will not be granted unless either the counsel moving was present at the trial, or the assessor's notes are produced with an affidavit verifying the assessor's signature. When cause is shewn the assessor's notes must be produced with a similar affidavit.

This action was tried in the Court of Passage at Liverpool before the assessor, when a verdict was entered for the plaintiff for 35*l*. A rule to shew cause why a nonsuit should not be entered having been obtained on behalf of the defendant by *R. G. Williams*—

Segar, for the plaintiff, appeared to shew cause, but when the assessor's notes of the trial were produced, it appeared that his signature had not been verified by affidavit.

R. G. Williams, in support of the rule, urged that the verification was not necessary, at least not on this rule which did not purport to have been moved on the production of the assessor's notes, and referred to *Morrison v. Wookey* (1).

THE COURT (2) said that the rule in this Court was that in cases tried before the Court of Passage, no rule for a new trial or to enter a nonsuit could be moved unless either the counsel moving was present at the trial, or the assessor's notes were produced with an affidavit verifying the assessor's signature, and that when cause is shewn the assessor's notes must be produced with a similar affidavit; and they refused to allow the argument to proceed except upon an undertaking by the defendant's counsel to file such an affidavit before the close of the argument.

The argument then proceeded, but was afterwards adjourned to Hilary Term, 1873, when the required affidavit was produced and the rule was made absolute.

Attorneys—Norris, Allens & Carter, agents for J. & H. Gregory, Liverpool, for defendants.

(1) 15 Com. B. Rep. N.S. 457.

(2) Kelly, C.B.; Martin, B.; Bramwell, B.; and Channell, B.

END OF MICHAELMAS TERM, 1872.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

HILARY TERM, 36 VICTORIÆ.

1872.
Nov. 13.
1873.
Jan. 23.

OSBORN v. GILLETT.

*Negligence causing Death of Servant—
Action for Loss of Services—Expense of
burying Servant also a Child.*

To a declaration alleging that by reason of the negligence of the defendant's servant the plaintiff's daughter and servant was killed, and claiming damages for loss of services and for the burial expenses paid by the plaintiff, the defendant pleaded, first, that the daughter and servant was killed on the spot by the act complained of, so that the plaintiff did not and could not sustain damage entitling him to sue; and secondly, that the act complained of was a felonious act on the part of the defendant's servant, and that the servant had not before the action been tried, committed or prosecuted in any way in respect of the same:—Held, per totam curiam, that the second plea afforded no answer to the declaration; and held by KELLY, C.B., and FIGOTT, B., that the first plea afforded a good answer, on the ground that, apart from Lord Campbell's Act (9 & 10 Vict. c. 93), no civil action

is maintainable against a person who has by negligence caused the death of another. But held by BRAMWELL, B., that the first plea afforded no answer, and that the action was maintainable.

Declaration.—That Elizabeth Osborn was the daughter and servant of the plaintiff, and the defendant by John Broadwater his servant so negligently and unskillfully managed and drove a waggon and horses along a public highway that the said waggon and horses were forced and driven against the said Elizabeth Osborn, whereby she being such daughter and servant as aforesaid was wounded and injured, and by reason of the wounds and injuries thereby occasioned to her as aforesaid afterwards died, whereby the plaintiff wholly lost the service of the said Elizabeth Osborn, and the benefits and advantages which would otherwise have accrued to him from such service, and was put to expense in conveying her body to his house, and afterwards and necessarily was put to and incurred expense in and about and incidental to the burial of the same.

Third plea.—That the said Elizabeth

Osborn was killed upon the spot by the acts and matters mentioned in the declaration, so that the plaintiff did not and could not sustain any damage entitling him to sue for the acts complained of.

Fourth plea.—That the act and matter complained of amounted in law to a felonious act by the said John Broadwater committed, and the said John Broadwater at the commencement of this suit had not and has not since been tried, convicted, acquitted of, nor in any manner prosecuted for the said offence, although nothing ever existed or exists to render such prosecution unnecessary, improper or inexpedient, or to entitle the defendant to bring an action without such prosecution having taken place.

Demurrers to these pleas, and joinder.

W. Graham (with him *P. F. O'Malley*), for the plaintiff, in support of the demurrers.—The only English authorities in support of the third plea being an answer to the action are, *Higgins v. Butcher* (1), which really was decided on another ground, turning on the point raised by the fourth plea here; and *Baker v. Bolton* (2), a case at Nisi Prius, the authority of which appears to be very questionable. The fourth plea is disposed of by *White v. Spettigue* (3), which shews that the objection relied on does not apply to an action against a third party innocent of the felony, and by *Wells v. Abraham* (4), which overrules everything in the older cases which could in any way support the defendant's contention as to the felonious character of his servant's act being a bar to the maintenance of a civil action such as this. A general allegation of service is sufficient—*Martinez v. Gerber* (5); and whether the deceased was the plaintiff's servant or not is a question for the jury—*Evans v. Walton* (6).

Prentice, for the defendant, in support of the pleas, relied on *Higgins v. Butcher*

(1), and *Baker v. Bolton* (2), and the American cases *Eden v. The Lexington, &c., Company* (7), and *Carey v. The Berkshire Railroad Company* (8), and on the words in the preamble to Lord Campbell's Act (9 & 10 Vict. c. 93), as shewing that before that Act no action was maintainable in respect of negligence causing the death of any person; and he contended that if the Court gave judgment for the plaintiff on the third plea, they would in effect be usurping the functions of the Legislature, by adding a clause to Lord Campbell's Act. As to the fourth plea, it was a good answer according to the well-known rule of law, founded on public policy, that—as expressed by Lord Ellenborough, C.J., in *Crosby v. Leng* (9)—“before the party injured by a felonious act can seek civil redress for it, the matter must be heard and disposed of by the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offence.” The same principle is recognised in *Stone v. Marsh* (10), *White v. Spettigue* (3), and *Wellock v. Constantine* (11), as well as in the notes to *Ashby v. White* (12).

[BRAMWELL, B.—*Wellock v. Constantine* (11) must be looked upon as overruled by *Wells v. Abraham* (4)].

Graham, in reply, cited *Hall v. Hollander* (13), and (as to the funeral expenses) *The Queen v. Vann* (14), *Ambrose v. Kerrison* (15), and *Chapple v. Cooper* (16).
Our. adv. vult.

PIGOTT, B.—This action was brought to recover damages for negligent driving by the defendant's servant, whereby the daughter and servant of the plaintiff was injured, and afterwards died, and in con-

(1) Yelv. 89; s. c. 1 Brown. 205, and Noy 18.
(2) 1 Camp. 493.
(3) 13 Mee. & W. 603; s. c. 14 Law J. Rep. (N.S.) Exch. 99.
(4) 41 Law J. Rep. (N.S.) Q.B. 306.
(5) 3 Man. & G. 88; s. c. 10 Law J. Rep. (N.S.) C.P. 314.
(6) 36 Law J. Rep. (N.S.) C.P. 307; s. c. Law Rep. 2 C.P. 615.

(7) 14 B. Monroe, 204.
(8) 1 Cushing, 475.
(9) 12 East, 409.
(10) 6 B. & C. 551.
(11) 2 Hurl. & C. 146; s. c. 32 Law J. Rep. (N.S.) Exch. 285.
(12) 1 Smith's L.C. 6th ed. 227, 267.
(13) 4 B. & C. 660.
(14) 2 Den. C.C. 325; s. c. 21 Law J. Rep. (N.S.) M.C. 39.
(15) 10 Com. B. Rep. 776; s. c. 20 Law J. Rep. (N.S.) C.P. 135.
(16) 13 Mee. & W. 252; s. c. 13 Law J. Rep. (N.S.) Exch. 286.

sequence the plaintiff lost her services, and was put to the expense of burying her. By the third plea, the defendant said "that she was killed on the spot," and the first question is, whether this plea affords a good defence in law to an action by a master for damage sustained by reason of the death of his servant. It may seem a shadowy distinction to hold, that where the service is simply interrupted by accident resulting from negligence, the master may recover damages, while in the case of its being determined altogether by the servant's death from the same cause, no action can be sustained. Still I am of opinion that the law has been so understood up to the present time; and if it is to be changed, it rests with the Legislature and not with the Courts to make the change. It is admitted that no case can be found in the books, where such an action as the present has been maintained, although similar facts must have been a matter of frequent occurrence. This alone is strong to shew that the general understanding had been to the effect laid down by Lord Ellenborough in 1808, in *Baker v. Bolton* (2). That was no doubt a *Nisi Prius* decision, but it does not appear to have been ever questioned. The ruling was that the death of any human being could not be complained of as an injury, i.e., as an *actionable* injury. And the law as there laid down has found its way into the various text-books treating upon master and servant. There was nothing in that case to shew that the negligence amounted to a felony; and if death is caused without criminal negligence, or by merely injudicious driving, it would not amount to felony.

But in addition to this authority and the general acquiescence in it for so many years, there is a clear parliamentary recognition and statement that such is the law to be found in the preamble to Lord Campbell's Act (9 & 10 Vict. c. 93). The language is not confined to cases to which the maxim *actio personalis moritur cum persona* applies, but is perfectly general, viz.—"Whereas no action at law is now maintainable against a person who by his wrongful act, neglect or default, may have caused the death of another person, and

it is oftentimes right and expedient, that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him." The remedy is then given to the deceased's personal representative for the benefit of *wife, husband, parent and child* only. Yet it must be manifest that numerous other cases in which special damage of various kinds is sustained (master and servant being one) must have been present to the minds of the framers of this statute; and if such had been the intention an express remedy would have been afforded in cases where proximate special damage results from the death so caused. Several American authorities were also cited—*Eden v. The Lexington, &c., Company* (7) and *Carey v. The Berkshire Railroad Company* (8), which shew that the law in America has followed the ruling of Lord Ellenborough, but I do not think it necessary to rely upon these cases.

The result is, in my opinion, that we are not at liberty to disregard the law thus established so long ago, and expressly recognized by the Legislature, nor in effect to add by the decision of this Court another clause to Lord Campbell's Act. For these reasons as regards the loss of service, therefore, I think this action is not maintainable, and the same reason applies also to the expense of the burial. I think the fourth plea is bad for the reason, that it only affords a defence (if at all) when the action is brought against the supposed criminal and before his prosecution.

KELLY, C.B.—I think that the defendant in this case is entitled to the judgment of the Court. No decision is to be found in the books from the earliest times, by which an action for this cause has been sustained. No *dictum* is to be found of any Judge, or upon any competent authority, that such an action is maintainable. All the authority that exists is against it. *Higgins v. Butcher* (1) shews that a husband cannot maintain an action against one who kills his wife; and by Tanfield, J., "If a servant be beaten and die, the master shall not have an action for the loss of his services." There, however, the decision proceeds on the ground that the act was a felony; upon

which it may be observed that so would be the killing in the case before the Court, if the act be such that the negligence makes it amount to manslaughter. In *Baker v. Bolton* (2) the facts are loosely stated, but they seem to shew that the action there was founded on negligence, and that the plaintiff had been deprived of the assistance—which may mean the service—of his wife. But the decision did not proceed on the ground that the killing was a felony; for Lord Ellenborough observed, without any qualification, that, "In a Civil Court, the death of a human being could not be complained of as an injury." Then we have the American case, *Carey v. The Berkshire Railroad Company* (7), and *Skinmer v. The Housatonic Railroad Corporation* (17), deciding that no action for loss of service is maintainable where death has been inflicted through carelessness. The case of *Ford v. Monroe* (18) was at Nisi Prius; and as the point was not taken, is really of no authority. Finally, we have the express declaration of the Legislature in the preamble to Lord Campbell's Act, that, apart from that Act, no action lies for damages sustained by the death of a human being, and the language shews that it was never intended to include more than is provided for by the operative enactments of the statute. Such then being the state of the authority, I agree "with my brother Pigott, that we must leave it to the Legislature to provide for a case like this; and that we ought not to take upon ourselves to create a new cause of action, which would be to make and not to expound the law.

BRANWELL, B.—The fourth plea in this case is clearly bad. *White v. Spettigue* (3) is in point. Indeed this case is stronger. There the plaintiff was owner of the books, and it may be said it was in some sense his duty to prosecute the man who stole them; but in this case I see no greater duty in the plaintiff than in any one else to prosecute for the supposed felony.

I think the third plea bad also. In this

plea it is not alleged that the killing was manslaughter, and as against the defendant it must be taken that it was not, for it is not alleged, and there may be a killing under circumstances of sufficient negligence to maintain an action if death had not ensued though the negligence is not criminal so as to make the killing manslaughter. The declaration shews that the deceased was the plaintiff's servant, that by a wrongful act, for which the defendant is responsible, she was wounded and killed, and that thereby the plaintiff lost her services and sustained damage which may be real and substantial from the valuable character of the service, prepayment of wages, or otherwise. The plea admits all this, but says that the wrongful act and death of the servant were at the same moment of time. Now these pleadings shew a state of things such that if the loss of service had arisen from the servant being injured, maimed, crippled or otherwise disabled from work, but not killed, the action would be maintainable—*Hodsoll v. Stallebrass* (19); and the only question is whether the loss arising from a killing makes any difference. It is important to bear this in mind, as it gets rid of all the suggested difficulties about the impolicy of such an action being maintainable, and about the unreasonableness of its being maintainable when an annuitant for a man's life could not maintain an action for the wrongful killing of the *cestui que vie*. Because, supposing we could entertain such a consideration, this action is no more against good policy than one would be where the servant was crippled but not killed. And in the supposed case of the annuitant, he could maintain no action for a wrongful crippling or disabling of the *cestui que vie*, whereby he could not pay the annuity, which, indeed, might have been granted to last during good health.

Here a relation is shewn to exist between the plaintiff and the servant in respect of which if the master sustains damage in consequence of a wrongful act, the law gives the master a right of action; and the only question is whether to that general rule there is an

(17) 1 Cushing, 475.

(18) 20 Wend. 210.

(19) 3 P. & D. 200; s. c. 9 Law J. Rep. (n.s.) Q.B. 132.

exception where the servant is killed. I asked why there should be. No reason was or could be given (except the supposed impolicy), but it was said to be a positive rule of law that where a damage was caused by death, no action lay. The burthen of shewing this is on the defendant who asserts it. He has to make out an exception to a general rule; and as no reason can be given for the exception, it seems to me to require very clear authority.

The general rule or maxim is first relied on—*actio personalis moritur cum persona*. But that clearly means *moritur* with the *persona* who was to be party to the action as plaintiff or defendant. Dies with *the person*—what person? It is not any person or every person. If the servant here had lived six months, and during that period service had been lost, this action would clearly be maintainable though she then died. Further, the maxim is *actio moritur*, which supposes the action was once alive, but here the argument is that the plaintiff never had any action. In effect the plaintiff's case is, "You killed my servant and caused me loss," and the defendant's case is the same, "I did kill her, and therefore I never was liable." The sense in which I say the maxim is to be understood is that put on it in *Broom's Legal Maxims*, pp. 904–916, and the many authorities there cited.

Next, the defendant relied on the recital in 9 & 10 Vict. c. 93, that "no action is now maintainable against a person who, by his wrongful act, neglect or default may have caused the death of another person." And certainly the words are large enough to include this case. But in justice to whosoever is responsible for framing the clause, we ought to see what was the subject-matter being dealt with. When that is done, it will appear manifest that such a case as this was not in contemplation. For (and it is somewhat strange) the section proceeds to say that, "wherever the death of a person shall be caused by wrongful act, and the act is such as would, if death had not ensued, have entitled the party injured to maintain an action, there the person who would have been

liable shall be, notwithstanding the death of the party *injured*," &c.—that means "killed." So that the death is to make a man liable to an action notwithstanding the death. But that the words "party injured" in the phrase "would have entitled the party injured," must mean the same as where they again occur, and therefore mean "party killed," the present case would be comprehended in this enactment. But it is manifest by section 2, that the statute is dealing with cases where no action lay by the representatives of a deceased person to recover damages for his being wrongfully killed, and to this the recital must be limited. Further, with all respect to the Legislature and the author of this section, I require stronger authority for the anomaly the defendant contends for, than a loose recital in an incorrectly-drawn section of a statute, on which the Courts had to put a meaning from what it *did not*, rather than from it *did*, say—see *Franklin v. The South Eastern Railway Company* (20).

The next authority relied on was *Baker v. Bolton* (2). Now certainly, as reported, it favours the defendant's views, for Lord Ellenborough is reported to have said that, "In a civil Court, the death of a human being could not be complained of as an injury, and in this case the damages as to the plaintiff's wife must stop with the period of her existence." The report is very short, and I am by no means sure of its accuracy. For though the evidence is that the wife assisted in the plaintiff's business, the special damage alleged does not contain any damage to the plaintiff's business. Lord Ellenborough is reported to have said that the jury could only take into consideration the plaintiff's hurts, and the loss of his wife's society and distress of mind till the moment of dissolution. But why was not the plaintiff entitled to recover for the loss of a month's assistance? and how was he entitled to recover for distress of mind at all? and especially why up to the time when that distress must have become greatest by the death? This is only a *Nisi Prius* cause; the plaintiff got 100*l.*, and probably was content.

(20) 3 Hurl. & N. 211.

I

No argument is stated, no authority is cited, and I cannot set a high value on this case, great as is the weight of the considered and accurately-reported opinions of Lord Ellenborough, after argument. The reporter puts a most significant query at the end of the case, viz., "If the wife be killed on the spot, is this *damnum absque injuria*?" Why should the answer to it be, "Yes," as the defendant contends?

The next authority cited by the defendant is *Higgins v. Butcher* (1). According to that report the plaintiff shewed no damage to himself. He said his wife was beaten, and died to his damage. This shews no pecuniary damage to him. Then Tanfield, J., expresses an opinion which was overruled in *White v. Spettigue* (3), and which—as it does not give as the reason that death gives no cause of action—may be said by its silence on that to be in the defendant's favour. The same case is reported in *Noy*, who states the declaration; and in that report also no damage to the plaintiff is shewn. There the Court say the king only is to punish a felony; and Tanfield, J., is stated to have said that the "action will not lie because the wife is dead, and she ought to have joined in the action, but otherwise if a servant." The case is rather an authority for the plaintiff than the defendant; it is mentioned by Twisden, J., in *Cooper v. Witham* (21), as depending on the act being a felony.

The remaining authorities are American, not binding on us indeed, but entitled to respect as the opinions of professors of English law, according to the position of those professors, and the reasons they give for their opinions.

The first in date are in the Supreme Court of Massachusetts (8). In one of the cases there reported, an action was brought by a father to recover damages for the loss of his son's service, killed by the negligence of the defendants, by an act not felonious. The other was brought by a widow to recover damages for the death of her husband, killed in a like way. It seems strange, but the two cases are supposed to present a single

question only for the Court—while it is obvious that the case of master and servant raises a different question to that of wife and husband. Nor do I understand why the plaintiff in the father's case—unless there was no damage to the father as master—was nonsuited. That looks as though he had not proved some fact. Possibly he had not proved damage, for the child was eleven years old only, and it is nowhere said there was any damage. If so, the decision is right. But the judgment is as follows: "If these actions or either of them can be maintained, it must be on some established principle of the common law." Now that is true, and the principle is that it is *injuria* and *damnum*, for which the defendant is responsible. The judgment proceeds: "And we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in very many instances. At the least we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel, and we cannot find any. This is very strong evidence that such an action cannot be supported." With great respect, the error of this reasoning is in supposing the burthen of proof or argument is on the plaintiff. The general principle is in his favour, that *injuria* with *damnum* gives a cause of action. It is for the defendant to shew an exception to this when the *injuria* causes death. If the case had been viewed in this way, the reasons of the Court tell for the plaintiff; for, in my judgment, the exception is not "upon any established principle of the common law;" it is not applied in any adjudged case in the English books; it is not stated in any elementary treatise. They then cite and rely on *Baker v. Bolton* (2), on which I have commented. They then cite a case (18) on which the contrary was assumed to be law by all parties and the Court, but suppose it may have passed *sub silentio*. I cannot be satisfied with this decision. The reasoning seems wrong, and the authority relied on insufficient.

The other case, *Eden v. The Lexington, &c., Railway Company* (7), is in the Kentucky Court of Appeals. That was an action by a husband for the negligent

(21) 1 Levinz, 247.

killing of his wife. It is obviously, therefore, not in point. There is no relation of master and servant. If the wife had lived, she must have joined in the action, except to the extent of her husband's pecuniary loss for medicine, &c. But in the judgment the case of master and servant was mentioned. I do not very clearly understand it. The first position was that the rule that no action lies for a felonious act before prosecution does not prevail in Kentucky. The second is this: "But according to the principles of the common law, injuries affecting life cannot in general be the subject of a civil action. In other inferior felonies the civil remedy is merely suspended until after the conviction or acquittal of the supposed felon; but for injury to life, the civil remedy is considered as being entirely merged in the public offence." This was said to be the established common law doctrine in the case of *Baker v. Bolton* (2). It is true Lord Ellenborough is reported to have said that in a civil Court death could not be complained of as an injury, &c., but there is nothing else to justify the above opinion, and if this is the authority, *White v. Spettigue* (3) shews its inapplicability here. The judgment proceeds: "The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence that the cause of action having itself abated, no separate action can be maintained for such damages as are exclusively consequential." I have dealt with this argument before. It is this: "Wrongful death which causes a damage gives no action, because it is death which causes it." The judgment proceeds to say that "damages may be recovered up to the time of death, but not beyond." The reason of this seems to be that all injuries affecting life, caused by the misconduct of another person, involve the commission of a public wrong, which merges the remedy for all private loss arising after death has occurred and occasioned by it. Why every death caused by misconduct is to be assumed to be a public wrong, I know not. The misconduct may be actionable though not amounting to criminal negligence. Nor do I know

why, however this may be, the remedy for private loss should merge in it.

I do not like criticising a variety of authorities, and escaping from their general effect by a variety of small differences and objections; but in this case it seems to me that the principle the plaintiff relies on is broad, plain and clear, viz., that he has sustained a damage from a wrongful act for which the defendant is responsible; that the defendant, to establish an anomalous exception to this rule, for which exception he gives no reason, should shew a clear and binding authority, either by express decision or a long course of uniform opinion, deliberately formed and expressed by English lawyers or experts in English law. I find neither. I may observe, too, that Mr. Manley Smith in his excellent work on *Master and Servant*, at p. 139, treats it as settled that an action like this lies. With the exception of a short note of the case of *Baker v. Bolton* (2), there is no semblance of an authority on this side of the Atlantic in favour of the defendant, and the cases from the other side are merely founded on that one, and on some vague notion of merger in a felony.

On the main question, then, I think the plaintiff entitled to judgment; but it seems to me clear that he is entitled to sue for the burial expenses. He says in his declaration that he necessarily incurred expenses in the child's burial. This must be taken to be true, if it can be. Now *The Queen v. Vann* (4) shews he was bound to bury the child if he had the means, which he may have had; and on this the judgment in *Eden v. The Lexington, &c., Railway Company* (7) is express. So also in *Baker v. Bolton* (2), the plaintiff recovered for loss up to the wife's death. In my opinion, then, the plaintiff is entitled to judgment.

Judgment for defendant.

Attorneys—Sharpe, Parkers, Pritchard & Co.,
for plaintiff; Flux & Leadbitter, for defendant.

[IN THE EXCHEQUER CHAMBER.]
(Error from the Court of Exchequer.)

1873. { THE COMPANY OF AFRICAN
Feb. 18, 19. { MERCHANTS (LIMITED) v.
THE BRITISH AND FOREIGN
MARINE INSURANCE COM-
PANY (LIMITED).

Marine Insurance—Voyage or Time Policy—South-West African Coast Trade—Deviation—Meaning of "Stay and Trade."

By the terms of a marine policy the insurance was expressed to be an insurance on a vessel and cargo "at and from Liverpool to the west or and south-west coast of Africa during her stay and trade therein and back to a port of call or and discharge in the United Kingdom." The premium was 8 guineas per cent. on the value insured. 20 per cent. of the premium was to be returned for the risk ending in ten months and 40 per cent. for the risk ending in eight months; and there was written in the margin "held covered at 13s. 4d. per cent. per month if longer than twelve months out." The vessel having stayed a month on the African coast for the purpose of earning salvage, and having been damaged there, and afterwards stranded on her voyage home, the owners sued for a total loss:—Held, that the words "stay and trade" meant "stay for the purpose of trade"; and that—no evidence being given that staying for salvage purposes was staying for an ordinary purpose of the South-West African coast trade—the risk had been substantially varied, that there was in the absence of such evidence no question for the jury, and that they were properly directed to find for the underwriters.

This was a bill of exceptions to the ruling of Kelly, C.B.

The declaration was on a policy of insurance on the ship *William Dent* and cargo. The material parts of the policy, the premium for which was stated to be at the rate of 8 guineas per cent., are as follows—

"It is hereby agreed and declared that the said insurance shall be and is an insurance (lost or not lost) at and from Liverpool to west ^{or} and south-west coast of Africa during her stay and trade therein

and back to a port of call ^{or} and discharge in the United Kingdom,

"Returning 20% for risk ending in "10 months,

"Returning 40% for risk ending in 8 months,

upon the body, tackle, apparel, ordnance, munition, artillery, boats, and other furniture, of and in the ship or vessel called the *William Dent*, and it is also agreed and declared that the subject matter of this policy as between the insured and the said company so far as concerns this policy shall be and is as follows upon—

"Ship value . . .	£2,000
Cargo . . .	11,000
	<u>£13,000 "</u>

In the margin was written—

"Held covered at 13s. 4d. % per month, if longer than 12 months out."

The only plea material to this case was the ordinary plea of deviation, "That after the commencement of the risk and before any of the losses or the misfortune alleged the said ship without sufficient cause and excuse did not proceed on the said voyage and deviated therefrom."

The following facts appeared at the trial, before Kelly, C.B., in London:

The *William Dent* sailed in July, 1869, from Liverpool, bound to the coast of Africa with a general cargo, and arrived at Kinsembo on that coast on the 28th September, 1869, where she discharged her outward cargo and took in a cargo consisting of ivory and other articles. She left Kinsembo on the 8th of November, not then having a full cargo, and proceeded to several places on the coast of Africa, taking in more cargo at those places; and about the 21st of November she arrived at Cabenda Bay, which is an open roadstead or bay on the south-west coast of Africa, and at times exposed to heavy seas rolling into the bay. There are no ports at that part of the coast, but vessels load and discharge there. The *William Dent* was anchored in 3½ fathoms of water, about half a mile from the shore, which was as near as she could properly get (vessels being always laden from lighters in Cabenda Bay); where the ivory put on board at Kinsembo was

discharged, and she then proceed to take in more cargo, and was on the 24th of November completely loaded with a full cargo, which belonged to the plaintiffs. On the same day the hatches were battened down and secured, and the ship was then ready to set sail on the homeward voyage to Liverpool. About the 25th of November, when she was ready to proceed to sea, a vessel, called the *Robert Jones*, struck on the rocks at a distance of about four miles off and close to the entrance of the bay. She was however got off the rocks and was towed towards the shore, but she sank in about $3\frac{1}{2}$ fathoms of water and about two or three cables length from the *William Dent*. The *Robert Jones* and her cargo, consisting of coal, were afterwards, about the 25th November, purchased by the plaintiffs' agent at Cabenda for a small sum, and the said agent wrote to the plaintiffs as follows: "I completed the lading of the *William Dent* to-day and she is now ready for sea; but I think it advisable to detain her for a day or two, in order that she may haul alongside the wreck of the *Robert Jones*, to remove the spars and if possible some of the cargo. I write to you at length *via* Bonny, of my purchase of the wreck, which I expect will turn out a very profitable transaction." He afterwards wrote as follows from St. Thomas, where he had gone from Cabenda Bay: "the *William Dent* is loaded and at Cabenda, but I have left instructions to the master to remain at Cabenda as long as there is a prospect of him saving sufficient of the cargo and spars of the *Robert Jones*, to warrant the detention. I instructed him to haul the *William Dent* alongside the brig, and in that position he will be able to save a vast quantity of cargo and gear."

The *William Dent* was not moved from her first place of anchorage until driven therefrom as hereinafter mentioned, nor was she in any way employed in salvaging the wreck of the *Robert Jones*; but her master and crew, with the exception of one or two left on board as a watch, were so employed.

The vessel remained in Cabenda Bay, with her full cargo on board, until the 26th December, and her detention there was solely for the purpose of employing

her master and crew in saving portions from the wreck of the *Robert Jones* and her cargo.

On the 5th December, there was a heavy tornado from the south-east, which parted the cable of the *William Dent*, and before the ship could be brought up with second anchor, drove her athwart the *Robert Jones*, thereby causing some of the copper of the *William Dent* to be torn off, and also part of her bulwarks and rails to be carried away. The winds generally prevalent on the coast near Cabenda in November and December are southerly winds.

The bulwarks and rails were repaired and the copper (as far as it could be), the vessel being afloat, and on the 26th December, the *William Dent* loaded as aforesaid, left Cabenda Bay bound for Liverpool. The plaintiffs' mate stated that, according to his judgment and opinion, the *William Dent* left in a perfectly seaworthy condition. He added that, in his opinion, the planking underneath was not injured, but he would not on his oath say that it was not injured.

During her said voyage to Liverpool the *William Dent* encountered bad weather, and was stranded at the island of Anna Bon, and during her said voyage events occurred in respect and on account of which the plaintiffs claimed in this action for a total loss.

Kelly, C.B., after the above-mentioned facts were proved by the plaintiffs' witnesses, expressed his opinion that the plea of deviation was proved. He proposed thereupon to nonsuit the plaintiffs, to which their counsel objected, asking that the jury should be directed according to the judge's opinion to find a verdict for the defendants on the issue joined on the plea of deviation, and thereupon Kelly, C.B., expressed his opinion to the jury, and they gave their verdict accordingly on the said issue, and were thereupon, by the consent of the parties, discharged from giving their verdict upon any other issue.

This bill of exceptions was then tendered and duly signed.

Cohen (with him *O. P. Butt*), for the plaintiffs.—The usual doctrine that delay constitutes deviation, though applicable to a voyage policy, does not apply to this policy, which is to some extent a time

policy, shewing on its face that the duration of the risk was not longer than the parties contemplated. Whether the risk was substantially varied or not was a question for the jury, which, having regard to the peculiar customs of the South African coast trade, they might well have answered in favour of the plaintiffs—1 *Arnould on Marine Insurance* (4th edit., 446), *Laroche v. Oswin* (1). In *Mount v. Larkings* (2), the jury found the delay to be unreasonable, and it was on that finding that the Court based their decision.

Milward (with him *Charles Russell and French*), for the defendants.—The words of the material clause of the policy are “stay and trade,” which mean “stay for the purpose of trade.” The use of the words ^{and} together in other clauses of the policy shews that the parties appreciated the difference between them. The *William Dent* was staying at Cabenda for the purpose of salving the *Robert Jones*, and the plea of deviation was therefore clearly proved—*Way v. Modigliani* (3). No doubt there are cases where African trading ships have been allowed to act as hulks or tenders without varying the risk insured against, but then the policies have been framed, as in *Hamilton v. Sheddon* (4), with special reference to such employment. In this case the ship was actually damaged while remaining at Cabenda after she was loaded. [He was then stopped by the Court.]

Cohen in reply.—It is not necessary for the plaintiffs to contend that this is purely a time policy. But it was clearly intended by the parties that the assured should have a discretion to remain a shorter or a longer time on the African coast, for the underwriters were to receive an increased premium for the longer time. If the policy be so framed as to allow a certain time on the coast, it is immaterial to the underwriters for what purpose the ship stays, and the plaintiffs might well have satisfied the jury that the purpose in this case was not unreasonable. The words “stay and trade” should be inter-

preted as enlarging the power of the assured (*i.e.* the ship may stay and she may also sail about trading on the coast), not as restricting her stay on the coast to the one purpose of trading.

COCKBURN, C.J.—I am of opinion that the Lord Chief Baron’s ruling in this case was right. The policy in question is not a voyage policy *simpliciter*, nor a time policy *simpliciter*, but it is a combination of both. It is a voyage policy in the sense that it was to cover the voyage to the African coast and back, and the period that the vessel might “stay and trade” there, while it is a time policy in the sense that the vessel has liberty to “stay and trade” for any period the assured might think proper, subject to the payment of the additional premium mentioned in the policy.

I cannot concur in the ingenious interpretation put for the plaintiffs upon the words “stay and trade,” *viz.*, that the words enable the vessel to stay for any purpose, and also to trade on the coast. I think they mean “stay for the purpose of trade only.” If for instance, after loading the cargo, the master was uncertain where it would be best to carry the cargo, a stay pending a decision to what port he should carry it would, in my opinion, be within the policy.

No doubt in such a case, a question of fact may arise, as in *Hartley v. Buggin* (5), whether the staying had the voyage for its object, or whether the risk had been varied. If, for instance, there had been in this case any evidence that, by the custom of the South-West African coast trade, a ship might be applied to such a purpose as the *William Dent* was here,—that this purpose was in fact an ordinary purpose of the voyage within the contemplation of the parties,—it would have been different, and there might well have been a question for the jury. Here, however, there was no evidence whatever that the employment of the vessel for salvage purposes was an ordinary purpose of the trade in question, and therefore the jury were properly directed to find for the defendants.

BLACKBURN, J.—I am of the same opinion. It is not necessary, in order to

(5) 3 Dougl. 39.

(1) 12 East. 131.

(2) 8 Bing. 108.

(3) 2 Term Rep. 30.

(4) 3 Mee. & W. 49; s. c. 7 Law J. Rep. (N.S.) Exch. 1.

discharge the underwriter, that the risk should have been *increased*. He stipulates for particular risks only, and if they are *substantially varied*, though they be not increased, that is enough to discharge him from his liability—1 *Phillips on Insurance*, p. 564, sec. 983. It is obvious from the words of the policy what sort of risk it was intended to cover, and if it were shewn that the purposes of the South West African trade included by custom peculiar purposes different from other trades, the words of the policy might well cover staying and trading for all those customary purposes. If, therefore, there had been any evidence of this, it might have been proper to ask the jury whether the stay of the ship at Cabenda in this instance had for its object any of the ordinary purposes of a South-West African trading voyage; and this view is borne out by the way in which the question was left to the jury in *Hartley v. Buggin* (5). But here no evidence whatever was offered that such a stay was in the ordinary course of such voyage; and we do not therefore require to rely on the doctrine laid down in *Ryder v. Wombwell* (6), that a mere *scintilla* of evidence is not sufficient to require the judge to leave the matter to the jury.

The risk here was varied; and where that is the case, the underwriter has a right to say; *non hac in fœdera veni*, and the Lord Chief Baron was therefore right in directing the verdict for the defendants.

KEATING, J., and MELLOR, J., concurred.

GROVE, J.—I also think the Lord Chief Baron was right. There can be no doubt as to the law, that deviation, in order to discharge the underwriter, need not involve *increase* of the risk. But it may be that the risk incurred here was not different from that contemplated originally, there being liberty to “stay and trade” on payment of an increased premium. I think the use by the parties of both the words “and or” in other parts of the policy, shews that the parties were alive to the difference of meaning, and that the words “stay and trade” are to be read conjunctively, and mean “stay

(6) 38 Law J. Rep. (n.s.) Exch. 8 s. c. Law Rep. 4 Exch. 32.

trading” or “stay for trading purposes only;” and that being so, the risk has been varied, and the loss is not covered by the policy.

HONYMAN, J., concurred.

Judgment for the defendants.

Attorneys—Walker, Sons & Field, for plaintiffs
Argles & Rawlins, for defendants.

1872.
Nov. 22. } *In re MARSHALL TURNER.*
1873.
Jan. 24. }

Attorney—Suspension by Superior Courts
—Practice—Materials for Rules Nisi and Absolute.

When another Superior Court has made an order to suspend an attorney for misconduct, this Court will grant a rule nisi for a similar suspension, upon proof of all the materials used before the other Court, of the judgment delivered and order made by such other Court, and of the identity of the attorney, and this rule nisi will make itself absolute unless cause be shewn within the time prescribed therein.

Garth (Murray with him), for the Incorporated Law Society (on November 22, 1872), moved for a rule absolute in the first instance to suspend an attorney from practising in this Court for ten years in consequence of an alleged misappropriation of moneys, upon affidavits verifying an order of the Master of the Rolls of July 6, 1872, suspending the attorney from practising as a solicitor of the Court of Chancery for ten years, and verifying the identity of the attorney.

He stated that in the same case the Court of Queen's Bench had granted a rule absolute in the first instance upon similar affidavits, but that the Court of Common Pleas had granted only a rule to shew cause upon production of the same materials as were before the Master of the Rolls, with affidavits verifying the order and the identity. He referred to *In re Wright* (1), *In re Brutton* (2), and

(1) 1 Exch. Rep. 658; s. c. 17 Law J. Rep. (n.s.) Exch. 128.

(2) 41 Law J. Rep. (n.s.) C.P. 58.

1 *Ohit. Arch. Pract.* p. 154, 12th Ed., and 23 & 24 Vict. c. 127. s. 25, which makes it imperative upon one Superior Court to strike an attorney off the rolls upon proof that he has been struck off the rolls of another Superior Court; and suggested that if such a proceeding was reasonable in that case, it was *à fortiori* so in the case of a temporary suspension.

[BRAMWELL, B.—We ought to see the judgment of the Master of the Rolls. One Court might suspend an attorney for some good reason which would not be applicable to another Court. MARTIN, B.—I do not think the rule should be absolute in the first instance. The attorney should have the opportunity of bringing the facts before us.]

The matter having been further discussed, the COURT (3) made the following order—"It is ordered that unless cause be shewn on or before the 4th day of Hilary Term, 1873, the said Marshall Turner be suspended from practising as an attorney of this Court for ten years, with leave nevertheless to apply again to this Court in the meantime. Upon notice of this rule to be given to Marshall Turner,"—and directed that the rule should be drawn up on reading, first, office copies of the petition of the Incorporated Law Society to the Master of the Rolls, of the affidavits used upon the hearing of the petition, and of the order made by the Master of the Rolls and also an affidavit verifying such copies and the identity of the attorney; and, secondly, a transcript of a shorthand writer's notes of the judgment of the Master of the Rolls, and the writer's affidavit verifying the same.

Garth (*Murray* with him) moved in the Second Division of the Court (on January 24, 1873), to make the above rule absolute, no cause being shewn; but the Court (4) said it was unnecessary to move, since this was not a rule to shew cause, but a rule *nisi*, which unless cause were shewn made itself absolute.

Attorney—Williamson, for the Incorporated Law Society.

(3) Kelly, C.B., Martin, B., Bramwell, B., and Channell, B.

(4) Bramwell, B., Cleasby, B., and Pollock, B.

1873. }
Jan. 20. }

SANDERSON v. ASTON.

Principal and Surety—Master and Servant—Alteration of Terms of Service—Discharge of Surety.

A bond was given by the obligor as surety that a servant would from time to time, and at all times during the service, satisfactorily account for and pay over to the master all moneys received by the servant for the master's use. One of the terms of the service was that it should be terminable by one month's notice on either side, but this was not known to the surety. After the commencement of the service the master and servant agreed, without the knowledge of the surety, that the service should be terminable by three months' notice:—Held (by KELLY, C.B., PIGOTT, B., and POLLOCK, B.; dubitante MARTIN, B.), that the surety was not discharged.

But the servant having failed satisfactorily to account for and pay over moneys which he had received for the master's use, and the master, having with knowledge and without informing the defendant thereof, retained the servant in the service,—Held, that the surety was discharged as to defaults committed by the servant after he was so retained.

The declaration claimed 250*l.*, the penalty of a bond, subject to a condition whereby after reciting, amongst other things, that by an agreement, bearing even date with the bond, the plaintiff had agreed to admit one Johnson into his service as clerk and traveller, on his obtaining two respectable persons to become securities for his duly and faithfully accounting to the plaintiff in his business of a lead, glass and colour merchant, in manner thereafter mentioned, and for his faithful and honest conduct during the time of his continuance in the service, and that the defendant and another had, at the request of Johnson, agreed to become such securities as aforesaid; the condition of the bond was declared to be that—if Johnson should from time to time and at all times well and satisfactorily account for and pay over and deliver to the plaintiff all and every sum and sums of money and securities for money, goods and effects

whatsoever which he, Johnson, should receive for the use of the plaintiff, or which should at any time or times be entrusted to his care by the plaintiff, or his correspondents or customers or others to whom he was or should be liable or accountable, and should not at any time embezzle, make away with, obliterate, deface or in anywise injure any of the money, securities for money, books, papers, writings, goods or effects of the plaintiff or any of his correspondents or customers or others, and also should in all respects fully and strictly and without qualification perform his, Johnson's, part of the agreement with the plaintiff—then the bond should be void, otherwise to remain in full force. Averment that the plaintiff admitted into his said service Johnson, who for a long time continued therein, and although Johnson during his service from time to time received for the plaintiff's use divers sums of money, yet (for assigning a breach of the conditions of the bond) Johnson did not well and satisfactorily account for or pay over or deliver to the plaintiff the said several sums of money or any of them, and 84l. 9s., parcel of the said sums, was wholly unpaid and unaccounted for by Johnson.

Second plea, on equitable grounds, that one of the terms of the agreement in the condition mentioned was that the agreement should be terminated by one month's notice on either side, and that the plaintiff and Johnson, after the making of the agreement, without the knowledge, privity or consent of the defendant, altered and varied the agreement, and made the same terminable by three months' notice on either side, and thereby materially increased the risk of the defendant as surety for Johnson, and that the said defaults of Johnson were committed by him after the alteration and variation of the agreement.

Third plea, on equitable grounds, that Johnson, before the said commission of the said defaults, had committed during the service divers other defaults of the same kind, and that the plaintiff, though well knowing the said last-mentioned defaults, wholly omitted and neglected to inform the defendant thereof, and notwithstanding the said last-mentioned de-

faults continued to employ and retained Johnson in the service, and that the defaults herein pleaded to were committed by Johnson during the said continuance and retention of him by the plaintiff in the service.

Demurrers to both pleas, and joinder therein.

R. G. Williams, for the plaintiff.—The second plea is bad, for the alteration was immaterial, and not such as to increase the risk of the surety. An increase of the clerk's salary and of his duties and liabilities, if made behind the surety's back, will discharge him—*Bonar v. Macdonald* (1); not so a reduction of the salary and the duties—*Frank v. Edwards* (2).

[*MARTIN, B.*—The alteration seems to me material. Suppose the clerk wished to relieve the defendant from his liability he could not do so under three months instead of one. The same mischief would happen if the defendant heard that the clerk was beginning to lead a dissipated life and to get into money difficulties, and wished to call upon the plaintiff to dismiss the clerk.]

The defendant would not be entitled to call on the plaintiff to dismiss the clerk for such conduct.

[*KELLY, C.B.*—Is there anything to shew that the defendant when he signed the bond knew that the service was terminable at one month?]

No; and on that ground it was decided in *Stewart v. McKean* (3), that though there was a material alteration in the nature of the employment the surety was not discharged. In *The North Western Railway Company v. Whinray* (4) a change in the agent's salary was held to discharge the surety, because the terms of the salary were named in the bond.

[*POLLOCK, B.*, referred to *Rees v. Berrington* (5).]

The allegation that the risk was in-

(1) 3 H.L. Cas. 226.

(2) 8 Exch. Rep. 214; s. c. 22 Law J. Rep. (N.S.) Exch. 42.

(3) 10 Exch. Rep. 675; s. c. 24 Law J. Rep. (N.S.) Exch. 145.

(4) 10 Exch. Rep. 77; s. c. 23 Law J. Rep. (N.S.) Exch. 261.

(5) Tudor L.C. 887.

creased is an inference of law, not a statement of fact. As to the third plea, *Phillips v. Foxall* (6) would be conclusive against the plea but for this distinction. The reasoning of the judgment in that case is limited to the facts, viz., dishonesty or such gross misconduct as would justify the master in dismissing the servant at once. Here the plea may mean only that the clerk without any dishonesty omitted to pay over moneys received, and that, though it would give a right of action against the surety, would not justify the master in dismissing the clerk unless there was an express condition that he might. The plea ought to have shewn how the defendant was prejudiced.

Lewers, for the defendant, was desired to restrict his argument to the second plea.—The defendant is discharged because if he had been told of the alteration of the terms he would have been entitled to revoke his guarantee. An alteration of the time of service is always material to the surety's risk—*Bonar v. Macdonald* (1), *Taylor v. Wildin* (7). The service was in fact a new one. The declaration says that the agreement was referred to in the bond, and it is consistent with that that the whole agreement was recited in the bond or known to the surety.

R. G. Williams replied.

KELLY, C.B.—I am decidedly of opinion that there is nothing alleged in the second plea which will discharge the surety. The contract between the employer and the employed, as recited in the declaration, was that the employed should duly account for moneys he received and pay them over to his employer. The second plea does not deny that the employed received and failed to pay over moneys which he was bound to pay over. So far, therefore, it is no answer to the declaration. But it says that there was a provision in the agreement that it should be terminable on either side by one month's notice, and that after the agreement was made and before any breach, the employer and employed agreed together to vary the terms by altering the one month to three

months. The question is whether this discharges the surety. Now if it clearly appeared that the surety entered into the obligation of the bond on the footing of the contract between the employer and the employed, and with notice to himself of the provision as to determination, then undoubtedly *The London and North Western Railway Company v. Whinray* (4) is an authority to shew that the basis of the contract between the plaintiff and the defendant would have failed, and therefore that the surety would have been discharged. But it does not appear on this record that when the surety executed the bond he had notice of that provision, or that any particular term of the contract was known to him. All that he is shewn to have known was that the employed was to account for and pay over all moneys received. No authorities have been cited to shew that under these circumstances the surety is discharged, and I think he is not.

But the third plea raises a very different question. The authorities shew clearly that where under a contract of service such a breach of duty—whether it be dishonesty or not—is committed on the part of the employed, that his employer has power to dismiss him, there the surety can call on the employer to do so. The question for us is, whether the breach of duty alleged in the third plea was such as to entitle the plaintiff to dismiss his clerk, and therefore to entitle the defendant to call on the plaintiff to do so. It was said, firstly, that a default might occur without any dishonesty. It is true that the clerk might receive moneys and without any dishonesty fail to pay them over. But the question is whether the default was such as to constitute a breach of duty. Now, it might be that the clerk only lost the money by an accident, and was enabled by borrowing or in some other way to make up the amount and pay it over, so that no default in paying it over occurred, but that is not the language of this plea. It says that he had received moneys and had failed to pay them over. The question is if that is not *prima facie* a breach of duty. I think it clearly is. The clerk was bound to pay over, and therefore it is enough to say that there is *prima facie* a breach of duty, which would

(6) 41 Law J. Rep. (N.S.) Q.B. 293.

(7) 37 Law J. Rep. (N.S.) Exch. 173; s. c. Law Rep. 3 Exch. 303.

have entitled the employer to dismiss the employed, and then the authorities shew that the surety is entitled to call on the employer to dismiss his clerk. I think, therefore, that the third plea is good, because the surety is discharged.

MARTIN, B.—I think the third plea is good on the authority of *Phillips v. Foxall* (6). I do not wish to differ from the rest of the Court, but my own impression is that the second plea also is good. If the plaintiff and his clerk agreed to any alteration of the terms of service which would cast on the surety a further liability, the surety would be discharged. I think when a clerk is liable to be dismissed at a month's notice, it is an alteration of the terms which may be very material to the surety if instead of one month three months' notice is required, for the mischief I mentioned during the argument might happen.

PICOTT, B.—I think the second plea raises no defence. It states, indeed, that the plaintiff and Johnson by making the alteration "materially increased the risk of the defendant as surety," but that is an inference of law, and I think the risk was not increased. We have to see if the change in the terms of service affords the surety any defence in equity. I think it does not. If the surety had agreed to become bound on certain terms, and those terms were so changed between the employer and his clerk as to increase the risk of the surety, he would be discharged. But if the change is in some purely collateral and immaterial point, that would afford no defence to the surety. I think the nature of the change in this case was such that it did not affect the surety. The change from a notice at one month to one at three months could not increase the risk, and the surety therefore has no defence on this ground.

I agree with my Lord on the third plea.

POLLOCK, B.—I am of the same opinion as to the third plea. On the second, the only diffidence I feel is in consequence of what my brother Martin has said. But for that I should have no doubt that this plea—seeing the mode in which it is pleaded, and necessarily pleaded—affords no defence. In

Whitcher v. Hall (8) an agreement was made between the plaintiff and Joseph Hall, and the defendant, James Hall, that the plaintiff should let Joseph thirty cows for milking, the defendant to be surety for the payment of the rent. The plaintiff afterwards, by agreement with Joseph, let him a less number of cows, and sued the defendant, James, on the original agreement for unpaid rent. It was held that he could not recover. Bayley, J., said (9), "The new agreement was binding only on those persons who were parties to it. If it had been intended to bind James by it he should have been consulted; he had a right to insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may perhaps be very little difference between the two contracts, but the question does not turn on the amount of the difference; the question is whether the contract performed by the plaintiff is the original contract to which the defendant was a party. If it is, then James is bound by it, otherwise he is not." There the surety took care that the terms of the original agreement should be made part of his own contract. That was not done in *Frank v. Edwards* (2), nor in *Stewart v. McKean* (3). Moreover in the cases cited, whenever the terms of the original agreement were not made part of the surety's contract, and yet the Courts have said that the surety was discharged, they held that the alteration in the terms was a material alteration. The discussion of that question shews that it is open to the Court to consider whether the alteration was material or not, and I think the alteration in the present case was not material. The pleader probably having that distinction in his mind drew this plea as an equitable one.

Judgment for plaintiff on the demurrer to the second plea, and for defendant on the demurrer to the third plea.

Attorneys—Cunliffe & Beaumont, agents for Gale & Middlemiss, Hull, for plaintiff; Lambert, Burgin & Petch, agents for J. E. Pettingell, Hull, for defendant.

(8) 5 B. & C. 269.

(9) *Ibid.*, page 275.

1873. }
Jan. 20. } RICHARDSON v. WILLIS (NO. 2).

Action—Costs given by Statute.

An action lies to recover the costs on an indictment for libel given by 6 & 7 Vict. c. 96. s. 8.

The plaintiff having been acquitted upon an indictment for libel preferred by the now defendant at the assizes for the county of Essex, brought this action to recover his taxed costs under 6 & 7 Vict. c. 96. s. 8 (1).

The demurrer to the declaration (which is fully set out in the first report of this case, *ante*, p. 15) was now argued.

Willis, for the defendant.—The action is not maintainable; the plaintiff ought to have applied to the Judge who tried the indictment or to the Court of Queen's Bench for execution for his costs—*The Queen v. Latimer* (2).

[*MARTIN, B.*—That was a criminal information, and the proceedings were therefore of necessity in the Queen's Bench.]

[*Philbrick*, for the plaintiff, referred to *The Queen v. Newhouse* (3).]

There is no precedent for such an action.

[*MARTIN, B.*, referred to *Com. Dig. tit. Debt A. 9.* "Debt lies upon any statute which gives an advantage to another for the recovery of it."]

Philbrick, contra, was not heard.

KELLY, C.B.—A Judge of oyer and terminer would have no power to issue execution for these costs. Wherever a statute gives a right to a sum of money and provides no other means of enforcing it, an action lies, for which the passage cited from *Comyn's Digest* is an authority.

(1) That section enacts—"That in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information such costs to be taxed by the proper officer of the Court before which the said indictment or information is tried."

(2) 15 Q.B. Rep. 1077; s. c. 20 Law J. Rep. n.s.) Q.B. 129.

(3) 22 Law J. Rep. (n.s.) Q.B. 127.

MARTIN, B., PIGOTT, B., and POLLOCK, B., concurred.

Judgment for the plaintiff.

Attorneys—A. R. Oldman, agent for F. J. Snell, Great Dunmow, for plaintiff; Brans, Laing & Eagles, for defendant.

1872. }
Nov. 18. }
1873. }
Jan. 22. }

GEAROE v. JONES.

Principal and Surety—Joint and several Debtor—Release of Debtor as if discharged in Bankruptcy—Discharge of Surety.

Of two obligors of a joint and several bond, one executed it as surety for the other, whereof the obligee then had notice. Afterwards and without the consent of the surety, the principal debtor by deed conveyed to the obligee of the bond, as trustee for the creditors of the principal debtor, all his estate to be administered for the benefit of the creditors, in like manner as if the principal debtor had been at the date thereof duly adjudged bankrupt, and in consideration thereof each of the creditors did thereby release the principal debtor "from his and their respective debts in like manner as if" the principal debtor "had obtained a discharge in bankruptcy." The obligee having sued the surety on the bond,—Held, by KELLY, C.B., and BRAMWELL, B. (dissentiente PIGOTT, B.), that the obligee by executing the deed had released the surety.

Declaration on a bond dated 18th of September, 1863, for 200*l.* to be paid by the defendant to the plaintiff, subject to a condition for avoidance, if one Thomas Jones and the defendant or either of them, or either of their heirs, executors or administrators should pay to the plaintiff 100*l.* with interest on the 18th of March next ensuing.

Breach, non-payment.

Plea that the bond was a joint and several bond of the defendant and one Thomas Jones, executed by the defendant as surety only for Thomas Jones, whereof the plaintiff then had notice, and afterwards on the 7th of May, 1869, and

before action, a deed was made between Thomas Jones of the one part, and the plaintiff and one Ackerman on behalf and with the assent of the creditors of Thomas Jones of the other part, which witnessed that—"Thomas Jones hereby conveys all his estate and effects to the said J. Cragoe and T. Ackerman absolutely to be applied and administered for the benefit of the creditors of the said Thomas Jones in like manner as if the said Thomas Jones had been at the date hereof duly adjudged bankrupt, and in consideration of the premises each of the creditors of the said Thomas Jones doth by these presents release the said Thomas Jones from his and their respective debts in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy." That the plaintiff made and executed the deed without the defendant's consent and without any request on his part so to do.

Demurrer to the plea and joinder therein.

Murphy, for the plaintiff.—The deed is not and does not purport to be an absolute release of the principal debtor, but amounts only to a covenant not to sue. The words "in like manner," &c., shew that the plaintiff intended to reserve all his rights against the surety, and they therefore do reserve them—*Bateson v. Gosling* (1). If the debtor had obtained a discharge in bankruptcy, the surety would not have been released. This was a deed under the Bankruptcy Act, 1861, sect. 163 of which enacts, that the order of discharge shall not release or discharge any person who was jointly bound or had made any joint contract with him. The surety will still have his remedy against the principal debtor.

Bosanquet, for the defendant.—Even if the plaintiff's construction of the deed be right, the defendant will only have a right to recover a dividend from the principal, whereas his right is to recover the whole debt, of which nothing but Parliament or the Court of Bankruptcy can deprive him. The deed is the plaintiff's own act, not the operation of a bankruptcy or a statute.

(1) 41 Law J. Rep. (n.s.) C.P. 53.

[*Pigott, B.*—The plaintiff executes only as trustee for creditors.]

It is an agreement between the creditor and debtor to prejudice the defendant, and he is, therefore, released. A bankruptcy would release the principal, and therefore would discharge the defendant, whether he be regarded as a surety or as joint debtor.

Murphy, in reply.—The defendant's construction gives no meaning to the words "in like manner," &c. The true principle is laid down in *Lewis v. Jones* (2), and adopted by Willes, J., in *Bateson v. Gosling* (1).

Cur. adv. vult.

The following judgments were read January 22nd, 1873—

Pigott, B. (3).—This was an action on a bond, and the plea stated that the bond was a joint and several bond of the defendant and one Thomas Jones, and that it was executed by the defendant as surety only for the said Thomas Jones; that after the execution of the bond, a deed of composition was made between Thomas Jones of the one part, and the plaintiff and one Ackerman, on behalf and with the assent of the creditors of the said Thomas Jones; of the other part, whereby Thomas Jones conveyed all his estate to the plaintiff and Ackerman, to be administered for the benefit of his creditors "in like manner as if Thomas Jones had been at the date thereof duly adjudged bankrupt," and in consideration of the premises each of the creditors did release Thomas Jones from his debts "in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy." It then averred that the plaintiff executed the deed without the consent or request of the defendant. To this plea there was a demurrer, and the question is what is the effect of the release given in the deed by the plaintiff to Thomas Jones.

The law, since the decision of the cases

(2) 4 B. & C. 506, 515 (n).

(3) *Pigott, B.*, stated that his judgment had been read and approved by Channell, B. That learned Judge heard the argument, but having retired from the Bench between Michaelmas Term, 1872, and Hilary Term, 1873, was not a party to the judgment of the Court.

including *Kearsley v. Cole* (4), has been settled in this: that in a composition deed between a debtor and his creditor, the latter may reserve his remedies against a surety, and thus prevent the latter from being discharged. "The reserve of remedies has that effect upon this principle"—says Parke, B., in his judgment (5); "first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if the instant afterwards the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him." In the recent case of *Bateson v. Gosling* (1), Willes, J., also says, "If the principal debtor consented to the creditor having recourse to the surety the latter would not be discharged, and would have his remedy against the principal debtor;" and concludes thus: "It comes round then to this, that if the principal debtor be *absolutely discharged of the debt*, the creditor can have no remedy against the surety."

Such being the law on this subject, the present question (as I think) is one of construction, *i. e.*, is the principal debtor *absolutely* discharged of the debt by this deed? Or is it only a composition of and a personal discharge from the principal creditor's claim? Of course this depends upon the meaning of the language they have used; they are not bound to use the precise language of Courts of law, it is enough if they express themselves so that their meaning can be ascertained. It is as follows—"Each of the creditors doth by these presents release the said Thomas Jones from his debts." If the release stopped there it would be clear enough, but the release has this additional language, *viz.*, "*in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy.*"

(4) 16 Mee. & W. 128; s. c. 16 Law J. Rep. (N.S.) Exch. 116.

(5) 16 Mee. & W. 135; s. c. 16 Law J. Rep. Exch. (N.S.) 117.

Now the words, "in like manner," &c., are not redundant; but are obviously introduced for some object, and we are bound to give them some application if they are capable of it, and if they do not qualify the words of release, what meaning can be given to them? But there is an application; the plaintiff retains his securities. If this plaintiff, instead of having a surety to resort to for this debt, had had a pledge for it, how could it be contended that under such a form of release as this he could be taken as intending to give up his pledge? But if the release be absolute he would be so bound—*vide Cowper v. Green* (6). Then if his pledge is reserved to him, why is not the right to resort to a surety? I cannot see how this form of release makes any distinction between them. "In like manner" must mean in the same way or to the same extent, and I think that compositions having now taken the place of bankruptcy proceedings very much gives the key to this form of release, and that the parties evidently meant to give and to receive under this deed a release having a similar effect to a discharge in bankruptcy as between these covenanting parties and no more, the right to retain the pledge and also to resort to a surety being in such case preserved. If the latter in his turn sues the debtor he is only in the same position as if he had agreed to a reservation of remedies in the most precise terms; or as if the principal creditor had expressly covenanted only not to sue him, or that the discharge should be personal only. We know that it is the object of the Legislature not to drive debtors into a Bankruptcy Court. And there can be no hardship upon the debtor in giving effect to his own covenant, for he has chosen to compound upon these terms, the best he could make, and they are obviously just as between all parties.

Nor can the true construction of a covenant entered into between parties be made to depend upon any rules of pleading? If they have agreed to a qualified or personal discharge of the debtor only, it cannot be turned into an absolute one against their intention by any form that

(6) 7 Mee. & W. 633; s. c. 10 Law J. Rep. (N.S.) Exch. 346.

the pleadings can take. The true construction of their language must govern their rights, and where their language is inaccurate, still it is to be expounded *ut res magis valeat*; but to give no meaning to the language when it is plainly capable of it, would be at variance with every rule of exposition.

For these reasons I think the plaintiff is entitled to judgment.

BRAMWELL, B.—It is clear law, that when a debtor is released or discharged by the act of the creditor, that is, when he can plead in bar to an action by a creditor, that creditor's voluntary act, a joint debtor, though the obligation be joint and several, can plead the same matter in bar. Has the plaintiff done this? I think he has. He has executed a deed *whereby he releases Thomas Jones* in like manner as if he had got his discharge in bankruptcy. Would that be a good bar if pleaded by Thomas Jones to an action brought by the plaintiff against him? Why not?

In terms it releases, but it adds in like way as if the certificate in bankruptcy had been obtained; but such a certificate would have been a bar to an action by the now plaintiff against him. Therefore he releases him in like manner as a certificate which would have been a bar would operate. Therefore the plaintiff has released Thomas Jones, and so has released the defendant or furnished the defendant with a bar. This construction gives effect to the words "in like manner as a certificate in bankruptcy," because those words give the plaintiff a right to retain any lien or security he has got, which right he would not have, if he had given a simple release. The plaintiff proposes to read this as though the words were, "I release you with no other consequence than a discharge in bankruptcy would have." In that case it might be that those words would qualify the release and turn it into a covenant not to sue. But those are not the words. They are, I release you as though you had got a discharge in bankruptcy. This is no technical view of the case. I think it extremely probable that the parties meant what I say they have said.

I have not noticed the fact that the

defendant says he was a surety. Had he been only a surety and not a joint debtor, I think he would have been discharged on the principle I have mentioned; viz., that the plaintiff by his own act had given a bar to the principal debtor.

KELLY, C.B.—I am of opinion that the defendant is entitled to the judgment of the Court. This is a case of creditor, debtor, and surety. One Jones was indebted to the plaintiff in the sum of 100*l.*, and the defendant was his surety. The plaintiff now sues the defendant for the debt, and he pleads that the plaintiff has released the debtor without his consent, and he is therefore discharged. Now the law upon this subject is clear and well settled. If the creditor without the consent of the surety by his own act destroy the debt or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged. But the plaintiff contends, that in this case he has reserved to himself the right to recover against the surety by the deed in which the debtor is released. The plea of the defendant sets forth the deed *in hæc verba*, by which it appears that Jones, the debtor, having assigned all his estate and effects to the plaintiff and another as trustees for the benefit of his creditors, the deed proceeds thus—"The said Joseph Gragoe (the plaintiff), in consideration of the premises, doth by these presents release the said Thomas Jones from his (and their) respective debts in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy."

Now the question is this, what is the effect of a release in these terms upon the rights and the condition of these three parties? It appears to me that the meaning of these words is clear and unambiguous. If Jones the debtor had obtained a discharge in bankruptcy he would have been discharged not only as against the plaintiff, the creditor, but also as against the defendant, the surety. It seems to me, therefore, free from doubt, that the plaintiff by this release having discharged his debtor as against the surety as well as himself and without the consent of the surety, the surety is himself dis-

charged. It is contended that this is a qualified or conditional release; but I look in vain throughout the deed for any words of qualification or reservation or imposing or creating a condition. It is true that if a debtor has obtained his discharge in bankruptcy, the creditor may still recover against the surety, and he or the surety, if he pay the debt, may prove against the debtor's estate under the bankruptcy. If, therefore, the debtor had really become bankrupt, and obtained his discharge, although the creditor might have recovered against the surety notwithstanding the discharge of the debtor, his right or power to do so would have been the act or consequence of the law or the Statutes of Bankruptcy; whereas here the discharge of the surety is his own act, and he cannot by his own act reserve to himself the right to sue the surety notwithstanding the discharge of the debtor, unless by the agreement of the debtor that notwithstanding his discharge in case the creditor shall recover against the surety, he will remain liable to the surety for the debt. The whole case upon this deed simply stated is, that the plaintiff has released his debtor in like manner as if he had obtained a discharge in bankruptcy, and inasmuch as if he had obtained a discharge in bankruptcy he would have been absolutely released, and neither the plaintiff nor the defendant could have afterwards sued him for the debt, he is absolutely released now, and as such absolute release was without the consent of the surety, the surety is by law discharged.

It is argued that a creditor may release his debtor, and reserve to himself the right to sue the surety, and that no doubt may be done, but only where the language of the release or of the deed in which it is contained is such that the debtor accepts the release subject to the condition that he shall remain liable to pay the debt to the surety, in case he shall have paid it, whether voluntarily or under process to the creditor. Such was the case in *Bateson v. Gosling* (1), where the release was contained in a trust deed under the Bankruptcy Act of 1861, but which was followed by a proviso that any creditors, including the plaintiff, who had

any security for their demands, "or any part thereof to the payment whereof any person or persons is or are liable as a surety or sureties for the debtor may execute these presents without prejudice to the same security or to the claim against any surety or sureties;" and this proviso was held to convert the release into a mere covenant not to sue, and to preserve the right of the creditor to sue the surety, and of the surety to sue the debtor; and Willes, J., in his judgment expressly states—"When the release in the deed is looked at, it is in terms a release subject to a proviso, and although but for such proviso it would be an absolute release so that there could be no proceeding afterwards against a surety, yet the proviso expressly reserves the creditor's remedy against a surety, and stipulates that any creditor may execute the deed without prejudice to his claim against any surety;" and again—"But if the principal debtor consented to the creditor having recourse to the surety, the latter would not be discharged, and *would have his remedy against the principal debtor.*" So that the release in that case was no discharge of the debtor as against the surety by reason of the proviso. Here there is no such proviso, nor is a single word to be found throughout the deed pointing to any qualification or any reservation whatever. The release is in its terms a simple and absolute release by the creditor of his debtor, in like manner as if the debtor had obtained a discharge in bankruptcy. If the debtor had obtained a discharge in bankruptcy the surety would have had no right of suit against him; and as the plaintiff, the creditor, has put his debtor in a condition in which the surety has lost his right to proceed against him, and this act has been done by the plaintiff, the creditor, without the consent of the surety, I hold that thereby he has discharged the surety, and that this action is, therefore, not maintainable.

Judgment for the defendant.

Attorneys—W. M. Hacon, agent for J. Donague, Swansea, for plaintiff; Norris, Allen & Carter, agents for M. Tennant, Aberavon, for defendant.

1873. }
Jan. 27. } MATTHEWS v. BAXTER.

Contract Voidable not Void—Drunkenness—Ratification.

A contract made when one of the parties to it is so drunk as to be incapable of transacting business or knowing what he is about, is not void but voidable only, and may be enforced against him, if ratified after he becomes sober; and this, though his condition was known to the other party to the contract at the time of making it.

Action for breach of contract in refusing to complete the purchase of and pay for land and houses which the defendant, at a sale by auction, agreed with the plaintiff to buy of him.

Second plea, that before and at the time of the making of the alleged agreement the defendant was so drunk as to be incapable of transacting business or knowing what he was doing, as the plaintiff then well knew.

Replication, that after he became sober, and whilst able to transact business and knowing what he was doing, and before action, the defendant ratified and confirmed the agreement.

Demurrer to the replication, and joinder therein.

Morgan Lloyd, for the plaintiff.—The plea alleges facts which make the contract not void but only voidable—*Molton v. Camroux* (1). To shew that the replication is bad, the defendant must contend that the plaintiff, after making the contract with knowledge of the defendant's state, could refuse to perform it if the defendant wished to enforce it. It is not necessary to refer to the cases in equity where specific performance has been decreed in spite of drunkenness.

Manisty (Hills with him), for the defendant.—The question depends on whether the contract was void or only voidable. For the defendant it is contended it was void. *Molton v. Camroux* (1) only decided that when a person who is really a lunatic, of unsound mind, so as to be

(1) 2 Exch. Rep. 487; s. c. 18 Law J. Rep. (n.s.) Exch. 68; affirmed in error, 4 Exch. Rep. 17; s. c. 18 Law J. Rep. (n.s.) Exch. 356.

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incompetent to manage his affairs, but is "apparently of sound mind and not known to be otherwise, enters into a contract for the purchase of property which is fair and bona fide, and which is executed and completed, and the property, the subject matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him" (2). Here the contract is executory, the parties can be restored altogether to their original position, and the plaintiff knew of the defendant's condition, and the question is therefore concluded by *Gore v. Gibson* (3), where to an action by the indorsee against the indorser of a bill of exchange a plea similar to the present was held good, on the ground that the contract was altogether void. Parke, B., there said (4), "Where the party when he enters into the contract is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances is guilty of actual fraud. The modern decisions have qualified the old doctrine, that a man shall not be allowed to allege his own lunacy or intoxication; and total drunkenness is now held to be a defence." Alderson, B., says (5), "A party even in a state of complete drunkenness may be liable in cases where the contract is necessary for his preservation—as in the case of a supply of actual necessities; so also where he keeps the goods when he is sober. The ground of his liability there is that an implied contract to pay for the goods arises from his conduct when he is sober, although I much doubt whether if he repudiated the contract when sober, any action could be maintained upon it. Here the action is

(2) 2 Exch. Rep. 503; s. c. 18 Law J. Rep. (n.s.) Exch. 72.

(3) 13 Mee. & W. 623; s. c. 14 Law J. Rep. (n.s.) Exch. 151.

(4) 13 Mee. & W. 626; s. c. 14 Law J. Rep. (n.s.) Exch. 152.

(5) 13 Mee. & W. 627; s. c. 14 Law J. Rep. (n.s.) Exch. 153.

necessarily brought upon the contract itself; and when it is shewn that the contract by indorsement was made when the defendant was in such a state of drunkenness that he did not know what he was doing, and especially when it appears that the plaintiff knew it, I cannot doubt that the contract is void altogether. It is just the same as if the defendant had written his name upon the bill in his sleep in a state of somnambulism." The plaintiff, therefore, ought to have new assigned.

KELLY, C.B.—A question arises here which is not free from doubt. In very early times it was held that neither lunacy nor drunkenness, at the time of making the contract, would excuse the person in that condition from the consequences, or enable him to avoid the contract. But the law has been so far changed that lunacy or drunkenness, at all events, makes a material difference, and it was argued in this case that a contract made by a person in the state in which the defendant was—if known to the other contracting party—is entirely void. But if we look at the nature of the question it is difficult to understand on what ground that could be held. For could a person, who has made a contract when in that state, be prevented when he comes to his sober senses from saying to the other contracting party, "It is true I was drunk and did not know what I was doing when I made this contract, but now I am sober and I mean to hold you to it"? And if he would have the right to say that, must there not be a reciprocal right in the other party? I think, therefore, that such a contract is not absolutely void, for if it were, the party who was intoxicated would not have the right to call upon the other to fulfil the contract. Then, if as regards one of the parties to the contract it is only voidable, not void, it must be so as to the other; and if it be only voidable, then if the person who was intoxicated recovers afterwards and deliberately declares himself to be bound, in principle and common sense the contract must be held binding on him.

It is true that there are many *dicta* in the cases, but though the cases on the subject, both at law and in equity, are

numerous, no authority has been cited which has decided that such a contract as the present is absolutely void *ab initio*, and in the absence of such a decision we must leave it for a Court of appeal so to decide.

I think, therefore, that since the defendant deliberately ratified the contract when sober, he is bound by it, and that the plaintiff is entitled to judgment.

MARTIN, B.—I quite agree with the Chief Baron. I think the Judges in *Gore v. Gibson* (3) meant that such a contract was not enforceable against the will of the defendant, and that the construction which it has been attempted to put upon their use of the word "void" (6) does not express their real meaning. If in that case, Pollock, C.B., Parke, B., and Alderson, B., had said that if the defendant had gone the next day, when sober, to the plaintiff, and said to him, "I adopt the indorsement," still the plaintiff could not recover, then I should agree with Mr. Manisty; but they did not say that, and I do not believe that they meant that such a contract was incapable of being ratified by the defendant when sober.

The present was a contract for the sale of some property, and it is possible that though the defendant was drunk when he made it, the purchase might be valuable, and very desirable for him to keep. It is quite consistent with this plea and replication that the defendant, when he had recovered, went to the auctioneer and said, "It is true I was in liquor when I bid for that property, but I am entitled to the benefit, and I insist on the fulfilment of the bargain." There the seller would have been bound. In the cases where such a contract has been held not enforceable, it has been treated as a fraud, as a case where the one party imposed on the other when incapable, and contrary to his interest.

Therefore I decide this case on the principle that it is competent for the drunken man when he becomes sensible to insist on the fulfilment of the bargain, and that the contract is voidable only, not void.

(6) In that case, as reported in 14 Law J. Rep. (N.S.) Exch. 152, 153, the learned Judges did not use the word "void." They said that the contract was not binding on the defendant.

PIGOTT, B.—I am of the same opinion, but with some hesitation. The language used by Parke, B., and Alderson, B., in *Gore v. Gibson* (3) must be looked at with reference to the matter in hand. I think they used the word "void" in the sense that the contract could not be enforced against the defendant.

A contract requires the consent of both parties, and if one of them is in such a state that he does not know or understand what he is doing, I have some doubt whether any contract is made.

Upon the whole, though my opinion is not strong, I am disposed to think that we have come to the right conclusion. It is in accordance with good sense, and I am glad that we have been able to arrive at it. I am inclined to think that the contract was voidable, not void, and so could be ratified.

POLLOCK, B.—I am of the same opinion. I think it was generally felt in the profession after *Molton v. Camroux* (1), that though it did not overrule *Gore v. Gibson* (3), yet it was impossible to support everything that was there said by the Judges. In all the cases it seemed to be considered that drunkenness did not afford a defendant a better defence to an action for breach of contract than lunacy would.

Judgment for the plaintiff.

Attorneys—Helder & Roberts, agents for J. L. Paitson, Whitehaven, for plaintiff; Wood & Tinkler, agents for Tom Milburn, Workington, for defendant.

(In the Second Division of the Court.)

1872.	} FRANCESCO v. MASSEY.
Nov. 25.	
1873.	
Jan. 30.	

Ship and Shipping—Charter-party—Charterer's Liability to cease—Demurrage at Port of Loading.

It was agreed by charter-party that a ship should load a full cargo at Liverpool in fifteen working days and when loaded proceed to Genoa, there "to be discharged, weather permitting, at the rate of not less

than thirty-five tons per working day from the time of her being ready to unload. And ten days on demurrage over and above her said laying days at 8l. per day. Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." The charterer having occupied more than twenty-five days in loading, the shipowner, after a full cargo had been loaded, sued the charterer for the demurrage in respect of some of the ten days:—Held, that the charterer was protected by the last clause of the charter-party.

Action in the Liverpool Court of Passage.

The declaration claimed five days' demurrage at 8l. a day, and damages for fourteen days' detention of the plaintiff's ship beyond the laying days, under a charter-party dated the 17th of January, 1872, made at Liverpool, between Perasso, the captain, as agent for the plaintiff, and the defendant, the charterer, described as of Liverpool, whereby it was agreed that the ship, then lying in Birkenhead docks, should proceed alongside a certain dock, and there load in fifteen working days (except in case of frost or other contingencies, which did not happen), from the charterer's agents a full and complete cargo of steam coals, and being so loaded should therewith proceed to Genoa, "and discharge the cargo upon being paid freight at the rate of 13s. 6d., British sterling, per ton (of 20 cwt.) on the entire quantity discharged." The freight to be paid one-third in Liverpool on signing bill of lading, and the remainder after right delivery of cargo. "The vessel to be discharged, weather permitting, at the rate of not less than thirty-five tons of coal per working day from the time of her being ready to unload. And ten days on demurrage over and above her said laying days at 8l. per day. The vessel to be consigned to the charterer's agent at the port of discharge, paying the usual commission of two per cent. Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage."

The defendant pleaded (*inter alia*) that his alleged liability for demurrage and

detention was such liability as was mentioned in the last clause of the charter-party; that before action the ship was loaded, and that thereupon his alleged liability ceased. Issue thereon.

At the trial before the learned assessor at Liverpool the following facts were proved—The ship arrived at the loading dock on the 12th of February, but the charterer did not begin to load her till the 13th of March, and she was not fully loaded till March 23. The plaintiff had received from the defendant five days' demurrage recovered in an action brought by Perasso before the ten days allowed for demurrage had expired, and now claimed the remaining five days' demurrage, and damages for the days the ship was detained. The jury found a verdict for the plaintiff for 127l. 10s., leave being reserved to the defendant to move this Court to reduce the verdict by the claim for demurrage.

A rule to shew cause having been accordingly obtained—

T. H. James and Kirby, for the plaintiff, shewed cause, and relied on *Pedersen v. Lotinga* (1) and *Christofferson v. Hansen* (2), contending that the demurrage accrued *de die in diem*; that the lien only covered demurrage at the port of discharge; hence the clause exempting the charterer from liability applied only to such demurrage, and could not divest a vested cause of action. *Bannister v. Breslauer* (3) might be relied on by the defendant, but its authority was impaired by *Gray v. Carr* (4) and *Christofferson v. Hansen* (2). Here the defendant was not an agent, but the principal.

Goldney, for the defendant, in support of the rule, relied on *Bannister v. Breslauer* (3), and contended that the parties intended that after the cargo was loaded no action should lie against the defendant for demurrage at the port of loading; and so thought the plaintiff, for he made haste to bring, in the captain's name, an action

for five days' demurrage before the loading was finished.

CLEASBY, B. (on Jan. 30, 1873), read the following judgment of himself, MARTIN, B., and BRAMWELL, B.—

[After stating the facts and the last clause in the charter-party the judgment proceeded.]

It has been for some time not unusual to have a similar clause in charter-parties. Such a clause was probably introduced at first in cases where it appeared upon the charter-party that the charterer was only an agent, and in such cases it has been held that the charterer could not be sued for any delay in loading the cargo which was afterwards provided. In *Oglesby v. Yglesias* (5) and *Milvain v. Perez* (6), the language of the clause, no doubt, expressly included defaults before and in shipping the cargo. But there was no provision in those cases giving the shipowner any corresponding lien for demurrage, or anything in the nature of demurrage, and the Court of Queen's Bench held the owner bound by the clause as a part of the bargain. The words of discharge in those cases were the same as in the present, viz., that upon the loading of the complete cargo, "the liability should cease." Hill, J., says, in his judgment in *Milvain v. Perez* (7), "In the present case the defendants have shipped the cargo. The plaintiffs say that that has been done too late, for that they were bound to do it in regular turn, but the defendants, by express terms, to which the plaintiffs have agreed, have stipulated that their liability shall cease as soon as they have shipped the cargo. We must give the plain effect to these plain terms, and must hold that this alleged liability does not attach." In those cases the language was express that the liability should cease in respect of defaults, as well before as after the shipping of the cargo, and the only bearing of those cases upon the present is that it was considered that

(1) 5 Week. Rep. Q.B. 290; s. c. 28 Law Times, 267.

(2) 41 Law J. Rep. (N.S.) Q.B. 217.

(3) 36 Law J. Rep. (N.S.) C.P. 196; s. c. Law Rep. 2 C.P. 497.

(4) 40 Law J. Rep. (N.S.) Q.B. 257.

(5) E. B. & E. 930; s. c. 27 Law J. Rep. (N.S.) Q.B. 356.

(6) 3 E. & E. 495; s. c. 30 Law J. Rep. (N.S.) Q.B. 90.

(7) 30 Law J. Rep. (N.S.) Q.B. 92.

the plain meaning of the words, "liability to cease," was not that the liability should cease to accrue, but that the liability should cease to be enforced. It further appeared in those cases that the charterer was acting as agent only, but this distinction is not so material, since it may be assumed that there was some reason for this stipulation, and unless the person interested in the goods to be delivered was a different person from the charterer, there would be no object in it.

In the present case the language is general that the charterer's liability should cease, and for this cessation of liability a corresponding benefit is obtained by the shipowner in having a lien upon a full cargo for demurrage which he would not have unless expressly agreed. If, then, the words, "liability to cease," are to be read in the same sense as in the cases referred to, the agreement discharges the charterer from demurrage at Liverpool, unless there be something in the charter-party to shew that demurrage at Liverpool could not be contemplated, which is certainly not the case.

The case of *Bannister v. Breslauer* (3) is very like the present one. In that case it did not appear upon the charter-party that the defendant was acting as agent, and there was no precise provision as to breaches before and after loading, but the provision was general that "the charterer's liability was to cease" (the same words as in the previous cases and the present one) "when the cargo was shipped, provided that the same was worth the freight at the port of discharge, and the captain was to have an absolute lien on the cargo for freight, dead freight and demurrage which he or owner should be bound to exercise." These last words, "which he should be bound to exercise," have no bearing upon the question to which breaches the discharge is to be applicable. It was held that the discharge extended to demurrage at the port of loading as well as the port of discharge, and reliance is placed in the judgments upon the word "demurrage" being used in the clause giving the lien, and there being nothing to limit it to demurrage at the port of discharge.

The reasons given for the conclusions

arrived at apply to the present case, and we should adopt the authority of that case unless there be some other decision inconsistent with it.

We were referred to two cases on behalf of the plaintiff—*Petersen v. Lotinga* (1) and *Christofferson v. Hansen* (2).

The first of those cases was decided in 1857. The charter-party provided that at the port of loading after the agreed days for loading, the captain was to receive 5*l.* a day for demurrage, day by day. For the port of discharge the language was different. There was to be demurrage after the laying days at 5*l.* a day. It was considered that the express agreement that the charterer should pay the 5*l.* a day, day by day, shewed that the clause providing that the owners should rest on their lien for freight and demurrage must apply to the demurrage at the port of discharge. The judgments are founded upon the use of the words "day by day" in connection with the payment of demurrage at the port of loading, and there is nothing of that sort in the present case.

In the other case of *Christofferson v. Hansen* (2), the words were general that all liability of the charterer should cease as soon as he had loaded the cargo, and it was held that those words did not relieve the charterer from liability for delay in loading. But in that case no lien was given for demurrage or delay in loading. And this forms a main ground of the judgment of Blackburn, J., and Lush, J. Lush, J., says (8) pointedly, "If there were any provision giving the shipowner an equivalent advantage, that would be a good reason for his absolving the defendant altogether, but there is no such provision." And he goes on to say that if the plaintiff gave up the liability of the defendant for past breaches, he would have no remedy except against the foreign principal not named, and perhaps not known. The claim now in question is not for detention but for demurrage, and the charter-party clearly gives a lien upon the complete cargo for all demurrage, both at the port of loading and of discharge. Neither of the cases last referred to are at variance

(8) 41 Law J. Rep. (N.S.) Q.B. 220; Law Rep. 7 Q.B. 516.

with the case of *Bannister v. Breslauer* (3), and we can give effect to the plain meaning of the words, viz., that upon the shipowner acquiring a lien upon the full cargo for freight and demurrage, all liability of the charterer for both shall cease.

BRAMWELL, B. (9).—I think this rule should be made absolute. By the charter-party the charterer was entitled to a certain number of days on demurrage. This was applicable to the loading as well as to the unloading. These days were consumed at the port of loading, and for a portion of them the defendant paid. The present claim is for the residue of the days so consumed at the port of loading. The charter contained a clause that on loading the cargo the charterer's responsibility should cease, the captain having a lien for freight and demurrage. It is impossible to say that this would not give a lien for demurrage incurred as well at the port of loading as at the port of discharge, and so for the demurrage sued for, and it seems impossible to hold that the matters as to which the liability was to cease, were not the same as the matters as to which the lien was given. If so the defendant is discharged, and this action is not maintainable. *Bannister v. Breslauer* (3) is in point, or more than in point if the action there was one, not for an agreed sum for demurrage but for unliquidated damages for delay in loading, and though that case has been questioned it has not been overruled, and is binding on us. Nor is *Christofferson v. Hansen* (2) opposed to this view; on the contrary the Lord Chief Justice and Blackburn, J., rely on the absence of a lien for the matter as to which the right against the charterer is supposed to be given up, and the reasoning of Lush, J., is very striking. He says (8): "If there were any provision giving the shipowner an equivalent advantage, that would be a very good reason for his absolving the defendant altogether." And so he holds liability for freight is given up but

(9) After reading his own judgment, Cleasby, B., said that Bramwell, B., entirely concurred in it, but had prepared a judgment, which being mislaid could not be then delivered, and which it was desirable to publish. This judgment was as follows.

not liability for damages for delay in loading because there was a lien for freight but none for such damages.

Mr. James, for the plaintiff, suggested that this demurrage was payable *de die in diem*, and that therefore a vested cause of action accrued, which it could not be supposed it was intended to give up. The demurrage is not in terms payable *de die in diem*, and it may be in point of law that none is due till it is known how much will be due. Here, however, all the days were consumed. But in order to give effect to clear words, we must hold either that the charterer's liability was contingent on his not loading a cargo, or that if a cause of action vested it was defeasible, and divested on the loading of the cargo.

Rule absolute.

Attorneys—Prior, Bigg & Co., agents for J. B. Wilson, Liverpool, for plaintiff; W. W. Wynne agent for Forshaw & Hawkins, Liverpool, for defendant.

1873. } FEATHERSTON v. WILKINSON
Jan. 24. } AND ANOTHER.

Charter-party—Prima Facie Evidence of Damage—Onus of Proof.

A charterer who has, through the ship-owners' default in not being ready to load at the time agreed upon, been compelled not only to pay increased freight, but also to pay a higher price for the article to be shipped, is—in the absence of evidence that he will be able to sell at a corresponding increased price at the port of delivery, or of other evidence that he will not be a loser—entitled to recover as damages the additional price paid as well as the difference in freight.

Declaration on a charter-party by which the defendants agreed that their ship, the *Edith Emily*, should sail to Northumberland Dock on the Tyne, and there in the first or second week in January, 1872, load 1,300 tons of coal and carry the same to Havre for delivery on payment of freight—averring that the ship was not ready to load in the first or second week in January, 1872, whereby the plaintiff was

put to expense in chartering other ships, and in buying coal to load them with at an increased price.

Pleas—payment into Court of 27*l.* 10*s.*, the amount of increased freight; and never indebted as to the residue of the claim. Issue.

The action was tried before Brett, J., at the Northumberland Summer Assizes, 1872, when the following facts were proved—After the making of the charter-party, the plaintiff agreed to take 1,300 tons of coal at 10*s.* 6*d.* a ton from the proprietors of the Bebside Colliery in the first or second week of January, 1872; and the *Edith Emily* was then named by him, according to the custom, as the ship to load the coal, and was put on the "turn book" of the colliery for the weeks agreed upon. The ship having lost her turn by the defendants' default, the plaintiff could not get his coal till he had procured another ship to carry it away, which ship would, according to the custom of the Tyne, have to wait her turn. The plaintiff lost no time in chartering and loading two other vessels with 1,300 tons of coal, but the price had in the meantime advanced 1*s.* 6*d.* a ton, which advance he had to pay in order to get the coal.

There was no evidence that the plaintiff was under any contract to deliver the coal at Havre at a particular price.

A verdict was entered for the plaintiff for 97*l.* 10*s.*, the total additional price he had to pay, leave being given to defendants to move to enter the verdict for them, the Court drawing inferences of fact.

A rule was afterwards obtained accordingly, on the ground that the damages were too remote and not recoverable.

G. Bruce (with him Holker) shewed cause, contending that the custom as to loading in turn being known to the defendants, as well as the necessary consequence of their not being ready in time, there was *prima facie* evidence of loss to the extent of 97*l.* 10*s.*; that the *onus* was on the defendants of shewing that the plaintiff's loss would be diminished by an increased profit at Havre or otherwise; and that, in the absence of any such evidence, there was no ground for inferring that the coal was purchased for resale at

all, and that the damages were therefore recoverable.

Herschell, in support of the rule, contended that the damage claimed was far too remote. The regulation as to loading was not necessarily known to the defendants, being a colliery regulation and not a dock or port regulation; and if the plaintiff had been compelled in consequence of the defendants' default to buy coal at a higher price, he really had a more valuable article, which he could sell at a corresponding increased price. If he had been under contract to deliver at Havre at a fixed price, and the defendants had known it, the case would have been different. But there was no evidence of any such contract; and it was for the plaintiff to prove its existence if he relied upon it. The rise in price at the colliery being proved, the Court may well infer a corresponding rise in the value of coal at Havre.

KELLY, C.B.—I think this rule should be discharged. The defendants contracted to be ready with their ship at a certain time to receive coal at Newcastle and carry it to Havre. In consequence of their default the plaintiff had to purchase coal at a higher price, paying 97*l.* 10*s.* extra, of which sum he is a loser. That is *prima facie* evidence of loss, and unless altered by other evidence, it is conclusive evidence of loss caused solely by the defendants. The mere possession of more valuable coal does not necessarily diminish loss, for the increased value may not extend beyond the particular port of shipment; and it by no means follows that because it is dearer there, it is dearer all over the country, or at a particular foreign port.

The defendants should have shewn that this coal was bought for resale, and that there was at Havre a corresponding rise in the value of it. In the absence of such evidence we cannot draw the inference we are asked to draw for the defendants.

MARTIN, B.—I also think the rule should be discharged, because I hold there was evidence for the jury on which they might give damages beyond the mere difference in freight. At the same time I think that the question has been raised before us in a very inconvenient form.

PIGOTT, B.—The inference I draw is, that the plaintiff had to pay more for the coal than he would have had to pay if the defendants had kept their contract, and drawing that inference, I think the damage claimed is not too remote.

Rule discharged.

Attorneys—S. R. Hoyle, agent for Lisle, Durham, for plaintiff; Shum, Crossman & Crossman, agents for Turnbull, West Hartlepool, for defendants.

1873. }
Jan. 16. }

ENGLAND v. COWLEY.

Conversion—Interference by Assertion of Right to Possession—Acquiescence in Assertion of Right.

The grantee under a bill of sale of furniture, being in possession in the house of the grantor and intending to remove the goods from the premises, was told by the landlord (who was there for the purpose of distraining) that he would not allow them to be removed till his arrears of rent were satisfied, and that he was prepared to resist the removal by force. The grantee thereupon made no further attempt to remove the goods:—Held, by KELLY, C.B., BRAMWELL, B., and POLLOCK, B. (dissentiente MARTIN, B.), that such assertion of the intention not to allow the removal of the goods did not, under the circumstances, amount to a conversion by the landlord.

Trover for household furniture, &c. Plea, not guilty; and issue thereon.

The action was tried at Guildford, before Bramwell, B., during the Surrey Summer Assizes, 1872, when the following facts appeared in evidence.—

In May, 1871, the plaintiff took from one Matilda Morley a bill of sale of the furniture, &c., mentioned in the declaration, as security for the repayment to him of 150*l.* by weekly payments of 30*s.* each, extending over 100 weeks. The furniture was deposited in a house at Chelsea, which was rented by Morley from the defendant.

On the 6th of August, 1871, Morley being in arrear with the weekly instalments, the plaintiff put a man in possession of the furniture; and on the 11th sent vans for the purpose of removing the furniture under the powers contained in his bill of sale. When the vans arrived at the house, the defendant was there for the purpose of distraining for his rent, and he refused to allow the plaintiff's men to remove the goods. The plaintiff being informed of this went himself to the house, when the defendant, who had in the meantime got two police constables to remain with him, again refused to allow any of the goods to be removed unless 12*l.* 10*s.* rent due to him was first paid, intimating that the policemen would, if necessary, be instructed to resist the removal of the furniture by force. The plaintiff thereupon tendered the defendant 7*l.*, believing that no more rent was then due. This money not being accepted, the plaintiff withdrew without further attempt to remove the goods, and the defendant subsequently distrained; whereupon this action followed.

The jury, having been asked whether the defendant deprived the plaintiff of his goods, and prevented him having dominion over them or removing them, found a verdict for the defendant.

A rule having afterwards been obtained, pursuant to leave reserved, to enter a verdict for the plaintiff for an amount agreed upon, if the Court should be of opinion that the jury should have been directed to find a verdict for him,—

Holl shewed cause, contending that there was no conversion of the goods by the defendant, the plaintiff having acquiesced in the assertion by the defendant of his right to prevent the goods being removed.

[MARTIN, B.—In *Fouldes v. Willoughby* (1) Alderson, B., said that “if a man has possession of my chattel and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and consequently amounts to a conversion.”]

That is merely a *dictum* of Alderson, B.,

(1) 8 Mee & W. 540, 548; s. o. 10 Law J. Rep. (N.S.) Exch. 364.

which differs altogether from the judgment which was delivered in that case by Lord Abinger. In order to constitute a conversion there must be more than a mere assertion of right, there must be such an assertion of right as amounts to an actual deprivation of the plaintiff's possession of the goods. He cited *Heald v. Carey* (2) and *Burroughes v. Bayne* (3).

[*MARTIN, B.*, referred to *Fowler v. Hollins* (4).]

Joyce (with him *Montagu Chambers*), for the plaintiff, contended that on the authority of the note to *Wilbraham v. Snow* (5) the plaintiff was entitled to the verdict. *Holt, C.J.*, there held that "the denial of goods to him who has a right to demand them is an actual conversion and not evidence of it only; for what is a conversion but an assuming upon oneself the property in and right of disposing of another's goods?" This is supported by *Burroughes v. Bayne* (8). Again, the defendant here, having assumed to act in a particular right, i.e. the right to the ownership of the goods, is estopped from denying that he was so acting.

POLLOCK, B.—I am of opinion that this rule ought to be discharged. The defendant has never been in possession of the goods. No doubt there might be cases where, although not in actual possession, a defendant might have been guilty of a conversion; but here the defendant did nothing more than express his intention of resisting the removal, which the plaintiff should have met by a practical assertion of his rights, if he meant to hold to those rights afterwards. The rule of law is laid down in *Co. Litt.*, 253 b, that the fear which prevents a man entering into possession, and so renders a claim by words equivalent to an entry in deed, must concern the person of the man, and also must not be a vain fear but some just cause of fear. There was no such just cause here. The defendant did not detain the goods, he merely insisted

that the plaintiff should not remove them.

BRAMWELL, B.—I am of the same opinion. There was no detention or conversion by the defendant. Even if he had used force instead of merely expressing an intention to do some act, I think trover would not have been maintainable against him here. The gist of the action is the conversion of the goods, as for instance, by selling them or converting them for the defendant's own purposes, or otherwise depriving the owner of the possession of them. I tell a man he must not take his pistol out of a drawer for the purpose he is intending, say of fighting a duel, and he forbears,—or if I tell a man on horseback he must not ride along a particular road, and he forbears, can I be said to convert the pistol or the horse in either case? To maintain trover, a plaintiff must be able to shew that he has been actually deprived of his dominion over the property in question. Here the plaintiff's man was left in possession, and the finding of the jury was to the effect that there was no such assertion of right as excluded the plaintiff from his dominion over the goods.

MARTIN, B.—I think this action is maintainable. The plaintiff went to remove the goods after sunset when the defendant could not distrain, and the defendant, in order to be in a position to distrain the next morning, told the plaintiff he would prevent the goods being removed, and took steps to resist the removal by bringing policemen on the premises. Surely the plaintiff was not bound to use force to get his goods; and if not, the defendant, who compelled him in this way to allow his goods to remain, was, in my opinion, guilty of a "conversion," for he deprived the plaintiff of that control over the goods which as owner he was entitled to exercise.

KELLY, C.B.—I agree with my brothers *Bramwell* and *Pollock* that there was no conversion in this case, and that the rule should therefore be discharged. Suppose a lodger was ill and in bed, and the landlord insisted on preventing the removal of the bed he was lying on by the true owner. That would be an interference with the owner's control over his property,

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(2) 11 Com. B. Rep. 977; s. c. 21 Law J. Rep. (N.S.) C.P. 97.

(3) 5 Hurl. & N. 296; s. c. 29 Law J. Rep. (N.S.) Exch. 186.

(4) 41 Law J. Rep. (N.S.) Q.B. 277.

(5) 2 Wms. Saund. 47 g.

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but could it be said to be a conversion? In *Fowler v. Hollins* (4) the plaintiff was out of possession and the defendant had control of the goods. So too, the decision in *Wilbraham v. Snow* (5), and the dictum of Alderson, B., in *Fouldes v. Willoughby* (1), which the plaintiff relies on, are based on the assumption that the plaintiff in the case was deprived of possession of his goods.

The plaintiff may have a remedy in some other form of action; but it would be unjust that, under the circumstances of this case, he should be able to recover from the defendant the full value of the goods.

Rule discharged.

Attorneys—C. H. Lind, for plaintiff; W. Day, for defendant.

(In the Second Division of the Court.)

1873. { MACKRETH v. THE GLASGOW AND
Jan. 23. { SOUTH-WESTERN RAILWAY COM-
PANY.

Writ of Summons—Scotch Corporation—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 16—Service on Officer of Corporation—Railway Booking Clerk.

The defendants, a Scotch railway company, having their line of railway and their principal office in Scotland, employed an ordinary booking clerk to issue tickets at the Carlisle station of the Caledonian Railway, over the southernmost portion of whose line the defendants had running powers:—Held, that such clerk, although the only officer of the defendants resident in England, was not a "head officer" or "clerk," within the meaning of the 16th section of the Common Law Procedure Act, 1852, so as to render service on him of an ordinary writ of summons a good service on the company.

This was an appeal from a decision of a Judge at Chambers, dismissing a summons taken out by the defendants to set aside the writ issued against them.

The defendants were a Scotch railway company, whose line of railway was

situated in Scotland. They had running powers over the Caledonian Railway between Gretna and Carlisle, and they kept at the Carlisle station of the Caledonian Railway a booking office and a booking clerk. The defendants' principal office of management was situated in Glasgow; and the booking clerk at the Carlisle station was their only resident servant or officer in England. The action was brought by a Scotchman resident in Scotland to recover damages resulting from an accident in Scotland alleged to have been caused by the negligence of the defendants' servants.

A rule having been obtained by the defendants, calling on the plaintiff to shew cause why the service of the writ should not be set aside—

Herschell shewed cause, relying on the doctrine laid down in the judgment of the Court of Queen's Bench in *Newby v. Van Oppen and Col's Patent Fire Arms Company* (1), viz., that where a corporation carry on any part of their business, there they must be taken to be resident, and where they are resident they must be taken to have a clerk or head officer within the meaning of the sixteenth section of the Common Law Procedure Act, 1852, which enacts that "every writ of summons issued against a corporation aggregate, may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer or secretary of such corporation." He also cited *Ingate v. The Austrian Lloyd's Company* (2).

Wills and *J. O. Carter*, in support of the rule, contended that as the contract on which the action was based and the breach of it both arose in Scotland, the English Law Courts had no jurisdiction to entertain the action; and that if they had, the booking clerk at Carlisle, who was served with the writ, was not a "head officer" or "clerk" within the meaning of the sixteenth section of the Common Law Procedure Act, 1852. The defendants' office and place of business was in Scotland; and if their principal office had been in London instead of

(1) 41 Law J. Rep. (N.S.) Q.B. 148.

(2) 4 Com. B. Rep. N.S. 704; s. c. 27 Law J. Rep. (N.S.) C.P. 323.

in Scotland, the mere keeping a clerk for the purpose of issuing tickets at Carlisle, would not have entitled them to be sued in the County Court at Carlisle, as "carrying on business" there—*Shiels v. The Great Northern Railway Company* (3), *Brown v. The London and North-Western Railway Company* (4). In *Newby's Case* (1), on the other hand, the person served was a *bona fide* manager of their staple business, performing precisely the same duties and exercising the same powers as their manager in America.

BRAMWELL, B.—I am of opinion that this rule should be made absolute. If the service is not good under the statute, it certainly is not good at common law. Therefore, we may treat this as a question whether the service was good under the sixteenth section of the Common Law Procedure Act, which says, that "every writ of summons issued against a corporation aggregate, may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer or secretary of such corporation." Now the word "clerk" there, does not mean *any* clerk in the employment of the company, but it means a principal clerk, a clerk who is in the nature of a town clerk or secretary, or such a clerk as we find in the City Companies. That is shewn by *Walton v. The Universal Salvage Company* (5), which did not arise, it is true, upon this statute, but upon the Uniformity of Process Act (2 Will. 4. c. 39), section 13. There it is held, that the word "clerk" did not mean an ordinary clerk in the secretary's office, but such a principal clerk as I have spoken of. Is the person then on whom this writ has been served a "head officer" within the meaning of the sixteenth section of the Common Law Procedure Act? I am of opinion that he is not. He is not the traffic manager, he is not the secretary nor principal managing director, nor chairman, nor any other person of any mark or importance in the company; therefore, one may say, that the words themselves

are decisive against the plaintiff in this action.

The argument for the plaintiff is a reproduction of what is said in the judgment delivered by Blackburn, J., to the effect that wherever a company carry on their business, or any part of it, there they are resident; and where they are resident they must have a head officer, whose knowledge is to be regarded as the knowledge of the corporation. Now that may have been the case in *Newby v. Van Oppen and Colt's &c. Company* (1), for aught that I know to the contrary; but it cannot be true as a universal proposition, that wherever part of a business is carried on, there the party must be treated as resident and as having a head officer.

In this particular case there are certain things which seem to shew strong reason why it could not be so. If this railway had belonged to an individual or a number of individuals not corporate, it is quite certain that under the statute the alleged service would have been an invasion of the 18th section of the Common Law Procedure Act, or contrary to its intention. For the plaintiff would have got at the principal, a Scotchman resident in Scotland, by serving such a servant as this clerk in England. It would be impossible to maintain in that case that a service on such a clerk would have been a good service on the principal; and if it could not be done in the case of an individual, why can it be done in the case of a corporation? Why should we suppose that the statute meant to leave a Scotchman, or a person resident in Scotland, without the operation of the Common Law Procedure Act, and yet to bring Scotch corporations within it, so that in point of fact the corporation could be served in England, when the individual could not be got at by a service in England? One argument put forward for the plaintiff is from the inconvenience of the thing. I confess that if the inconvenience could be measured on one side and on the other, the greater inconvenience would be in acceding to the plaintiff's argument; because, as it has been put to us for the defendants, every transaction taking place in Scotland, between Scotchmen, upon a Scotch contract, resulting in a Scotch

(3) 30 Law J. Rep. (N.S.) Q.B. 331.

(4) 4 B. & S. 326; s. c. 32 Law J. Rep. (N.S.) Q.B. 318.

(5) 16 Mee. & W. 438.

breach of the contract—if I may use such an expression—might be made the subject matter of an action here in England.

There is another argument, namely, that if this were an English company, carrying on business in England and having a head office in London, nobody could say that this man at Carlisle was the head officer within the meaning of the Act of Parliament; so that the man served here would become head officer, not because of the nature of his employment or his duties, but because his employers have their principal office in Scotland, and not in England.

And so, if this company were to amalgamate with the Midland Company, which is not an improbable or an impossible event, and then the head office of the Amalgamated Company was in London, this man would cease to be the head officer immediately, which up to that time he had been! Again, I think the observation is well worthy of notice, that if this action had been brought not in the Superior Court, but in the County Court, the plaintiff could not sue the defendants in the County Court of Carlisle, without special permission—for the cases cited shew that the defendants cannot be said to carry on business there. I think that is a topic perhaps which is not a decisive argument on the matter; but on the words of the Act and the reason of the thing, it seems to me this rule ought to be made absolute.

Then how are we to deal with *Newby v. Van Oppen* (1)? I deal with it by saying there is very great difference between that case and this. Here the employment of the clerk was a very small matter. He had nothing to do but to carry on that ordinary business of issuing tickets which occurs between a railway company and the public. He no doubt was capable of making a contract in a sense, because every time a railway company takes a passenger and takes his money to carry him, they make a contract with him; but the making of these contracts, which may be said almost to make themselves, was the extent, so far as I am informed, of his powers. But in the case referred to, the defendants carried on in London that which was the main and important part

of their business. They were manufacturers of fire-arms, and also sellers of fire-arms, and the thing which concerned them most was the selling of them; and that selling business, which was the main object of their coming into existence, which was their real business, they did in London as well as in America. They may have done more of that in America than in England, but still they did business of the same character in England, and in all probability the person served in *Newby's Case* (1) had power to make the same contracts, or nearly so, as the company had power to make in Connecticut; but there is nothing of that kind here, and therefore the cases are distinguishable.

CLEASBY, B.—I am of the same opinion. The question is, whether there was here a sufficient service under the Common Law Procedure Act, as having been made on a person who can be said to fill the character of "clerk" or "head officer."

Now, there is no difficulty, or at least not much, in applying this to an English Corporation, for there is in such case always a head officer to be found, i.e., some person who may be regarded as the head officer; and in the case of an English Corporation it is quite clear that a clerk appointed for a particular purpose would not answer that description. There may perhaps be two head offices, and the person having the management of each might be regarded as the head officer capable of being served. That would be comparatively a simple and easy question, but that is not the question here. We have to deal with a question certainly of more difficulty; and that is how a person or a corporation is to be served, the head office of which in the ordinary sense of the term is and must necessarily be out of England, but the business of which is in part carried on in England.

Now, I think perhaps the case cited may be said to establish that, if there be any regular branch, agency, or establishment of the business of which branch there is a manager and head officer here, that service on the corporation may be effected by serving such branch manager. In each case of course it would depend upon the nature of the business carried on here. It might be the making of con-

tracts, or it might be connected with some local interest in England rendering it clear that the resident officer was a head officer carrying on and managing the business here. But then when we look at the facts of this case, we find the person served here was merely a clerk issuing tickets. Well, there are hundreds of persons issuing tickets at various places at the same time and for the same company, and the duty of an officer issuing tickets is a totally different one from the duty of a head officer, and it might depend, in some cases, of course to a certain extent, on the terms of a man's employment, which might possibly give him greater powers than those of an ordinary clerk issuing tickets, but I see here nothing which elevates this clerk into the character of head officer.

POLLOCK, B.—I entirely concur with the rest of the Court. At first I was somewhat pressed by *Newby's Case* (1), but upon comparing the facts of it with the present case, it seems to me to be clearly distinguishable. I should be sorry in a case like this, of great and growing practical importance, to distinguish it from a former one upon any but substantial grounds; but such substantial grounds do, I think, exist. In *Newby's Case* (1), the very existence of the company as a trading company in this country made it essential that there should be such a person here as the manager on whom the service in that case was effected, which service the Court held properly effected so as to bind the company. In the present case it seems to me, looking at the character of the company, looking also at the duty performed by the clerk on whom the service was effected, that it was almost a mere accident. I think so partly for the reasons already given by my brother Bramwell that had this been an English company with booking clerks at many different offices, it could not be for a moment contended that any one of those was a clerk or head officer on whom service could be properly made. Then does it make any difference that a portion of the company's line or rather not of their own line, but of the lines over which they have running powers, are in England and another portion in Scotland? I

think not, and I think also that if we were to hold in this case that the booking clerk on whom the service was effected was a proper person to be served, we should be driven almost to this absurdity—(following the abstract proposition as laid down in *Newby's Case* (1)—that in a place where any Scotch Railway Company had running powers in England, if their only servant in England was a porter, then he is a person who superintends the whole English business, whatever it may be, and therefore service on him would be good. I therefore think that this rule should be made absolute.

Rule absolute.

Attorneys—Phelps & Sidgwick, agents for Daniel McAlpin, Carlisle, for plaintiff; Beale, Marigold & Beale, for defendants.

1873. } HOLKER v. PORBITT AND
Jan. 30, 31. } OTHERS.

*Watercourse — Divergence of Stream—
Riparian Rights—Diverging Stream confined in Artificial Course.*

A mill on the bank of a river had been supplied for more than twenty years by water flowing from a stream through an ancient divergent channel, and conducted thence through a reservoir and tunnel constructed in his own land by a former proprietor of the mill, who was also the owner of both banks of the divergent channel. At the place where the reservoir was constructed the divergent stream had formerly, after filling and overflowing a cattle-trough, been allowed to waste itself over the adjoining land, whence it found its way by percolation to the river, into which the stream itself also flowed:—Held, following Nuttall v. Bracewell (36 Law J. Rep. (N.S.) Exch. 1), that an action was maintainable by the present owner of the mill, who had purchased it with all existing water rights, against a riparian proprietor above the point of divergence in the original stream, for obstructing the flow of water to the mill.

Declaration for obstructing and diverting the flow of water to which the plain-

tiff was entitled in certain streams and watercourses to and through his land.

Plea denying the plaintiff's right to the flow of water, and issue thereon.

The action was tried before Willes, J., at the Manchester Summer Assizes, 1872, when the following facts were proved. A stream was divided into two at a point hereinafter and in the plan used at the trial called E, by a collection of stones called a "feather," which, as far as the evidence went, might have been placed there before living memory. The portion diverted by the feather formerly flowed to a farmyard, where it entered a trough used for watering cattle, and after serving this purpose it overflowed the trough, and found its way, not in a definite channel but by percolation, into the river Irwell into which the main portion of the stream also flowed. In 1847, one Walker, who purchased the land between E and the river Irwell, together with a mill on the bank of that river, made a reservoir to collect the overflow at the trough, and conducted the water from the reservoir to the mill through a tunnel or covered drain.

In 1867 Walker conveyed to the plaintiff the mill, together with the right to all wells, springs and streams of water in, under or upon or arising or issuing from or out of all or any part of the lands comprised in his estate (which was copyhold), reserving to himself a supply of water for domestic and other purposes.

The defendants were the owners of land on the banks of the stream above point E, and the plaintiff sued for an obstruction by them of the stream above that point, substantially diminishing the flow of water to the reservoir, and thence to the mill.

A verdict was entered for the plaintiff for 40s., with leave to move to enter it for the defendants, and a rule was afterwards obtained accordingly.

Holker, Kemplay and J. E. Gorst shewed cause.—According to the principle of the decision in *Nuttall v. Bracewell* (1) the plaintiff is entitled to maintain this action. The divergent stream in this case is analogous to the goit in *Nuttall v. Bracewell*, and whatever difference

exists between the facts of the two cases is in favour of the plaintiff in this case. Walker, as riparian owner on the channel between E and the old trough, might have maintained the action, and his right to do so was not affected by his collecting the water which previously ran to waste and confining it in a definite course, nor did he thereby interfere with any rights of owners on the stream above E. The quantity of water diverging from the main stream at E was still precisely the same as before. The *Stockport Waterworks v. Potter* (2) is distinguishable from this case, because here the plaintiff claims as owner of the land a right to water granted to him as such owner, whereas the plaintiffs in the *Stockport Case* (2) claimed only as licensees a right to take water for the use of strangers purchasing from them.

Pope, Herschell and T. H. Baylis, in support of the rule.—The case is governed by *The Stockport Waterworks v. Potter* (2), and the distinction attempted to be drawn between that case and the present does not hold good. Though Walker could have maintained an action such as this by reason of his proprietorship at E, he could not transfer his right to anyone not a riparian proprietor. If he could, the same right might be acquired by any number of persons to whose premises water might be conveyed by pipes from the reservoir, all of whom might sue a proprietor interfering with the original stream above E. The plaintiff must, in order to succeed, shew himself to be a riparian proprietor in respect of the original stream; for new channels, such as the one in question here, give no rights as against the proprietors above—*Bickett v. Morris* (3). The stream from E to the trough cannot be treated as a natural stream. Its being open and not confined in a pipe or drain makes no difference in this, and the fact of its terminating in the overflow at the trough is inconsistent with its being natural. The right claimed by the plaintiff could only be acquired by prescription. Four ways only are suggested by which a stranger like the plaintiff could obtain the right claimed. First, be-

(1) 4 Hurl. & C. 714; s. c. 36 Law J. Rep. (N.S.) Exch. 1.

(2) 3 Hurl. & C. 300.

(3) Law Rep. 1 Sc. Ap. 47.

ing in possession of the pipe and water, as to which the Court held in *Laing v. Whaley* (4) and in the *Stockport Case* (2), that such possession would give no right. Second, As being a riparian proprietor—which he is not—of the original stream. Third, As the grantee of some riparian proprietor from whose bank of the stream the water is carried to him—as to which the majority of the Court in the *Stockport Case* (2), held that the right could not be so acquired, except as against the grantor; and, Fourth, by way of easement—as to which the Court held in the *Stockport Case* (2), that the right could not be so acquired. Lastly, the plaintiff is only a recently enfranchised copyholder of a manor of which the defendants are also copyholders; and as between persons so situated, no such right as the plaintiff claims can be gained by prescription.

KELLY, C.B.—I am of opinion that this rule should be discharged. An ancient stream has existed from time immemorial, running from south to north, on the banks of which the defendant has lands, in respect of which he has the rights of a riparian proprietor. The stream runs from defendant's lands to the point called E, where it divides into two channels, one of which runs to the river Irwell, the other to the spot where the trough was. Formerly, after discharging into the trough, the overflow from the latter channel percolated through the ground and found its way to the Irwell. The plaintiff is possessed of land near the river Irwell, and of a mill which he purchased from Walker, who was, at the time of the purchase, the proprietor of land, part of which constituted both banks of the branch stream running to the trough, and other part of which extended a mile or more thence to the river Irwell.

There was no evidence as to how the channel or branch leading to the trough came into existence; but there was evidence on which a jury might have found that it existed from time immemorial. The "feather" which is found at the division of the stream appears to have been placed there at a very remote period.

(4) 3 Hurl. & N. 675; s. c. nom. *Whaley v. Laing*, 27 Law J. Rep. (N.S.) Exch. 422.

Walker, twenty-five years ago, collected the overflow from the trough, and conducted it in a definite stream to his land near the Irwell. Had he a right to do so? Nothing that he did could take any water out of the stream beyond what formerly flowed into it, so that his operations could not affect the rights of riparian proprietors higher up the stream. If the stream had continued below the trough, and Walker or the plaintiff had appropriated or diminished the quantity flowing to any other person's land below their land, they might have incurred a liability to such persons; but what Walker or the plaintiff did could not interfere with any rights below. Walker found the stream ceasing to run in a definite channel at the trough, and he put the water into a reservoir, and conducted it through a tunnel till it reached his premises which are now the plaintiff's.

If large quantities of water had been taken away by the defendants so as to diminish what flowed down to Walker's property, he might have brought an action against them, and so might the proprietor of land between the point E and the trough. But it is said that the plaintiff, though claiming under Walker, is not a riparian proprietor at all, nor entitled to bring such an action. I think, however, that the plaintiff, or any one else who, after the act done by Walker, is deprived of the water naturally flowing to his land after that act, may maintain such an action as this in the same way as though the water had always flowed to him in a definite channel. Suppose instead of a tunnel the channel had been an open drain, surely every person through whose land the open stream passed would have had the same rights as a riparian proprietor between the point E and the trough. The cases that have been referred to shew no difference between the tunnel and the open stream in this respect. In *Nuttall v. Bracewell* (1), the goit was a covered stream. And as the stream has been enjoyed here for more than twenty years, no question arises as to the acquisition of such a right as the plaintiff claims by user for any shorter period than twenty years.

The case of *The Stockport Water-*

works Company v. Potter (2) is clearly distinguishable from the present—if on no other ground—on the ground that it was the case of the diversion of a stream made by a person who diverted it for his own purposes into a new branch. The bearing of *Nuttall v. Bracewell* (1) on the present case is shewn by the concluding words of Channell, B.'s, judgment. He says, "I see no reason why the law applicable to ordinary running streams shall not be applicable to such a stream as this, for it is a natural stream or flow of water, though flowing in an artificial channel. It may be that the case of an entirely artificial stream (as one flowing from a mine for instance) would be different: but that an artificial stream may be on the same footing as a natural one as regards the rights of riparian proprietors is held in *Sutcliffe v. Booth* (5)."

I may remark that the word "artificial" has two meanings—an artificial flow, i.e. a stream created artificially as by a diversion, or an artificial method of confining a natural or divergent flow as in this case. But though in both senses this be an artificial stream, all persons possessing lands on its banks are entitled to have a reasonable quantity of its water, that is to say, just as much as and no more than flowed along the branch beginning at the point E. For these reasons I think the plaintiff is entitled to maintain this action.

MARTIN, B.—I am of the same opinion. Walker, it is admitted, could have maintained such an action as this. He had a natural stream flowing from the point E to the trough, though no one could tell the origin of it. He therefore had a right to the water flowing in that stream, subject to the proprietors above E, using it in the ordinary way for their own purposes; and if a stream be substantially diminished by such ordinary user of it, the proprietors below may have to submit. But the ordinary user does not, as a rule, substantially diminish the supply of water to those below. Five-and-twenty years ago, this stream lost itself after leaving the trough as in a marsh or swamp. Now it seems to me that, if a proprietor in such a case cuts a channel

for the overflowing water, he thereby acquires a watercourse, and his rights in respect of it are the same as if it was a natural stream. The same water is, in point of fact, carried down to the same destination though through a different channel; and there has been in this case an enjoyment of it for more than twenty years. I do not go into the objection raised as to the land being copyhold, and no easement being capable of being acquired over it.

The real question is, could Walker, having such an interest in this stream as I think he had, assign it to the plaintiff? He could assign a right of way, and why not therefore such a right as this which he himself has? In my opinion, he certainly could assign it. The collection of the water in the reservoir might give proprietors below a right to complain, but does not affect the defendants.

PIGOTT, B.—I am of opinion that the defendant's argument fails altogether. To make this case like the *Stockport Case* (2), there should have been a diversion of water from the stream by a riparian proprietor, who passed the diverted water on to a licensee. Here, however, the branch diverging at E is an ancient stream existing from time beyond the memory of man, not merely, therefore, a diversion of the stream, but equivalent to a diverging branch of the stream itself. Then Walker collects, in an artificial manner, the water which was running to waste, and the plaintiff subsequently became possessed of Walker's land with its water rights. *Nuttall v. Bracewell* (1) shews that those same rights continue in the new proprietor, who claims in the same way as his predecessor in title, viz., as proprietor of the land through which the same stream runs. I consider that the *Stockport Case* (2) has nothing to do with this case, and that this rule should therefore be discharged.

Rule discharged.

Attorneys—Milne, Riddle & Mellor, agents for Woodcock & Sons, Haslingden, for plaintiff; Woodcock & Ryland, agents for Grundy & Co., Manchester, for defendant.

(In the Second Division of the Court.)

1873. } WRIGHT v. THE MIDLAND RAIL-
Jan. 29, 30. } WAY COMPANY.

Railway Company—Carriers of Passengers—Negligence—Liability for Negligence of another Company in exercise of Running Powers.

Under an agreement embodied in an Act of Parliament, the M. Railway Company granted running powers, on the payment of a mileage charge, over a portion of their own line to the L. Railway Company, and regulated by their own servants the passage of all the trains of both companies over such portion. Through the negligence of the servants of the L. Company in the exercise of the running powers, a train of that company ran into a train of the M. Company, by which the M. Company were carrying a passenger in fulfilment of a contract over such portion of their line. The servants of the M. Company were not guilty of any negligence:—Held, that the M. Company were not liable to the passenger for the injuries caused by the collision, since the servants of the L. Company, whose negligence caused the collision, were not concerned in the carriage of the passenger, and were not employed by, or under the control of, the M. Company.

The declaration, in the usual form, charged the defendants, as carriers of passengers, with such negligence in carrying the plaintiff, as a passenger for hire from Leeds to Sheffield, and in the management of the railway and trains, that the plaintiff's train was run into by another train, and the plaintiff was injured, &c.

Plea, not guilty. Issue thereon.

At the trial at the York Summer Assizes, 1872, before Cleasby, B., the following facts were proved—

The defendants are and were before 1865 possessed of the Wellington Railway Station in Leeds, and of a railway therefrom to Sheffield, on which they carry passengers and goods in their own trains. In 1865 the Leeds New Railway Station Act (28 & 29 Vict. c. cclxvii.) was passed, the preamble of which recited that the making of a new railway station, with

NEW SERIES, 42.—EXCHQB.

certain lines of railway, "would be of great public advantage."

By section 2, "the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Acts Amendment Act, 1860, the Railways Clauses Consolidation Act, 1845, and part 1 of the Railways Clauses Act, 1863, so far as the same are not expressly altered or otherwise provided for by this Act, shall apply to the station and works by this Act authorised to be made, and shall be incorporated with and form part of this Act."

By section 4, the expression, "the companies," means the North Eastern Railway Company and the London and North Western Railway Company, or either of them.

Section 13 authorised "the companies" to make and maintain a railway station on the south-east side of and adjoining or near to the Wellington Station, and a railway extending therefrom to a junction with the Midland Railway near a certain bridge; "and the said intended station and railway and the works connected therewith respectively shall, so far as relates to the share or interest of each of the companies therein, for the purposes of tolls and charges and for all other purposes, become and be part of the undertaking of that company, provided that the companies shall not, except with the consent of the Midland Company under their common seal, take, use or interfere with any of the works, lands or property of the Midland Company, except in conformity with the provisions of the heads of arrangement scheduled to this Act."

Section 33—after reciting (*inter alia*) that the Midland Company had a station at Leeds known as the Wellington Station, and lands and works used in connexion therewith, and such station and lands and works respectively were in close contiguity to the station, railway and works by the Act authorised and that it would be for the advantage of the public and for the mutual convenience and accommodation of the companies and the Midland Company if arrangements were made for the adjustment of the said stations and lands respectively, and for the appropriation to the exclusive or particular use of the respective companies of portions there-

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of respectively, with which view the companies and the Midland Company had entered into the heads of arrangement contained in the schedule, continued—
“Therefore the said heads of arrangement are hereby confirmed and made binding on each of the companies and on the Midland Company, and shall be carried into effect by them respectively.”

Section 39.—“The companies may pass over and use, with their engines and carriages of every description, or those of any other company or person, those portions of railway belonging to the Midland Company which will intervene between the junction therewith of the railway by this Act authorised and the respective junctions therewith of the Leeds Northern Railway, of the North Eastern Railway Company, and of the London and North Western Railway, near and to the west and east of the Holbeck Station in Leeds, and also such portions of the Midland Railway as may be necessary in order to get access to and from those several junctions respectively from and to the said intended station, paying only to the Midland Company as provided in the said agreement with them scheduled to this Act; and the Midland Company shall perform upon the aforesaid portions of their railway and premises all such services and duties as may be necessary or reasonable for the convenient conduct of the traffic of the companies over the same.”

Section 40.—The companies between themselves and the companies and the Midland Company, from time to time, may enter into and carry into effect contracts, agreements and arrangements with respect to all or any of the following purposes, that is to say—

The construction of the station, railway and works by this Act authorised;

The maintenance and management, use, working and occupation of the said station, railway and works, and of the aforesaid portions of railway and premises, and the Wellington Station of the Midland Company, and the station, yards, booking offices, warehouses and conveniences belonging to or connected with that station;

The appropriation of any part or parts

thereof respectively to the exclusive or particular use of any of the said companies respectively.

The conveyance and interchange of traffic, or of certain particular traffic, in or upon the said stations and railways, or in or upon the portion or portions thereof respectively which may be so appropriated or otherwise.

The charges to be made by the said companies, or any one or more of them, to the other or others of them for the use of the said stations and railways, or any part or parts thereof respectively, or for any services rendered in respect thereof.

The fixing, collecting and apportionment of the tolls, rates, charges, receipts and revenues levied, taken or arising in respect of traffic in or on the said stations and railways, and generally with respect to all such matters and things as may be necessary or desirable for the mutual convenience and advantage of the said companies respectively, and of the traffic of the said railways and stations or any of them.

By the heads of arrangement contained in the schedule, and made May 16th, 1865, between the companies and the defendants, it was, for the considerations therein specified, agreed (*inter alia*) that the companies should respectively pay to the defendants for the use of their line, from the proposed point of junction therewith to the existing points of junction therewith, a mileage proportion as for one mile of the respective rates or tolls from time to time charged by the companies respectively, in respect of each description of traffic carried by them respectively over the said portion of the Midland Railway.

In accordance with the above Act, the North Eastern Railway Company and the London and North Western Railway Company constructed the new station and the new railway extending therefrom to a point of junction (called the Leeds Junction) with the Midland Railway, and carried passengers and goods in their own trains from the new station over the new railway to the Leeds Junction. From this point their trains ran over the defendants' railway and on the defendants' rails as far as the respective “existing points of junction” mentioned in the heads of ar-

rangement. At the last-mentioned points they left the defendants' railway, and proceeded on their own railways respectively. At the Leeds Junction, which is between a quarter and half a mile from the defendants' station at Leeds, a signalman employed by the defendants was posted, whose duty it was to regulate the passage of all the trains of the three companies running over the Leeds Junction, both into and out of the two stations at Leeds. It was the duty of the drivers of all such trains to obey the signals given by the signalman. This system being in operation the plaintiff, on the 29th of August, 1871, having bought from the defendants a ticket from Leeds to Sheffield, entered a train of the defendants at Leeds which was to travel to Sheffield. Soon after leaving the defendants' station at Leeds, the driver of the defendants' train received a signal from the signalman that the line was clear and that he might proceed. He accordingly proceeded, and when the train was about half way over the Leeds Junction, it was run into by a train of the London and North Western Railway Company. This train had left the new station about the same time as the defendants' train had left the defendants' station, and was travelling over the new railway towards the Leeds Junction, from which point it was to run on the defendants' railway in accordance with the system related above. While this train was still on the new railway, and before it had reached the Leeds Junction, the signalman duly gave the driver a signal that the line was not clear, and that he was not to advance to the junction. The driver disobeying the signal, drove his train up to the Leeds Junction, where it struck the defendants' train. In the collision the plaintiff received the injuries for which the action was brought.

Cleasby, B., asked the jury whether, in their opinion, the collision was attributable to the negligent management of the trains by the servants of the defendants, and directed them that, if they thought the collision was caused by the negligence of the driver of the London and North Western Railway Company's train in not attending to the signals, the defendants would be entitled to the verdict, reserving

leave to the plaintiff in that event to move to enter the verdict for him, if the Court should be of opinion that the defendants were liable.

The jury found that the defendants were not culpable, and assessed the plaintiff's damages at 200*l.*, if the Court should hold that the defendants were responsible for the negligence of the driver of the London and North Western Railway Company's train.

A rule having been obtained to enter the verdict for the plaintiff for 200*l.*, in pursuance of the leave reserved—

D. Seymour and Barker, for the defendants, shewed cause.—It is to be taken that the sole cause of the collision was the negligence of the London and North Western driver, and as the defendants had no control over him they are not liable for his negligence. The rule was obtained, not on any reason or principle, but on the authority of *Blake v. The Great Western Railway Company* (1) and *Thomas v. The Rhymney Railway Company* (2), but those cases are distinguishable. In the latter the collision was caused by the negligence of the station-master, and though he was not the servant of the defendants, yet by allowing him the control of the railway they made him their agent.

[BRAMWELL, B.—As I said there, I should like to see what declaration would be proper, under the circumstances, the defendants not being guilty of any negligence whatever. Montague Smith, J., said that (3) "there would be very little difficulty in drawing the declaration." Anyone can draw a good declaration; the difficulty here is to draw one that can be proved. If the plaintiff merely alleges that the defendants contracted to use due and reasonable care by themselves and their servants, there is no breach. If he alleges that they contracted that the servants of other companies shall use due and reasonable care, he cannot prove such a contract. The real *ratio decidendi* seems to have been public convenience.]

There is a wide distinction between

(1) 7 Hurl. & N. 987; s. c. 31 Law J. Rep. (N.S.) Exch. 346.

(2) 40 Law J. Rep. (N.S.) Q.B. 99.

(3) 40 Law J. Rep. (N.S.) Q.B. 95.

cases where a railway for its own profit agrees to give another company running powers, and cases like the present, where it is compelled by Act of Parliament to give running powers—*The Great Northern Railway Company v. Taylor* (4). The preamble and section 38 of the Leeds New Railway Station Act, 1865, recite that the powers given thereby to the companies would be for the public advantage; and sections 33, 39, and 40 shew that those companies have powers which the defendants cannot deprive them of. For negligence in the use of such powers the defendants cannot in reason be liable.

[BRAMWELL, B.—If an omnibus and a cab are both using the high road, and the omnibus negligently runs into the cab, is the cab-owner liable to his passenger?]

No, and by section 89 of the Railways Clauses Consolidation Act, 1845, a railway company are not liable in any other case than where stage coach proprietors and common carriers would be liable. To hold them liable in the present case is to make them insurers.

Field and Forbes, for plaintiff, in support of the rule.—The question is what is the real contract between the plaintiff and the defendants? As to goods, when a railway company contract to carry to a point beyond the extent of their own line, they are liable for negligence of all the companies over whose lines the goods pass—*Muschamp v. The Lancaster and Preston Junction Railway Company* (5). The principle is the same as to passengers, except that the company are not insurers—per Cockburn, C.J., in *Blake v. The Great Western Railway Company* (1); that is, the real contract with a passenger is that due and reasonable care shall be used, not only by the contracting company, but by all persons using the line. Admitted that the defendants would not be liable for a wilful trespass by a stranger, but the London and North Western Railway company were not strangers; the defendants had for their own purposes and profit agreed to give them running powers, for which they paid the defendants a mileage rate. The

present case falls within *Thomas v. The Rhymney Railway Company* (2) and *Blake v. The Great Western Railway Company* (1). In the latter case, the defendants' train, while travelling on the line of the South Wales Railway Company, ran into an engine of that company left on the line by the negligence of the servants of that company, and it was held that the defendants were liable, on the ground that their contract was that reasonable care should be used for the whole distance. The judgments of Cockburn, C.J., proceeded on the principle that the railway company contract to use due and reasonable care to maintain their own line fit for the carriage of passengers; and that if, by arrangement with another company, they contract to carry passengers over the line of such other company, then the same obligation attaches to the whole line, and their contract is that such other company, or some one on their behalf, shall use due and reasonable care to maintain such other line in a proper condition. That this was the real ground of the decision of the Exchequer Chamber was distinctly stated by Bovill, C.J., and by Keating, J., in *John v. Bacon* (6), and Bovill, C.J., said that it was not and could not have been contended, that the servants of the South Wales Company were the servants of the Great Western Company. The Exchequer Chamber following that decision, again affirmed the same principle in *Thomas v. The Rhymney Railway Company* (2), where the defendants had running powers over the Taff Vale Railway, and the collision occurred on that railway, through the negligence of the servants of the Taff Vale Company, in charge of the Taff Vale Company's station at Llandaff, in allowing the defendants' train to leave the station.

[BRAMWELL, B.—Those servants were deputed by the defendants to decide whether the defendants' train should leave the station. The Court held that they were bound by *Blake v. The Great Western Railway Company* (1).]

The defendants were held liable in all the cases cited on the ground of contract,

(4) 35 Law J. Rep. (N.S.) C.P. 210.

(5) 8 Mee. & W. 421; s.c. 10 Law J. Rep. (N.S.) Exch. 460.

(6) 39 Law J. Rep. (N.S.) C.P. 365, 367, 368, 369.

and not upon the maxim "respondeat superior," which did not apply, because the defendants had no control over the servants whose negligence caused the injury. Kelly, C.B., said (7), for himself and for several members of the Court, that, independently of that decision, in his judgment, "if a railway company issues a ticket for a journey of considerable length, and in the course of that journey the train which conveys the passenger has to pass along a portion of the line of another company (whether it be under running powers, or whether it be under any particular contract for a participation of profits or otherwise), the contract between the company and the traveller, to whom such ticket is issued, is, upon every principle of the law, not merely a contract that they themselves will not be guilty of any negligence, but a contract that the traveller shall be carried with due and reasonable care along the whole line from one end of the journey to the other." And again, "it is a contract that reasonable care should be exercised by all whose exercise of care is necessary, for the reasonably safe conveyance of the passenger from one end of the journey to the other."

[BRAMWELL, B.—Unless "all" is limited to all engaged in the carrying it would include wrong-doers.]

Kelly, C.B., specially excepts wrong-doers. He further says (8), "It appears to me that if by negligence in anything that may come within the compass of railway management on any portion of the line from one end of the journey to the other, a mischief occurs to the plaintiff, he is entitled to maintain an action against the company with whom he contracted." The principle of this case was approved in *Daniell v. The Metropolitan Railway Company* (9), by Lord Hatherley, who supposes an accident to occur from misplaced switches on a railway not the property of the conveying company, and says that they "would be responsible for any negligence which occurred on the other line of road, whether under their control or not, if they have contracted to

carry passengers over that particular piece of road."

This is not the case of a highway, the defendants are owners of the railway, and the argument *contra* that the defendants are not liable for negligence in those who have a parliamentary right (as distinguished from a right by agreement) to use the defendants' railway, is answered by this, that without an Act of Parliament the agreement between the defendants and the two other companies would have been *ultra vires*.

[CLEASBY, B.—The railway is a highway. By section 92 of the Railways Clauses Consolidation Act, 1845, which is incorporated in the Leeds New Railway Station Act, 1865, all companies and persons are entitled to use the railway on payment of tolls.]

In theory, but in practice it is not done, and the London and North Western Company were not exercising powers under that clause. If the defendants are, not liable for the present act of misfeasance, neither would they be liable, if, instead of running into the defendants' train the London and North Western servants had negligently, through inadvertence, left one of their carriages upon the defendants' line and the defendants' train had run into it without any negligence on the part of the defendants. For such an act of nonfeasance the plaintiff would have no remedy against the London and North Western Company, and would, therefore, be without redress, for, if the defendants' contention is right, he would have no action against them. But *Blake v. The Great Western Railway Company* (1) has decided that for such an act of nonfeasance the defendants would be liable, and as there is no difference in principle between the supposed act of nonfeasance and the act of misfeasance which did happen, the defendants are liable. Unless they are, the plaintiff has no remedy, for he cannot sue the London and North Western Company.

BRAMWELL, B.—I am of opinion that this rule should be discharged. The facts are simply these. The defendants undertook to carry the plaintiff from Leeds to Sheffield. While he was performing the

(7) 40 Law J. Rep. (N.S.) Q.B. 94.

(8) 40 Law J. Rep. (N.S.) Q.B. 95.

(9) 40 Law J. Rep. (N.S.) C.P. 121, 125.

journey, upon their own line, there being no negligence of any sort upon their part, either as owners of the line, or carriers, or otherwise, the train of the London and North Western Company, through the negligence of the servants of that company, ran into the defendants' train, and so injured the plaintiff. The act that did the damage was solely and exclusively the act of the North Western Company. Now why, under those circumstances, should the defendants be liable? If this had been the case of goods, they would have been liable, because they are then insurers; but here the duty of the defendants, according to the decided cases, is this; they enter into a contract that all persons connected with the carrying and with the means and appliances of the carrying, with the carriages, the road, the signalling, and otherwise, shall use care and diligence, so that no accident shall happen. But they contract no farther. If they were to contract that everybody should use care and diligence, their duty would extend to strangers. But it is conceded that they have no such duty as that. They have no contract or duty that strangers to the railway (if one may use such an expression) shall do nothing wrong either by wilfulness or negligence, but it is said that they have a sort of intermediate obligation which is *more* than that all who are engaged in the carrying shall use care and diligence, but *less* than that all mankind shall use care and diligence, and not be guilty of wrong: a sort of obligation that all persons who have occasion, and who lawfully may use the line, shall not be guilty of any negligence or misconduct. Where is the authority for that proposition? In reason and upon principle how is it justified at all? It is said to be a very convenient thing that the plaintiff should be able to sue those undertaking to carry him, and should not be driven to inquire who it was that injured him, and bring his action against that person. But that is really an argument that it is very convenient to be unjust. Why there should be some duty extending beyond all those engaged in the carrying, and yet not including all mankind, I cannot see, either in reason or upon principle.

Now one word about the authorities.

The first case quoted was *Blake v. The Great Western Railway Company* (1). That decision appears to me to have proceeded upon the grounds particularly expressed in the judgment of Cockburn, C.J., and Crompton, J., from which I gather that the Court considered that the defendants undertook to carry the plaintiff over the South Wales Railway, and therefore they undertook that the South Wales Railway Company's lines should be in a fit condition for the conveyance of the plaintiff. I will not say that I see nothing unreasonable in that, but I see nothing so unreasonable in it as, at all events, the proposition of the plaintiff upon the present occasion would be. This seems to me a plausible way of putting the case: "You have undertaken to take me to this place; I care not by what means you do it. You are going to take me by a certain railway belonging partly to yourselves and partly to others. On your own railway you would be bound to take due and reasonable care that it shall be in a fit and proper condition to convey me, so therefore you ought to undertake that the other railway over which you carry me shall be, and of which I know nothing at all." I say I think that is a plausible proposition, and I will not cavil at it. It is decided, and one ought not, without one is satisfied that the opinion expressed is wrong, to say that it is so. The South Wales Railway was not in fact in a fit condition for the carriage of the plaintiff, because somebody who was the servant of the South Wales Railway Company had put a carriage there, and the South Wales Company's servants had left it there. Therefore if the defendants had undertaken that the whole line should be in a fit condition, their contract had not been performed. Similar reasoning will apply to the case of *Thomas v. The Rhymney Railway Company* (2), and more especially when it is remembered that in that case the departure of the defendants' train from the Taff Vale Station depended upon certain information which they could get there, which information was to be given to them for their guidance, and for want of which information the accident happened. Therefore it may well be said that there was neglect in certain persons whom the

Rhymney Company employed to give them notice whether their train should go on or not. And although the case was not one of master and servant, it may well be that the Taff Vale porter and the station officials were the agents of the Rhymney Company in such a sense as to make the defendants responsible for their misdeeds. At all events, if these persons did nothing,—which was the case when they did not tell the defendants they ought not to go on,—the defendants were in this situation that nobody had done that which ought to have been done before they started on their forward journey. It seems to me, therefore, that those two cases prove nothing more than what I have said, viz., that if in the carrying of the passenger, including therein road, engines, carriages, signalling, and so on, there shall be any negligence from which damage may accrue to the passenger, the company are liable. But here there is nothing of the sort. This act of the North Western Company is not negligence which related to the plaintiff being carried at all; it was done while he was being carried it is true, but it had nothing to do with his being carried. It was done by the North Western Company for their own purposes in a matter not connected with the carrying of the plaintiff. It was not a negligent act which made the road more unsafe, or the carriage or engine unsafe, or the signals wrong, but an act done outside of the carrying (if I may use the expression) and while caused damage to the plaintiff while he was being carried. It is admitted that if the London and North Western Company had been trespassers, this action would not be maintainable, but it is said that because they had a right to be there, there is some obligation on the part of the defendants with relation to them which makes the defendants liable. Now I think there is such an obligation, but only to this extent, that the defendants are bound to use due and reasonable care that the London and North Western Railway Company shall not run into them, and shall do nothing to make the road or the defendants' carriages unsafe. But the defendants did their duty in this. For they signalled to the London and North Western train not to come on, and I think

if the defendants' engine driver could have seen that the London and North Western train was coming on, and could have stopped before coming into collision with it, he ought to have done so.

But the argument is not only that there is some duty with regard to the user of the line by the London and North Western Company, but also that the London and North Western Company shall not be negligent. I protest that I cannot see the reason of that. Suppose, for example, they had crossed upon a bridge of their own over the defendants' line and by their negligence the bridge had broken down, and so damaged the Midland Company's trains, would there have been any liability? Certainly not. And what is the difference between the principle in that case and this?

Then Mr. Forbes puts this case. He says, supposing a carriage had been left by the North Western Company on the railway; that would be a nonfeasance, and there would be no liability upon the part of the defendants, because they did not put it there, and no liability upon the part of the North Western Company because there is no privity. I dissent from both propositions. If it had been left by the North Western Company upon the line it would have been the duty of the defendants to have got it out of the way, and if they had not done so they would not have had the line in the condition in which it ought to have been. The case would then have been the same as *Blake v. The Great Western Railway Company* (1), because the undertaking is that the line should be in a fit condition for the passage of the plaintiff.

But, further, I disagree with Mr. Forbes in his other proposition. It would be a misfeasance on the part of the North Western Company to place on the line an obstruction endangering the passage of travellers along it. Indeed it might be an indictable offence. I think, therefore, in the case put, the plaintiff would have had an action against the North Western Company, although there was no privity, and upon the authority of *Elike v. The Great Western Railway Company* (1) he would have had an action against the defendants.

A striking remark was made by my brother Cleasby that a railroad is a public highway and people may use it. I know they do not, and I know practically they cannot, and that is why running powers are obtained; but still it is a public highway upon which everybody, with properly arranged engines and so forth, has a right to go. What would happen if anybody using the line in that way had under those powers done this thing? Would any liability attach to the defendants? They are liable as carriers, and yet looking to the illustration put by my brother Cleasby they would be liable simply because somebody else, having the right to use the same road, had run into them. If that is so it would follow that if an omnibus ran into a cab the cab proprietor would be liable for the damage done.

It seems to me, therefore, that, in the reason of the thing, this is a plain case, and I do not think that any of the authorities have created any difficulty in the way of our decision. This rule must accordingly be discharged.

CLEASBY, B.—I also think that we may discharge this rule without in any way coming into conflict with any of the decided cases.

I quite agree that a contract for carriage from one place to another extends over the whole journey whether upon the line of the contracting company or not, and, further, that it is the carrier's duty to use due and reasonable care during the whole journey. And I think that due and reasonable care extends to everything that is made use of by the contracting party during the course of that journey. For instance, as regards the construction of a railway, it embraces a contract that the rails themselves shall be in a sound and efficient state, so far as due care can make them so, and if they were worn out on a part of the railway not belonging to the contracting company, and which therefore they had not the power to repair, I agree that the decisions establish that they would be liable for a want of care in those rails not being in a proper state, if any damage was sustained thereby; and the same may be said if the switches or anything of that sort were defectively

constructed, and it were made out that in the course of a journey over the rails an accident arose from that defective construction. So, again, as regards persons employed by the carrying company or made use of by them. The management of the stations, for example, is in the hands of certain persons; certain regulations are made; and I will suppose that whilst the regulations are proper and sufficient the persons entrusted with the duty of enforcing them, as in the *Rhymney Case* (2), fail to do so, and an accident occurs in consequence. In such a case the contracting company in performing their contract make use of those persons, and although the arrangements at the station may be in other hands, still the carrying company would be responsible. That seems to me consistent with reason, and certainly is consistent with the authorities that have been referred to; it is consistent with *Blake v. The Great Western Railway Company* (1), where the decision is put upon the footing of there being neglect in allowing that to be upon the line which ought not to be there, and it is also consistent with *Thomas v. The Rhymney Railway Company* (2). In the latter case I was a party to the judgment in the Exchequer Chamber, and acquiesced in it upon the ground referred to in that passage which occurs in the Lord Chief Baron's judgment (10) where he put the case as one of negligence in something connected with the management of the railway, the defect being in the management of the railway during the journey on which the accident took place. That is the effect of the authorities, which I will not go into any further.

Now, it appears to me that the railway ought to be in a reasonably fit state, free from obstruction so far as regards the management and care of the railway; but it is unsound to argue (as is attempted in this case) that the contract is that the railway shall be in a reasonably fit state so far as regards the acts of third parties—whoever they may be—who, whether negligently or not, cause some obstruction. I cannot connect with the management of the railway something which is the direct

effect not of defective regulations of the company, not of any act to which they were parties, not of the neglect of any person whose services they use, but of the neglect of some persons over whom they have no control whatever, and of whose services they do not make use.

It seems to me the case of a level crossing is a very good illustration. Persons have a right to cross a level crossing with a cart. The railway company contract to carry safely along the line, and the level crossing is upon that line. But do they contract that a person shall not, contrary to their regulations, cross at the time the train is going along properly? They do contract that the line shall be in a fit and proper state, so far as it can be made so by regulation; but they do not say it shall be in a proper state if a person brings a cart there. That seems to me the distinction that ought to be drawn in this case. Without, therefore, in any degree dissenting from any of the authorities cited, I think the rule should be discharged.

POLLOCK, B.—I entirely agree with the other members of the Court. The first thing here is to find out what is the contract between the parties. The distinction between the duty of a carrier in the carriage of goods and in the carriage of passengers was for many years not clearly laid down in this country. In America it had been considered and the decisions were tolerably clear. But in *Redhead v. The Midland Railway Company* (11) the whole law was thoroughly considered, and it was shewn that the contract of a railway company with a passenger is not that of an insurer, but simply to take sufficient care and to use due diligence in the provision of proper materials, engines, carriages, and the like for the carriage of the passengers. That being so, there is no difficulty whatever in applying the rule where the railway company's line is all their own. But where the passenger, in order to get to his destination, has to go upon other lines over which the contracting company may have running powers, or which by some other contract they may

(11) 9 B. & S. 519; *n. c.* 38 Law J. Rep. (*n.s.*) Q.B. 160.

NEW SERIES, 42.—EXCELSIOR.

have the right to use, then an apparent difficulty arises. It is quite clear upon principle and now upon authority that the utmost extent to which the railway company who contract may be made liable, is for due diligence and care and the due provision of proper materials, fixed or locomotive, that is, engines, rails, carriages and all the necessary appliances for the carriage of the passenger upon the lines in respect of which the contract arose; and this makes it quite immaterial whether it is the case of several railway companies or a case in which the passenger is carried by different means of locomotion. Such was one of the cases cited by Mr. Field of *John v. Bacon* (6), where the accident arose at Milford Haven by reason of the hatchway upon a truck being out of order. Such would be constantly the case, and it was so for years when the transit from London to Dublin was partly by railway. Having reached Wales, it was necessary to cross the Menai Bridge and there take the coach to Holyhead, and from Holyhead there was a steamer, and with reference to those different vehicles and all the persons having the management of the materials, whether rail, road, or steamer, the first contracting company would be liable. But there you must stop. If you do not, it is impossible to say in respect of whose contract you would seek to make the defendants liable.

Now, Mr. Field—feeling the difficulty—said, "This is not the ordinary question of a highway," and admitted that if a stranger, either by putting an obstruction in the highway or by running into the passenger's carriage, injured the passenger, then the carrying company would not be liable; but he said that this was rather in the nature of an agreement between the Midland Company and the other companies, whereby the Midland Company gets the benefit of the other companies using their line. Upon that part of the case I think Mr. Barker put the sections of the Act of Parliament clearly before us and shewed that which must be the case, viz., that the railway was still a highway, and that this was merely a particular arrangement with regard to this particular highway; just as in London and other large towns a

portion of the highway is attributed to tramways, while the rest of the public are left to their common law rights upon the residue of the road.

But I am not prepared to say that even if Mr. Field's argument were right and the Act of Parliament were altogether got rid of, there would be any liability. Take the case of a man who lets out a field to a number of persons who exercise their horses there. Each man coming into that field contributes to the owner of the field, but he does not become the agent of the owner in such a manner as to make the owner responsible for all his actions. And if one person were riding his horse properly and carefully in that field, and another person came in with a horse that was vicious and troublesome, and known by the rider to be so, and partly by that and partly by the carelessness of the rider, any injury was occasioned to the first person, in that case the owner of the field, though he got the benefit of the letting, would not be responsible for the act by which the injury was caused, unless he had a knowledge upon the subject. I do not think that you can make the Midland Company liable, except by shewing either that the act was occasioned by some misfeasance or negligence on the part of themselves or their servants, or was occasioned by the act or misfeasance of some other people in such a manner that the Midland Company had a knowledge of it and could have remedied it. That is not the case here, and, therefore, I think the company are not liable.

Rule discharged.

Attorneys—Doyle & Edwards, agents for J. & G. E. Webster, Sheffield, for plaintiff; Hayes, Twisden & Parker, for defendants.

1873. }
Jan. 24. }

MITCHELL v. HOLMES.

Executor and Administrator—Payment—Proportionate Part of Annuity—Payment before Administration granted.

An annuity was payable under a will to a woman during her life, and a proportionate part computed from the last day of payment to the date of her death was payable to her executors and administrators:—Held, following Mitchell v. Moorman, that a payment of this proportionate part to the husband of the annuitant, who never took out letters of administration, was not a good payment in law, and that the amount could therefore be recovered by the son of the annuitant, in administering her estate after the death of the husband, whose executor he also was.

Replevin for a hay stack, a barley stack, six wheat stacks, and seven oat stacks, upon Acorn Close farm, in the county of Durham.

Avowing that before the plaintiff became possessed of, or had any estate or interest in the said farm, William Gibbons was seized in his demesne as of fee and in certain lands, and by his last will and testament gave and devised the same unto and to the use of Edward Gibbons, and his heirs and assigns for ever, subject nevertheless to and charged with the payment to one Jane Holmes of an annuity or yearly rent-charge of 20*l.*, for and during the term of her natural life. And in and by the said will, the said William Gibbons directed that the annuity should be paid out of and charged upon the said several lands, and should be paid to the said Jane Holmes, clear of taxes and all other deductions, by equal half-yearly payments, that is to say, on the 30th of May and the 23rd of November in every year; the first half-yearly payment of the said annuity or rent-charge to be made to the said Jane Holmes, if living, on such of the said days of payment as should first happen after the end of six calendar months next after his decease; and to the executors or administrators of the said Jane Holmes a proportionate part of the said annuity or rent-charge, to

be computed to the day of her death, from the then last preceding day of payment. And the said William Gibbons further, by the said will directed that in case the said annuity or rent-charge, or any part of the same, should be behind or unpaid by the space of forty days next over or after either of the days whereon the same was directed to be paid, then, and so often as it should so happen, it should and might be lawful for the said Jane Holmes and her assigns to enter and distrain upon all and every or any part of the lands charged with the annuity and to dispose of the distress or distresses then and there found according to law, as in the case of distresses taken by landlords for rents reserved upon leases for years, to the intent that thereby, or otherwise, the said annuity or rent-charge, and every part thereof in arrear, and all costs, charges and expenses occasioned by the non-payment thereof might be fully paid and satisfied. And the said William Gibbons afterwards, being so seized and entitled as aforesaid, and without altering his will as to the said devise, died, leaving the said Jane Holmes him surviving, whereupon, and after the end of six calendar months next after the decease of the said William Gibbons, the said annuity or rent-charge of 20*l.* became and was payable to the said Jane Holmes, as the said will provided and directed, and she became and was entitled to the same, and the said farm in which, &c., was and is part of the several lands by the said will devised, and so chargeable with the said annuity or rent-charge. And afterwards, and before the said time when, &c., the said Jane Holmes died, and there was due and in arrear behind and unpaid at the time of her death, as aforesaid, a sum of money, to wit the sum of 137*l.* and 9*d.* of and for the said annuity or yearly rent-charge, and the sum of 8*l.* 17*s.* 5*d.*, the proportionate part of the annuity computed to the day of her death. Averment that after the death of the said Jane Holmes, as aforesaid, he, the defendant, became and was duly constituted and made administrator of the personal estate and effects of the said Jane Holmes, and her legal personal representative, and, as such, entitled to payment to him of the said arrears of the said annuity or rent-charge; and because

the same remained behind and in arrear, &c.

Plea—riens in arrear; and as to the 137*l.* 0*s.* 9*d.* the statute of limitations. Issue thereon.

The action was tried by Willes, J., without a jury, at the Durham Summer Assizes, 1872, when the following facts were proved—

In 1826 William Gibbons died, leaving a will, by which George Holmes, the defendant's father, was appointed executor. The testator devised his estate of Acorn Close to George Gibbons, subject to the payment of an annuity of 20*l.* a year to Jane Holmes for life, to be paid clear of taxes and all other deductions by equal half-yearly payments, on the 13th day of May, and the 23rd day of November in every year, "and to her executors and administrators a proportionate part of the said yearly sum, to be computed to the day of the death of the said Jane Holmes from the last preceding day of payment."

Payments of the annuity had fallen into arrear for some years; and 8*l.* 17*s.* 5*d.* was the proportionate amount payable to the executors and administrators under the will.

After the death of Jane Holmes in April, 1866, the plaintiff, who was the owner of Acorn Close, paid her husband, George Holmes, 10*l.* in respect of the annuity. George Holmes, the husband, had not then taken out, nor did he ever take out, letters of administration to his wife. He died in March, 1869, leaving his sons, John Holmes and the defendant, his executors; and on the 3rd of May, 1871, the defendant took out letters of administration to his mother, the annuitant Jane Holmes, and afterwards distrained on the plaintiff's land for the arrears due at his mother's death. Of the amount claimed, the 8*l.* 17*s.* 5*d.* only accrued due within six years of the distress.

Willes, J., ruled that the payment of 10*l.* to George Holmes the husband, was not a valid payment in law. He refused permission to add an equitable plea based upon it, and directed a verdict for the defendant accordingly.

A rule was afterwards obtained for a new trial, on the ground that the payment to George Holmes the younger,

the defendant, was a sufficient payment, and that there was evidence that the defendant had adopted the payment; and for leave to the plaintiff to add special pleas, legal or equitable, to raise the question of title.

Kemplay (*John Edge* with him), were stopped in shewing cause, relying on *Mitchell v. Moorman* (1).

C. Crompton (*Holker* with him), in support of the rule.—In *The Attorney-General v. Partington* (2), where a chose in action like this belonged to a wife, and her husband died without taking out administration, it was held that two duties were payable. Although here the husband may not have been entitled at law before taking out administration, he had such an equitable interest in the subject matter that he could give a valid discharge; and the defendant would be considered in equity as the representative of the father as well as administrator to the mother. He cited *Betts v. Kimpton* (3), and *Cart v. Rees*, quoted in *Squib v. Wyn* (4).

(1) 1 You. & J. 21.

(2) 3 Hurl. & C. 193; s. c. 33 Law J. Rep. (N.S.) Exch. 281.

(3) 2 B. & Ad. 273.

(4) 1 P. Wms. 381; see 1 Wms. on Executors, 359 (5th edition).

KELLY, C.B.—In this case the sum claimed became due under the terms of the grant of the annuity to the executors and administrators of Jane Holmes, but was never due or owing to the annuitant herself. Her son is her administrator, and he alone is entitled to the money. The defendant contends that her husband was entitled as administrator. If he had taken out letters of administration, that would have been so. But he died without taking out letters of administration; and after his death the son took out administration to his mother's estate. The defendant also contends that the money belonged to the husband in equity, and that therefore the son must be supposed to claim this money as executor of his father, who received the equivalent in his lifetime. The answer is that this plea, if enforceable at all, is enforceable as an equitable plea only, in which light we cannot deal with it upon this record; and it is too late now to amend the pleadings in the manner proposed.

MARTIN, B., and PIGOTT, B., concurred.

Rule discharged.

Attorneys—Rogerson & Ford, agents for W. Marshall & Son, Durham, for plaintiff; J. Tucker, for defendant.

END OF HILARY TERM, 1873.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

EASTER TERM, 36 VICTORIÆ.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Exchequer.)

1873.
Feb. 15, 17, 18;
April 17.

ALLGOOD AND OTHERS v.
BLAKE. (1st & 2nd
actions.)
REED v. BLAKE.
BOACH v. BLAKE.

Will, Construction of—General Rules of Construction—“All and every other the Issue of my Body”—“For Default of such Issue.”

A testator had issue living at the time of his will, a son F. (who had then living two sons F. and R. and three daughters E., I., and S.), a daughter I. and four grandchildren issue of a deceased daughter S. By his will he devised his hereditaments to his son F. for life, with remainder to his elder grandson F. for life, with remainder to the first and other sons of the grandson successively in tail male; and for default of such issue to R. the second son of his son F. for life, with remainder to his first and other sons successively in tail male, or for default of such issue to the third, fourth and other sons of his son F. thereafter to be born successively in tail male; and in default of such issue, to the testator's daughter I. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter E. for life, with re-

mainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter I. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter S. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth, fifth and other daughter or daughters of his son F. successively, and in remainder, one after another, and the heirs male of their bodies; and “for default of such issue, to the use and behoof of all and every other the issue of my body; and for default of such issue, to my right heirs for ever.” And he expressed a desire “to prevent as far as might be the dispersion of his estates among several persons”:—Held, that the words “all and every other the issue” were not to be read in the strict sense of intending to exclude those coming within the class who were provided for before, and were supposed to have failed, but rather to complete a provision for all the issue, so as to make the estate go over by force of the words in the limitation “in default of such issue” only upon failure of all the testator's issue; and that thus a vested remainder in tail general was created which descended to the testator's grandson F.; and that, he having executed a disentailing deed, and all the previous estates having expired, his devisees were entitled to the property.

Error from the Court of Exchequer upon Special Cases stated in actions of ejectment (1).

The questions turned entirely upon the construction of the will of Sir Francis Blake, Bart. (the first baronet), made in the year 1780, in which year he died. At the time of the making of his will, the first baronet had two children living, viz., Francis (the second baronet) and a daughter Isabella. There were also then living four children of a deceased daughter Sarah, who had married Christopher Reed; and also five children of the testator's son Francis, viz., Francis (the third baronet), Robert Dudley, Elizabeth, Isabella, and Sarah.

The provisions of the first baronet's will, so far as material, were as follows—He devised all his manors, messuages, and castle lands, hereditaments, &c., to the second baronet for his life, "with remainder to Francis (the third baronet), for life, with remainder to the first and all and every other the sons of the third baronet successively in tail male; and for default of such issue to Robert Dudley Blake (second son of the second baronet) for his life, with remainder to his first and other sons successively in tail male; and for default of such issue to the third and all and every other the sons of the said second baronet thereafter to be born successively in tail male; and for default of such issue to Isabella, the testator's daughter, for life, with remainder to her first and other sons successively in tail male; and for default of such issue to Elizabeth (eldest daughter of the second baronet) for life, with remainder to her first and other sons successively in tail male; and for default of such issue to Isabella (second daughter of the second baronet) for life, with remainder to her first and other sons successively in tail male; and for default of such issue to Sarah (third daughter of the second baronet) for life, with remainder to her first and other sons successively, in tail male; and for default of such issue to the fourth and all and every other the daughters of the second baronet successively in tail male;" and "for default of such

issue to the use and behoof of *all and every other the issue* of my body lawfully to be begotten, and for default of such issue to the use and behoof of my right heirs for ever."

And after devising as aforesaid the following words occurred in the will—"And thus, having at least expressed a very natural desire to prevent as far as may be the dispersion of my estates amongst several persons, and to keep up my name and family in one person, I do hope that the person into whose hands my estates shall come, will be equally ready to adopt the plan for the purposes aforesaid."

On the death of the testator in 1780, the second baronet succeeded to the title and estates. He died in 1818, leaving his eldest son the third baronet, his second son Robert Dudley, and a son William, and a daughter Eleanor Ann (both born after the death of the first baronet), surviving him.

Isabella Blake, the daughter of the first baronet, and all three daughters of the second baronet died, unmarried in the lifetime of the second baronet. Upon the death of the second baronet, the third baronet succeeded, and was in possession until his death on the 3rd of August, 1860.

In the year 1834 the third baronet executed indentures for the purpose of barring and extinguishing the estate tail, vested in him by the will expectant on the failure or determination of the estates in tail male limited to the use of his sons, and the death and failure of issue male of his brothers and of his sister, and all reversions thereon expectant or depending.

The third baronet on the 15th of October, 1845, made his will, whereby, after reciting that under the will of the first baronet, and by other assurances, he was entitled to the said estates in fee, he devised the same to the defendant in the three first actions, for life, with remainder to his sons successively in tail male.

Robert Dudley Blake and William Blake, brothers of the third baronet, died without issue in his lifetime.

Upon the death of the third baronet, his sister, Eleanor Ann, who had married Bethel Stag, assumed the name and arms of Blake, and entered into and continued

(1) See 41 Law J. Rep. (N.S.) Exch. 217.

in possession till her death in 1869. She left surviving a daughter, the plaintiff Eleanor Ann, wife of Charles Roach, the heiress at law of all three baronets.

The plaintiffs, Allgood, were grandchildren and great grandchildren of the testator's daughter, Sarah Reed, who died as before-mentioned in his lifetime, and they claimed as joint tenants, under the penultimate limitation, as persons coming within the class therein described at the death of Mrs. Stag.

The plaintiff Reed was heir male of the eldest son of Sarah Reed, the testator's daughter, and he claimed as heir in tail of the testator at his death, all within the particular limitations being excluded.

The defendants claimed under the will of the third baronet.

The Court of Exchequer held that the devise to the issue of the testator's body could not be read as having the effect of giving the estate *per capita*, in joint tenancy among all who came within the class at the time of vesting in possession; that the words "all and every" did not import that all and every were to take at the same time, but were well satisfied by all taking in succession; and that the word "other" was not to be read as intending to exclude those coming within the class who were provided for before, and were supposed to have failed, but rather to complete a provision for all the issue, so as to make the estate go over by force of the words of the limitation "in default of such issue" only upon failure of all the issue of the testator.

This finding amounted to judgment for the defendants in all the actions.

The plaintiffs having brought error—

H. F. Bristowe (with him *H. Dalton*) was heard for Reed, contending that the penultimate clause was not a devise to a class, but a devise over to give an estate tail in the whole to Reed;

Manisty (with him *Waley* and *G. Bruce*) was heard for the Allgoods, contending that the penultimate clause in the will was a devise to a class comprising them, and that they were entitled to recover their proper share; and

The Solicitor-General (with him *W. L. G. Bagehawe* and *Wallis*) was heard for

Mrs. Roach, contending that she took an "estate in special tail," and was entitled to recover the whole.

[The COURT (2) then intimated that they were prepared to affirm the judgment of the Court below in *Reed v. Blake* and in the two cases *Allgood v. Blake*.]

Charles Hall (with him *Sir J. Karslake*, *Joshua Williams*, *Kemplay*, *C. Browne* and *W. B. Trevelyan*), for the defendants, was then heard in the case of *Roach v. Blake*; and

The Solicitor-General replied.

The cases cited are all mentioned in the report below (1).

Cur. adv. vult.

The arguments appear sufficiently from the judgment, delivered on April 17 by

BLACKBURN, J.—The questions raised in these four actions all depend upon the construction of the same clause in the will of Sir F. Blake, who died on the 29th of March, 1780, having made the will in question on the 8th of January, 1780. The provisions and effect of the will are sufficiently stated in the judgment of the Court below (3), and to that we refer instead of repeating them again.

The whole question in each of the causes depends upon the true construction of what has been called the penultimate clause in the will.

The general rule is, that in construing a will the Court is entitled to put itself in the position of the testator, and to consider all the material facts and circumstances known to the testator, with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used, with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words. As is said in *Wigram on Extrinsic Evidence*, p. 9—"The question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words?" But we think that the meaning of words varies according to the cir-

(2) Blackburn, J.; Mellor, J.; Keating, J., Grove, J.; and Honyman, J.

(3) 41 Law J. Rep. (N.S.) Exch. 222, 223.

circumstances of and concerning which they are used.

In *Doe d. Hiscocks v. Hiscocks* (4), in the judgment of the Court of Exchequer, it is said—"The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family and others whom he names and describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances."

All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate and often necessary evidence to enable us to understand the meaning and application of his words.

No doubt in many cases a testator has for the moment forgotten or overlooked material facts and circumstances, which he well knew. And the consequence sometimes is that he uses words which express an intention, which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean. And the general rule, we believe, is undisputed that in trying to get at the intention of the testator, we are to take the whole of the will, construe it altogether, and give the words their natural meaning (or if they have acquired a technical sense, their technical meaning), unless, when applied to the subject-matter which the testator presumably had in his mind, they produce an inconsistency with other parts of the will, or an absurdity or inconvenience so great as to convince the Court that the words could not have been used in their proper signification, and to justify

the Court in putting on them some other signification which, though less proper, is one which the Court thinks the words will bear.

The great difficulty in all cases is in applying these rules to the particular case; for to one mind it may appear that an effect produced by construing the words literally, is so inconsistent with the rest of the will, or produces an absurdity or inconvenience so great, as to justify the Court in putting on them another signification which to that mind seems a not improper signification of the words; whilst to another mind the effect produced may appear not so inconsistent, absurd or inconvenient as to justify putting any other signification on the words than their proper one, and the proposed signification may appear a violent construction. *Grey v. Pearson* (5) is an example of this. Lord Cranworth, Lord St. Leonards and Lord Wensleydale laid down the general rules in terms not substantially differing from each other; but when they came to apply them to the case in hand there was a marked difference of opinion. We apprehend that no precise line can be drawn, but that the Court must in each case apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will.

Let us then in the first place see what were the material circumstances known to the testator in the present case. The state of the testator's family at the time he made his will, was as follows: He had one son alive, Francis (afterwards the second baronet), who was married and had then living two sons, Francis (afterwards third baronet) and Robert, and three daughters, Elizabeth, Isabella, and Sarah. These were all young children at the time of their grandfather's will. The testator also had a daughter, Isabella, then alive and unmarried. He had also either four or five grandchildren, the issue of a de-

(4) 5 Mee. & W. 363, 367; s. c. 9 Law J. Rep. (N.S.) Exch. 27, 29.

(5) 6 H.L. Cas. 61; s. c. 26 Law J. Rep. (N.S.) Chanc. 473.

ceased daughter Sarah, who had married one Reed, the eldest of whom was a son, John Reed, then in his twenty-first year. The statement in the Case leaves it doubtful whether a fifth grandchild, Isabella Reed, survived the testator or not. Having made the earlier provisions in his will, the testator, if he recollected all these facts and understood the effect of his previous limitations, would have known that he had then in existence (at least) four grandchildren, the issue of his deceased daughter Sarah, to whom nothing would come under the previous limitations in his will. He would also have known that it was very likely that the children of his son Francis might have daughters who might have descendants, and that the different tenants in tail male, to whom he had limited estates, and his daughter Isabella, might have daughters who might have descendants, and that the four children of his daughter Sarah might have descendants. He therefore knew that there were four persons issue of his body in existence, and a fair probability of a large number of persons issue of his body coming into existence, who would take nothing under the previous limitations in his will. He also knew, or ought to have known, that when all the estates in tail male which he had created had died out, there was at least a probability that his estate, if not otherwise disposed of, would descend to coheirresses, and he has in his will declared that it was his desire "to prevent as far as may be the dispersion of my estates amongst several persons." Such being the state of things, he devises his estates "in default of such issue (that is, issue who would take under the several estates in tail male already created), to the use and behoof of all and every other, the issue of my body, and for default of such issue to my right heirs for ever."

And the question the Court has to answer, we apprehend, is, what intention do these words express, when used by a testator with reference to such a state of the family, and in a will containing such previous limitations, and such a declaration of the testator's desire to prevent the dispersion of his estates amongst several persons?

NEW SERIES, 42.—EXCHEQ.

The Court of Exchequer came to the conclusion that the intention expressed by the testator was, that his estates as an entirety were to go to all the issue of his body successively according to their order, and that the only means of effecting that intention was to apply the doctrine of *Mandeville's Case* (6), and construe the will as creating what has been sometimes called a *quasi* entail, as if the estate had been conveyed to the testator himself and the heirs of his body.

If this be correct, there was a vested remainder in tail general created, which descended on Sir F. Blake, the third baronet, and as he has executed a disentailing deed, and all the previous estates have expired, his devisees, who are the defendants, have the title, and all the plaintiffs fail.

The plaintiffs in the cases now before us dispute the propriety of this decision.

ALLGOOD v. BLAKE (1st and 2nd actions).

These two actions are brought to recover different portions of the property from different defendants, but are in truth one. It was contended for the plaintiffs that the effect of the penultimate clause was to create a devise to a class, namely, to all the issue of the testator's body who should be in existence at the time when the last estate in tail male should expire from the dying out of all the issue who took under the previous limitations. It was argued that this devise vested the remainder in the four children of Sarah who were living at the testator's death, and that the class would open to receive each fresh person born afterwards who was the issue of the testator's body, not being one of those who might take under the previous limitations in the will. As the devise is of the "estates" of the testator, these parties (if this construction is to prevail) would have taken the remainder in fee among them as joint tenants, had it not been for the devise over in default of such issue to the testator's right heirs. This made it necessary to contend that they took separate undivided moieties in the

(6) Co. Litt. 26 b.

P

estates each as tenant in tail general. In the events which have happened, the result would be that on the death of Mrs. Stag, the last tenant in tail under the previous limitation, the estates were to go to forty-eight different persons as tenants in tail general of undivided moieties in the whole; and also that several of those, being children of living parents, took estates tail in moieties at the same time that their parents took estates tail in other moieties. It is obvious that no testator was likely to wish to produce this result; and it is quite certain that this testator who in the same will declares his desire "to prevent, as far as may be, the dispersion of my estates amongst several persons" did not wish to do so, and this was not disputed. It was admitted that it produced a very natural prejudice against the plaintiffs, the Allgoods, which was said to be only a prejudice, for the testator had used words (according to the argument) expressing an intention to make this devise; and in effect it was argued that the Court below, instead of interpreting his will, had made a will for him.

We think that the utmost shewn for the plaintiffs in these two actions was that a devise "to the use and behoof of all and every other the issue of my body," may from the context or otherwise be construed to mean a devise to such persons as answer that description as a class. But we think that the word "issue" is at least quite as naturally used in the sense of heirs of the body, as a word of limitation; and consequently, that the decision of the Court below in those two cases was right. We therefore did not think it necessary to hear the counsel for the defendants in those two cases, but gave judgment in them affirming the judgment below.

REED v. BLAKE.

The plaintiff in this action is the heir male of the body of John Reed, the eldest son of Sarah the daughter of the testator, who died in his lifetime. Mrs. Roach, who is plaintiff in the remaining action, is the only daughter of Mrs. Stag, the last tenant in tail male under the previous limitations of the will,

and is also the heir of the body of the testator. These two plaintiffs agreed with the defendants in contending that the estates went under the penultimate devise as an entirety to some one who would take an estate tail in remainder after the estate in tail male of Mrs. Stag. They agreed with each other in contending that the effect of the word *other* was to prevent this remainder from coming to Sir Francis, the third baronet, but they differed from each other as to who took the estate tail. It was contended for Mr. Reed not only that the word "other" did not include the issue who took under the previous limitations, and who, by the supposition of the will, had failed before the penultimate limitation came into effect, but also that it did not include Mrs. Roach, who certainly was one of the issue of the body of the testator, who took no estate under the previous limitations, and who has in no sense of the word failed but is now alive. We thought this not a tenable proposition; and as in our opinion Mrs. Roach's title, whether preferable to the defendants or not, was preferable to Mr. Reed's, we did not call upon the counsel for the defendants to argue in Mr. Reed's case, but affirmed the decision of the Court below.

ROACH v. BLAKE.

We felt more difficulty in this case, which we heard argued fully and very ably both for the plaintiff and for the defendant; but after taking time to consider, we are all of opinion that in this case also the decision of the Court below was right and ought to be affirmed.

The words, "other the issue of my body," used as they are immediately after speaking of the failure of particular issue, do, in their *prima facie* natural sense, mean issue different from those who have been spoken of before. It is, we think, not so accurate to say that the word *other* excludes those mentioned before, as to say that it does not include them.

For the plaintiff it was argued that the word had more force of exclusion, and the defendant did not admit that it had so much. But the testator

has been here speaking of the event of the failure of the issue to whom he had previously limited estates, when the estate which he created by the penultimate limitation would vest in possession. And if he had in contemplation that time only, the issue of his body (who had by supposition died out) and all and every other the issue of his body, would together constitute the whole of the issue of his body. It is a very common thing to read words creating an estate in remainder, which are such as *prima facie* refer to the expiration of the previous estate, and so would create an estate contingent till that event happened, as creating a vested estate in remainder from the time of the testator's death; cases to that effect will be found collected in *Jarman on Wills* (7). They are all cases in which some violence is done to the words used, because of the great convenience of making the estates vested instead of contingent, and of the probability that the construction really effectuates the intention of the testator. And we think that in this case, the intention of the testator clearly is, that every one of the other issue should take, and if it is necessary in order to effectuate that intention, we think the Court are fully justified in construing the word "other" as being used with reference to the time of vesting in possession, and as a word, not intended to be operative, but rather intended to be demonstrative—not intended to produce any effect, but to make the idea in the mind of the testator clearer: an intention which no doubt it fulfils very ill.

It was said for Mrs. Roach with considerable reason, that a decision as to the construction of one will can rarely be a guide as to the construction of another not in the same words; but it seems to us that the counsel for the defendants are justified in their contention, that the words of this devise are so similar to those used in the will set out in the special verdict in *Burchett v. Durdant* (8), that the decision of the House of Lords in that case that those words created an estate tail (the reasons for which are un-

fortunately not reported), must have proceeded on some principle applicable to the present case. But the main argument for the plaintiff was, that it was in no way necessary to put any violence on the words, for that full effect could be given to the intention of the testator to give an estate to each and every of the other issue without construing the words as creating a vested estate tail general, which would descend to and vest in Sir Francis, the third baronet, as heir of the body of the testator.

Two ways in which this might be done were suggested. The first was by construing them as intended to create an estate in the testator, and the heirs of his body, exclusive of those heirs of his body who would take any estate under the previous limitations in the will. So if Sir Francis, the third baronet, had a son and a daughter, the estate tail which would have been suspended till the birth of that daughter, would then have vested in her, subject to an estate tail vesting in any daughter of the son who might thereafter be born, and who would come in before her, and that again subject to be divested on the birth of a niece, the daughter of her brother, if she had one, and so on as long as any male issue of Sir Francis the third existed.

This the Solicitor-General called an "estate in special tail," but no such estate ever has been known up to the present time. We do not think any such estate could be created; and we think it impossible to suppose that the testator intended to create such an estate. The other mode was, what, in my brother Bramwell's opinion, the testator probably wished to say, though he did not say it. It was said we ought to construe this word "other" as meaning that an estate in tail general should be given to the daughters of the sons of his eldest grandson, or those who were the heirs of their bodies at the time when the estates in tail male expired, being contingent as to the person who was to take till that event happened. And inasmuch as, in the event of there being more than one such daughter, the estate would be divided amongst them as coheirresses contrary to the testator's expressed desire to prevent

(7) Vol. i. p. 764.

(8) 2 Vent. 311.

the dispersion of his estates among several persons, it was suggested that such daughters were to take in succession; and on failure of their issue a new set of contingent limitations were to be implied, which in the events that have happened, would have been forty-eight in number, and might have been many more. Perhaps if the testator had given instructions to an able conveyancer, such as the one who framed the earlier part of this will, to prepare a settlement for him to the effect which my brother Bramwell suggests, that conveyancer might have been able to frame limitations, which would have effectuated this intention. It would not have been easy, and the limitations would, when expressed, have probably been very voluminous, but it might perhaps have been done. But we think that when we are asked to crowd into the one word "other" the whole of such a complicated limitation, we are asked to put a far greater strain upon the word than can be said to be put upon it by adopting the construction of the Court of Exchequer. Moreover, the construction contended for on behalf of the plaintiff, makes all these numerous remainders contingent, whilst the other construction makes one vested remainder which alone is a strong reason in favour of the latter.

We therefore think that the judgment below should be affirmed in this case also.

Judgment affirmed.

Attorneys—W. G. Jennings and Nicholl & Co., for plaintiffs; Gray & Mounsey, for defendants.

1873.
April 25, 26. } WANT v. STALLIBRASS.
May 6. }

Vendor and Purchaser—Conditions—Want of Title in Vendor—Recovery of Deposit.

Land was put up for sale by auction, subject to conditions (among others) that "the vendors should within seven days of the sale deliver to the purchaser an abstract of their title, all objections and requisitions not delivered to the vendors within fourteen days

after the delivery of the abstract to be considered as waived, and in this respect time to be of the essence of the contract;" that "the vendors being trustees should not be required to obtain the concurrence of any one interested in the proceeds of the sale;" and that "if the purchaser should fail to comply with the conditions his deposit should be forfeited." An abstract was delivered to the purchaser within seven days, shewing that the property had been devised to trustees (of whom the vendor was the survivor) upon trust to pay the income to F. S. for life and after his death to sell and divide the proceeds among his children; and that F. S. was still alive. The abstract did not state whether he had children living, though there was in fact eight all of age:—Held, that the vendor having thus no title to sell the property, the purchaser was entitled to recover back his deposit, although he had made no requisition within the fourteen days—the Court being of opinion that the conditions as to waiver and forfeiture referred only to the waiver of requisitions for further information or security in the case of a defective title capable of being made good on the defects being supplied, but not to the case of a title wholly bad.

Held, also, by KELLY, C.B., that the abstract delivered was not a sufficient abstract.

Semle, by MARTIN, B., and POLLOCK, B., that the abstract, if a true abstract of such title as the vendors had, sufficiently indicating points calling on the purchaser to make further requisitions, was an abstract of their title within the meaning of the condition, although the title was not such as the purchaser was bound to accept.

Declaration for money had and received. Plea, *Never indebted*. Issue thereon.

At the trial before Martin, B., in Middlesex, it appeared that the plaintiff had paid 300*l.* deposit on a purchase by him of an estate, called Stone Farm, which was put up for sale by auction by the defendant on the 14th of September, 1865, subject to the following, among other, conditions—"Within seven days after the sale the vendors will at their own expense deliver to the purchaser an abstract of their title; all objections and requisitions not stated in writing and

delivered to the vendors' solicitors within fourteen days from the delivery of the abstract shall be considered as waived, and in this respect time shall be of the essence of the contract."

"The vendors being trustees for sale shall not be required to enter into any covenants other than the usual covenants against incumbrances, nor shall they be required to obtain the concurrence of any one interested in the proceeds of the sale."

"If the purchaser shall fail to comply with these conditions his or her deposit shall be thereupon actually forfeited to the vendors, who shall be at liberty to re-sell the property either by public auction or private contract at such time and place, subject to such conditions, and in such manner as they shall think fit, and any deficiency in price on the re-sale, and all expenses attending the same, shall immediately afterwards be made good to the vendors by the defaulter at this present sale, or shall be recoverable as and for liquidated damages."

Within the time stipulated for, an abstract of title was delivered, which, after bringing down the title to one William Waylett, recited a devise by him of the premises to trustees (of whom the defendant was the survivor) "upon trust to pay to Frederick Stallibrass, for life, the annual income arising from the said trust estate, for his own use; and from and immediately after his decease, upon trust that the trustees or trustee for the time being should, with all convenient speed, absolutely sell and dispose of the said trust estate, either by public auction or private contract, to any person or persons whomsoever for such price or prices, as to his said trustees or trustee for the time being should seem proper; and the testator directed his trustees to lay out and invest the proceeds (after payment thereof of all his just debts, and funeral and testamentary expenses, and also all costs of and relating to such sale and investments) in or upon some of the public stocks, or funds or on Government security, or at interest on freehold security in Great Britain, and to stand possessed thereof for the children of the said

Frederick Stallibrass, as herein mentioned."

The abstract also shewed that Frederick Stallibrass was alive at the time of the sale, but was silent as to his children. No requisition was made before the 13th of October, 1865.

There were in fact eight children living, all of age. And the trust was really in favour of such children only as should attain twenty-one.

The verdict was entered for the plaintiff, with leave to move; and a rule was afterwards obtained to enter the verdict for the defendant on the ground that the plaintiff did not deliver any objections or requisitions to the abstract of title within the time limited by the conditions, and that the deposit thereby became forfeited.

Henry James and Joseph Dixon now shewed cause for the plaintiff, contending that the abstract shewed on the face of it that the vendor had no title to sell, and that he could not compel the purchaser to complete—*Blacklow v. Laws* (1); *Johnstone v. Baker* (2), and *Mosley v. Hide* (3); and that being so, the abstract delivered was in fact not an abstract at all within the meaning of the condition; and consequently, the purchaser was not called on to make requisitions. In any case the abstract was not sufficient, the will not being properly disclosed—*Oakden v. Pike* (4), per *Kindersley, V.C.* The condition as to requisitions applies only where defects in what may prove to be a valid title may be supplied; it does not apply where the vendor has no title at all.

T. K. Kingdon and Tapping, for the defendant in support of the rule.—The vendors were to deliver an abstract of their title—i.e., of such as they had. And such an abstract the defendant delivered, the extract from the will being sufficient to point out to the purchaser and the vendor the matters which might call for further information. This entitles them to call on the purchaser to complete—*Murrell*

(1) 2 Hare 40.

(2) 8 Beav. 233.

(3) 17 Q.B. Rep. 91; s. c. 20 Law J. Rep. (n.s.) Q.B. 539.

(4) 34 Law J. Rep. (n.s.) Chanc. 620, 622.

v. Goodyear (5); *Micholls v. Corbett* (6); and he cannot now recover his deposit—*Blackburn v. Smith* (7). Besides, in this case the purchaser not having made any requisition within the time stipulated for, his deposit was forfeited by the express words of the condition. They referred to *Dart's Vendors and Purchasers*, c. 4. s. 3.
Cur. adv. vult.

KELLY, C.B. (on May 6),—after referring to the conditions of sale and the facts as above stated.—It is clear that the pretended title as it appeared on the abstract was in fact no title at all, inasmuch as it being stated in the abstract that Frederick Stallibrass was still alive, the trustees had no power to sell the estate and could confer no title to it on the plaintiff. The cases cited at the bar of *Blacklow v. Law* (1); *Johnstone v. Baker* (2); and *Moseley v. Hide* (3) are conclusive to this effect. I am of opinion, therefore, that it was then competent to the plaintiff at once to throw up the contract and proceed to recover his deposit back.

The defendant, however, contends that the abstract having been delivered within the seven days, the plaintiff was to make his objection within the fourteen days, which he certainly did not. This might have been so, if the title disclosed had been merely a defective title, where, upon objections made, the defects could have been supplied; but where the abstract which ought to set forth a *prima facie* good title shews in express terms that the vendor has no power to make a title at all, it is not a case for objection and answer; but the abstract at once enables the purchaser to say that the vendor has broken or had no means of performing his contract, and that he is entitled to the return of his deposit.

But the vendor also contends that he has set forth enough of the will of Waylett in the abstract, to shew that the remainder being devised to children, it is possible that they by concurring in the

conveyance may make the title good. But to this the answer is twofold: first, that he does not shew upon the abstract, that, even if the concurrence of remaindermen could make a good title, there are any children, remaindermen, to concur; and second, and chiefly, that the pretended abstract is in effect no abstract at all, and so no abstract can be said to have been delivered within the seven days. This appears from the authorities cited. Mr. Dart, relied upon by the defendant, lays it down that an abstract "as perfect as the vendor could furnish it at the date of delivery, although it might be of a defective title, is good, if it states with sufficient fulness the effect of every instrument that constitutes the title." But here, the instrument that constituted the title was the will, and the only clause in it, fully set forth, shewed that the trustees had no power to sell; and the clause containing the devise of the remainder to the children was not fully set forth; but merely shewed that it was left to the children of Frederick Stallibrass; and the clause as now appearing, upon the whole will coming before the Court, gives the remainder only to such of the children as should be living at his death, and should attain the age of twenty-one. And the abstract is silent as to whether there were any such children, or whether any were living at the testator's death, or ever attained the age of twenty-one. Therefore this instrument, the will, being in the possession of the vendor, was not stated with sufficient fulness, and so the abstract was not as perfect as the vendor could furnish it, and so was not sufficient. Then the case of *Oakden v. Pike* (4), cited for the plaintiff, shews that "the omission of a clause in a will, if material, vitiates the abstract;" and that "an abstract which is incomplete is not an abstract at all within the meaning of the condition." Here then, the abstract having shewn that the sale was unauthorized, a good title could have been made, if at all, only by the children of the marriage who had survived the testator, and attained the age of twenty-one, becoming parties to the conveyance; and the abstract, by omitting the portion of the clause, gave the purchaser no op-

(5) 1 De Gex F. & J. 432; s. c. 29 Law J. Rep. (N.S.) Chanc. 425.

(6) 34 Beav. 376.

(7) 2 Exch. Rep. 783; s. c. 18 Law J. Rep. (N.S.) Exch. 187.

portunity of requiring information whether there were any such children, and whether, if there were, they were able and willing to become parties to the conveyance.

And though unnecessary to the decision of this case, we may observe that, now that the facts are before us, it appears that there were children of the marriage who survived the testator, and had all attained the age of twenty-one; and that one or more of them have settled their shares, giving interests to their children, who are under age, or who may come into existence hereafter, though as yet unborn. So that, upon the whole evidence, it is impossible for the defendant to make a good title. I am, therefore, of opinion that the plaintiff is entitled to recover, and that the rule should be discharged.

POLLOCK, B.—The ground upon which the plaintiff alleges that he is entitled to recover his deposit, is that the defendant has failed to make a good title to the estate sold. The defendant's answer is twofold. He says—first, that there is no valid objection to the title; and second, that even if there were, and the defendant could not enforce the sale by specific performance, or call on the plaintiff to pay the balance of the purchase money, yet the plaintiff has forfeited his deposit by failing to comply with the conditions of sale.

With respect to the first contention on the part of the defendant, the facts are these. The defendant was devisee under the will of William Haylett, who devised the estate in question to the defendant, upon trust to pay to the testator's son-in-law, Frederick Stallibrass, during his lifetime, the annual income arising from the estate; and, after the decease of the said Frederick Stallibrass, to sell the estate, and pay the proceeds to the children of the said Frederick Stallibrass. At the time of the sale Frederick Stallibrass, and his children, eight in number, and all of age, were alive. Under these circumstances, it seems clear that the defendant had no such title to the estate as he could have compelled the plaintiff to accept, and, consequently, no action could have

been maintained for the balance of the purchase money. This proposition is thoroughly established by the cases cited for the plaintiff, of *Blacklow v. Laws* (1), *Johnstone v. Baker* (2), and *Moseley v. Hide* (3).

The defendant's second contention is based upon the conditions of sale. Now when personal property is sold, it is not usual to add any conditions of sale respecting the title of the vendor; and in the absence of any express stipulation, if the vendor cannot perform his part of the contract, the same ground which entitles the vendee to resist payment of the whole price entitles him also to recover back any deposit he may have made in part payment thereof, on the ground that there has been a total failure of consideration. In the case, however, of real property, the title to which is a matter requiring professional learning, an estate cannot change hands by sale without the interchange between the solicitors of the vendor and vendee of what are commonly known as an abstract of title, and objections thereto or requisitions thereon. Every vendor of freehold property is bound to furnish to the intended purchaser an abstract of all the deeds, wills and other instruments, which have been executed with respect to the land in question during the last sixty years; and if this is not done by a perfect abstract, the vendee may object, or require further information. The very statement of this practice shews the necessity, where there is a sale by auction of real property, for conditions similar to those embodied in the present contract for sale; and it may well be, that these may be so framed as to entitle a vendor to retain the deposit, although he cannot enforce the contract against the vendee.

Now, in this case, the abstract was sent to the plaintiff's solicitor on the 18th of September, 1865, and no objection to it was delivered until the 13th of October, when more than fourteen days had elapsed. On the part of the plaintiff it was contended, that the abstract was insufficient,—first, because it shewed that the defendant could not give a good title during the lifetime of Frederick Stallibrass, and secondly, because it failed to

disclose the real title of the defendant, inasmuch as it did not state that there were any children of Frederick Stallibrass living.

If the only question for our determination were, whether the abstract was sufficient, I should incline to think that it was. The first objection, that it disclosed a faulty title, is met in my opinion by the answer that, provided a vendor gives a true abstract of the title which he has at the time, the abstract is good, although the title shewn by it is bad; and for this the ruling of Rolfe, B., afterwards upheld by this Court in *Blackburn v. Smith* (7), is a sufficient authority. As to the second objection, the reference in the abstract to the will of William Waylett, and the trust created thereby for the children of Frederick Stallibrass "as therein mentioned," in my view sufficiently drew the attention of the vendee to the trusts created by the will to call on him to make objection or requisition, and removes this case from the ground of decision acted upon in the cases of *Hobson v. Bell* (8) and *Oakden v. Pike* (4).

But I do not think it necessary for us to pronounce any opinion upon either of these objections, because the question here is not whether the abstract was "sufficient." The words "sufficient abstract" are not used in the conditions of sale; the question is, has the plaintiff by any default on his part, or breach of the condition of sale, debarred himself from his right to reject the insufficient title proffered to him, and to recover back his deposit. The language of the third condition is not that if the purchaser does not deliver his objections or requisitions within fourteen days he is to forfeit his deposit or to be taken to have failed to comply with the condition of sale, but that by such non-delivery within the specified time all objections and requisitions shall be considered as waived; and if the defendant's contention were correct, it follows that the plaintiff by not objecting within the stipulated time waived all objections to title, and must not merely forfeit the deposit, but must accept and pay for the estate.

Now the right of a vendee to a good title is a right not merely growing out of the agreement between the parties, but is given by the law. This is affirmed by Lord St. Leonards in his work on *Vendors and Purchasers*, chap. 8, sec. 1, and is supported by *Hall v. Betty* (9); and it would be putting a most unreasonable construction upon the conditions of sale to hold that the vendee, by failing to object to the abstract within the stipulated time, not merely waived any requirement as to further information or further security which he might have properly enforced against a vendor who had a valid title or one capable of being made valid, but that he became liable to accept a title wholly bad, when the very basis of the contract, apart from the condition of sale, was that the vendor was bound to give a good title.

The case has been most carefully argued, but no authority has been cited for this proposition, nor do I think it is tenable.

The basis of the contract is that the vendor has a title; and although purchasers might by their conditions of sale waive even this, I do not think the plaintiff has done so here; and it appears to me that by failing to give any objection or requisition within the stipulated time he cannot be taken to have waived his right to that which was the foundation of the whole contract, and which, on the face of the defendant's own abstract, is shewn not to exist. The rule to set aside the verdict for the plaintiff ought, therefore, to be discharged.

MARTIN, B., concurred with Pollock, B.

Rule discharged.

Attorneys—M. K. Braund, for plaintiff; M. Gosset, for defendant.

(8) 2 Beav. 17 s. c. 8 Law J. Rep. (N.S.) Chanc. 241.

(9) 4 M. & G. 410; s. c. 11 Law J. Rep. (N.S.) C.P. 256.

1873. }
 April 25. } HIRSCHMANN v. BUDD.

Pleading—Bill of Exchange—Alteration of Date—Evidence of Alteration under Plea of Non-acceptance.

When the plaintiff sues on a bill of exchange payable after date, and the date of the bill produced corresponds with the date stated in the declaration, the defendant may, under a plea traversing the acceptance, prove that when he accepted the bill it bore a different date, and that the alteration was made without his knowledge and after the bill had been put into circulation.

Declaration that the drawers "on the 11th day of October, 1872, by their bill of exchange now overdue, directed to the defendant, required the defendant to pay to the" drawers "or order 71l. 10s. 6d. four months after date, and the defendant accepted the said bill, and the" drawers "endorsed the same to the plaintiff, but the defendant did not pay the same."

The first plea traversed the acceptance. Issue thereon.

At the trial before Martin, B., at the Middlesex sittings, on April 22, the plaintiff having produced the bill and proved the defendant's handwriting, *Arthur Charles* called the defendant, who swore that when he accepted the bill it was dated the 1st of October, and that he knew nothing of the alteration. The plaintiff objected that, there being no plea averring the alteration of the date, this defence could not avail, but Martin, B., held that it could be raised under the plea traversing the acceptance, and directed the jury to find a verdict for the defendant, if they believed that the alteration of the date was made after the acceptance and after the bill was put into circulation, and without the defendant's knowledge or consent. The jury found a verdict for the defendant.

J. O. Griffiths, for the plaintiff, now moved for a rule for a new trial on the ground of misdirection.—This is a defence in confession and avoidance, and requires a special plea averring the alteration. It is conceded that if the alteration rendered a

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new stamp necessary, the defence would be admissible under the general issue, but a new stamp was not required here. The question is concluded by *Parry v. Nicholson* (1), where the facts were exactly the same as here, and it was held that this defence could not be set up under the plea of *non acceptit*. Parke, B., there said, "The date is immaterial." It is not necessary to allege the date accurately in the declaration, and a declaration omitting the date would not be demurrable.

KELLY, C.B.—I think there ought to be no rule, and that the learned Judge would have done wrong if he had reserved the point.

The bill when produced at the trial bore date 11th of October—the date alleged in the declaration—but the defendant proved that the bill he had accepted bore date the 1st of October. *Parry v. Nicholson* (1) was cited as a decision directly in point by a Judge of the highest authority, that the defence could not be set up under the plea denying the acceptance. There the plaintiff declared on a bill made the 22nd of March, and the defendant pleaded that he did not accept. The bill when produced bore date the 22nd, but, says the report, "it was objected on behalf of the defendant that the date had been altered from the 2nd to the 22nd day of March." On that statement merely, it may be true that the defendant was not entitled to the verdict, because if the alteration were made before it had been accepted the plaintiff would be entitled to the verdict, since, if when the defendant accepted it, it bore date the 22nd, the allegation on the record would be true. There is, however, reason to doubt whether the facts were as I have supposed. Baron Parke observed, "The date is immaterial." Though the accuracy of that very learned Judge was almost perfect, yet I have no hesitation in saying, that that observation is inaccurate and contrary to the law. It is clear that in a declaration on a bill payable at a certain time after date, the date is material. Supposing the facts in that

(1) 13 Mee. & W. 778; s. c. 14 Law J. Rep. (N.S.) Exch. 119.

case to have been as I have suggested, then the case was well decided, but if the facts really were that the alteration of the date took place, not only after the bill had been accepted, but after the defendant had put it into circulation and without his knowledge, then the decision is wrong, and we cannot recognise it. I say this the more confidently because Parke, B., is reported to have referred to *Hemming v. Trener* (2) as supporting the decision. But *Hemming v. Trener* (2) was "*assumpsit* on a written guarantee set forth in the declaration. Plea, *non assumpsit*. On the trial the instrument appeared to have been interlined, so as materially to alter its effect; but without the interlining it corresponded to the declaration. The jury found that the interlineation was made after the instrument was executed. Held, that the plaintiff was entitled to the verdict, whether or not he was privy to the alteration; the effect of the alteration, if any, being only to discharge or modify the original contract, and therefore constituting a defence which required to be shewn by way of confession and avoidance." That case, therefore, does not support the proposition which, it is contended, was established by the decision in *Parry v. Nicholson* (1).

MARTIN, B.—I do not believe Lord Wensleydale ever said that in an action against the acceptor on a bill payable three months after date, which, when it was originally accepted, bore date the 2nd of March, and, after acceptance, was altered without the acceptor's consent from the 2nd to the 22nd, the defendant could not give any evidence of the alteration under a plea denying the acceptance, when the plaintiff has declared on the bill as altered. I cannot believe it (whoever may have reported him as saying so), because he thoroughly understood these matters. But assuming that he did say so, then it must be considered as utterly contrary to *Cock v. Corwell* (3) to which my brother Pollock has referred. That was an action by the indorsee against the acceptor of a bill dated the 15th of

December, payable two months after date. At the trial the defence was that the bill had been altered in its date after the acceptance and without the defendant's knowledge. It was argued that the defence could not be set up under the plea of non-acceptance, and that the alteration should have been specially pleaded, but the Court thought otherwise. Bolland, B., said, "The defendant says in substance, the instrument on which you claim against me I never accepted. It cannot be said to be the same instrument if there has been any alteration." And Alderson, B., says, "It amounts to saying that he did not accept the bill set out in the declaration."

This question is fully discussed in the notes to *Master v. Miller*, in *Smith's Leading Cases*, vol. i. (5th edition), p. 817; and Mr. Smith, having all these cases before him, says, "Where the plaintiff declares upon the instrument as altered, there the defendant may raise any available defence arising out of the alteration under a plea denying the contract." *Byles on Bills* says exactly the same thing (4), and shews the distinction between a declaration on the bill in its altered state and one on the bill in its original condition.

POLLOCK, B.—I never had any doubt on this question, which has constantly been discussed in the chambers of pleaders. In declaring on a bill of which the date has been altered, the plaintiff always has the option of alleging the original or the altered date. If he declares on the altered date, the defendant need not plead the alteration specially (see *Bullen and Leake*, 3rd edition, p. 532, b), but may rely on the plea of non-acceptance. That was decided in *Cock v. Corwell* (3). That case was not referred to in *Parry v. Nicholson* (1), but it has never been doubted that it was a good decision.

Then Mr. Griffiths argued that the date was immaterial, and relied on section 49 of the Common Law Procedure Act, 1852, as an authority for that proposition. That section enacts that "All statements which need not be proved, such as the statement of time, quantity and value, where these are immaterial . . . shall be

(2) 9 Ad. & E. 926; s. c. 8 Law J. Rep. (N.S.) Q.B. 160.

(3) 2 Cr. M. & R. 291; s. c. 4 Law J. Rep. (N.S.) Exch. 307.

(4) *Byles on Bills* (10th edition), p. 322, 323.

omitted." But the date of a bill is material, and must be proved as alleged in the declaration. The defendant having pleaded non-acceptance, the date was most material to the issue, which was whether he accepted a bill dated the 11th of October. I quite agree that we ought not to throw the least doubt on the law by granting a rule.

Rule refused.

Attorneys—Harper, Broad & Co., for plaintiff;
Gregory, Rowcliffes & Co., for defendant.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

1873. } MORRISON v. THE UNIVERSAL
Feb. 14. } MARINE INSURANCE COMPANY
May 10. } (LIMITED).

Marine Insurance—Slip—Policy—Concealment of Material Fact—Election—Appeal on Matter of Discretion—Common Law Procedure Act, 1854, ss. 35, 41.

Underwriters having agreed upon the terms for a marine insurance with the broker of the assured, initialled the slip and debited the broker with the premium, in ignorance of a fact material to be communicated to them, and known to the broker. Shortly afterwards the underwriters discovered the concealment, and mentioned it to the broker, but raised no objection, and afterwards, at the usual time, executed and delivered to the broker in silence a stamped policy in accordance with the slip. News of a total loss having arrived, they repudiated their liability on the ground of the concealment, and the assured sued them on the policy. By 30 & 31 Vict. c. 23. s. 9, no policy shall be pleaded or given in evidence in any Court, or admitted in any Court to be good or available in law or in Equity unless duly stamped. It was conceded that in effecting marine insurances, when the slip is initialled the contract is considered concluded; and it was proved to be the usage to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initialled.

BLACKBURN, J., directed the jury that the underwriters could not, after discovering the concealment, say, "we elect to go

on," and afterwards, on hearing of the loss, repudiate the contract, but were bound within a reasonable time after the discovery to elect whether they would avoid the contract on that ground; and he asked the jury whether the underwriters had, after the discovery, elected to treat the policy as subsisting, telling them that he himself attached no weight to the delivery of the stamped policy:—

Held (reversing the judgment of the Exchequer), that there was no misdirection of which the assured could complain; that since the assured had not been induced to alter his position by a belief that the underwriters had elected to treat the contract as binding, the delivery of the stamped policy was not an act of estoppel; nor even prima facie evidence of an election, so as to make it incumbent on the underwriters to shew that the assured did not understand, or had no right to understand, the conduct of the underwriters as an election.

Upon an appeal to the Exchequer Chamber from a decision of the Court below, making absolute a rule for a new trial, the respondent cannot support that decision on the ground that the verdict was against the weight of evidence; for under the Common Law Procedure Act, 1854, the Court of Appeal has no jurisdiction to entertain that question in any form.

Appeal from a decision of the Court of Exchequer, making absolute a rule for a new trial, reported at page 17.

Benjamin (Butt and James Mellor with him), for the defendants, appellants, contended that the delivery of the stamped policy was not any evidence of an election, since the proved usage was to deliver it, even after the underwriters had discovered that they had been induced to initial the slip by the concealment of a material fact; that the assured would have no means of bringing the question into Court (30 & 31 Vict. c. 23. ss. 4, 7, 9) if the underwriters made themselves the judges, and refused to deliver; that they would be acting dishonourably in so refusing; that the broker knew this, and did not consider the delivery as an election; and that to hold the contrary would have the effect of entirely changing the practice of marine in-

insurance. That the delivery of the stamped policy was a mere mechanical act, the necessary consequence of initialling the slip, and that if the underwriters had superhuman power they would issue stamped policies immediately on the making of the contract. That this being understood by both parties, the underwriters were not bound to volunteer an election; that it was the interest of the assured to have an election declared, and that it lay on him therefore to ask for it. He also cited (in addition to the cases referred to in the Court below) *Clough v. The London and North Western Railway Company* (1).

Holker (*Herschell* and *McConnell* with him), for the plaintiff, urged all the arguments used in the Court below, except as to the point arising on the contents of *Lloyd's Lists*. He also contended that he was at liberty to support the decision below on the ground that the verdict was against the weight of evidence, that being one of the grounds on which the rule to shew cause was granted; because though, by the Common Law Procedure Act, 1854, s. 35, "no appeal shall be allowed" on such a ground, yet the plaintiff was not appealing; and he argued that the words of section 41, "The Court of Appeal shall give such judgment as ought to have been given in the Court below," were large enough to admit this contention.

[BLACKBURN, J.—We all think that question cannot be entertained.]

Our. adv. vult.

The judgment of the Court (2) was (on May 10) read by

HONYMAN, J.—This is an appeal by the defendants from a decision of the Court of Exchequer, making absolute a rule obtained by the plaintiff for a new trial. The action was brought by the plaintiff, the owner of the ship *Cambria*, on a policy on chartered freight, dated the 12th of October, 1870, for 500*l.* The defendants pleaded, among other pleas, concealment of a material fact. The case came on for trial before Blackburn, J., at the Liverpool Winter Assizes, 1871.

(1) 41 Law J. Rep. (N.S.) Exch. 17.

(2) Blackburn, J.; Keating, J.; Mellor, J.; Lush, J.; and Honyman, J.

The following were the facts proved, so far as is material to the question before us: The insurance in question was effected by the plaintiff through his brokers in London, Messrs. Previt  & Greig. On the 8th of October, 1870, the plaintiff gave orders to his brokers to insure 5,000*l.* on the ship and 5,000*l.* on freight, and on the 10th he sent to Messrs. Previt  & Greig a telegram in the following words—"10th of October, 1870, since writing Saturday, paragraph in *Mercury*—'Cambria, qu re Cameo, from New Orleans, aground on North Breaker.' To-day's *Mercury* says: 'the vessel on the North Breaker reported yesterday as *The Cameo* from New Orleans; can you find out at *Lloyd's*? Let me know by wire before acting." The broker, upon receipt of the orders and telegram, proceeded to endeavour to ascertain whether the ship reported to be aground was or was not *The Cambria*. He accordingly (as was admitted on the part of the defendants) in good faith proceeded to cover the risk, and prepared the usual slip, and on the 12th of October, 1870, a line of 500*l.* was taken by the defendant's assistant-underwriter, Mr. Prichett (in the absence of Mr. Fisk, the principal underwriter), and that slip was initialled by him. The broker did not communicate to Mr. Prichett the orders he had received from the plaintiff, or the telegram of the 10th, or give the underwriters the opportunity of judging for themselves whether the ship reported to be aground was or was not *The Cambria*. Information relating to the grounding of *The Cambria* had appeared in *Lloyd's List* of the 8th of October, but, by mistake, had not been inserted in the Loss Book, and was not so inserted till the 12th of October, after the risk had been taken by the defendants. This was seen by Mr. Prichett shortly afterwards on the same day, and he then learnt from the broker that he had been in possession of the information which he had not communicated to him.

It was admitted that in effecting marine insurances the matter is considered merely as negotiation till the slip is initialled, but that when that is done, the contract is considered to be concluded. It was proved to be the usage of under-

writers to issue a stamped policy in accordance with the slip, notwithstanding anything that might happen after the initialling of the slip. But it was not stated to be the usage to do so without protesting or notifying to the assured that it was the intention of the underwriters, notwithstanding the delivery of a stamped policy, to rely on the concealment; and as in general the concealment is not discovered till after the policy is issued—there probably was no usage on the subject. It was further proved to be the practice of the defendants always to date the policy as of the date of the slip, and that the ordinary course of business in the defendants' office is, that the slips, after being initialled, are sent from the underwriting department to the secretary's department, and there stamped policies are filled up by the clerks in accordance with the slips, and signed by the directors, and left in the office until called for by the brokers. Accordingly the clerks in the secretary's department filled up a stamped policy in accordance with the slip, dating it as of the 12th of October, 1870, and this was executed by the directors on the 14th or 15th of October, and deposited in the usual way in the office, and taken away by the brokers' clerk on the 14th or 15th. In the meantime, viz., on the 13th of October, Mr. Fisk had returned to London, and was then informed by Mr. Prichett of the circumstances attending the taking of the risk, and that the information about the grounding had not been communicated to him; but it did not appear that Mr. Fisk took any steps in the matter, though he stated that he was the person whose duty it would be, on ascertaining there had been a concealment, to determine whether the insurance should be carried out.

On the 19th of October, news was received that the ship lost was the *Cambria*, and the defendants on the next day gave notice to the brokers that they repudiated all liability. Except this the defendants never gave any notice to the plaintiff or his brokers—or protested in any way against being liable on the policy. The premium was debited to the broker in the usual way but was not payable till the 8th of November, and

was tendered to the defendants after the 20th of October but refused by them.

The learned Judge told the jury that when an underwriter discovers that there has been a material concealment in effecting the insurance he is not bound to put an end to the policy, but has a right at his election to say, "You have been guilty of a concealment which would entitle me to determine the policy, but I prefer to go on with it;" but he cannot say, "I elect to go on," and then, when he hears there is a loss say, "now that I hear there is a loss, I will not recognise the policy." He cannot keep the contract and get rid of it too. He has a right to say, "Take back your premium and make the contract a nullity," or to say, "You have done what has entitled me to get rid of the contract, but I will keep the premium and go on." He has a perfect right to do either of those things, and when he has got notice of the concealment he is bound to make his election within a reasonable time; he is not bound to do it with desperately hot speed. A man cannot wait to take his chance, he must elect within a reasonable time.

The learned Judge then examined the evidence, and pointed out to the jury that Mr. Prichett knew on the 12th of the concealment by the broker; that on that day he told Mr. Fisk so, and that Mr. Fisk was the man to determine whether the premium should be returned; that he knew on the 13th of October of the non-disclosure, and that he might have returned the premium, or had a right to say he would return the premium, and that the return of the premium would indicate that he considered that he was not liable; that no doubt if he had offered to return the premium, Mr. Previt's answer would have been, "I will not take it," but still that Mr. Fisk had no right to hold the premium—that he could not play fast and loose—but must either adopt or refuse it.

The learned Judge further told the jury that although a good deal had been said about the slip and the stamped policy, he thought that as regarded that part of the case it made no difference whatever, and remarked that he believed (though the jury probably knew better than he did)

that it had been quite correctly stated that the putting it on the slip was considered in fair dealing and mercantile understanding as being the contract, as if it were made on that day. That this would equally apply if the contract had actually issued as a stamped policy. The learned Judge again drew the attention of the jury to the fact that Mr. Prichett knew of the concealment on the 12th and Mr. Fisk on the 13th, and that it was not till the 20th, after the news of the loss, that any steps were taken by the defendants, and he then asked the jury—"Do you think that the defendants having the opportunity—and taking into account that they should make the election within a reasonable time—had elected to go on with the contract? If so, that puts an end to the defence. On this I express no opinion at all. I leave this entirely to you."

Four questions were left by the learned Judge to the jury. The first is immaterial as regards the questions before us. In answer to the second, the jury found that the concealment was a material one. In answer to the third—viz., whether the broker had a right to suppose that the underwriters were acquainted with the contents of *Lloyd's List*—they said, No. In answer to the fourth question, did the defendant company, after knowledge that the broker had not disclosed this fact, elect to treat the policy as subsisting?—the jury replied, No. The learned Judge thereupon directed the verdict to be entered for the defendants.

In Hilary Term, 1872, Mr. Holker for the plaintiff obtained a rule *nisi* for a new trial on the ground of misdirection, the misdirection alleged being that the learned Judge ought to have told the jury that the defendants were to be presumed to know the contents of *Lloyd's Lists*, and that the plaintiff was not bound to communicate information contained in them, and that, on the facts found, with reference to the execution of the policy without protest after knowledge of the concealment, the Judge ought to have directed the jury to find for the plaintiff; and also on the ground that on the question of election the verdict was against the weight of evidence. After argument

the rule was made absolute for a new trial by the majority of the Court of Exchequer (Martin, B., and Bramwell, B.), Cleasby, B., dissenting. From this decision the defendants appealed, and we have now to determine whether the case ought to go down to a new trial.

Upon the argument, it was admitted by Mr. Holker, who appeared for the plaintiff, that as the Court of Exchequer was unanimous on that part of the rule relating to *Lloyd's Lists*, and as no leave to appeal was given, it was not open to him to contend before us that the verdict could be upset on that ground. He also admitted that he could not contend that as a matter of law the Judge was bound to tell the jury that the circumstances before mentioned relating to the delivery of the policy, amounted to an election to go on with the insurance. But he drew our attention to the facts that the defendants had made no fresh entry in their books—that they had not struck out the debit of the premium, and that the usage as found was only an usage to deliver out a stamped policy so as to enable the assured to raise the question, and that it was not found to be the usage to deliver it without a protest or reservation of the underwriter's rights, and he contended that the learned Judge ought to have told the jury that the defendants by not protesting when they issued the policy, as was done by the underwriters in the case of *Nicholson v. Power* (3), and by remaining quiescent from the 13th of October, when Mr. Fisk became aware of the concealment, down to the 20th of October, when they became aware of the loss of the ship, had allowed the plaintiff to remain under the belief that he was insured, and could not, on hearing of the loss, repudiate their liability. He further submitted that the learned Judge ought to have explained to the jury what amounted to the exercise of election, and that his omission to do so was equivalent to a misdirection. In our opinion this contention is ill founded. The law as to the rights of a person who has been induced by fraud to enter into a contract, has recently been laid down by this Court in *Olough v. The*

London and North Western Railway Company (4): "The fact that the contract was induced by fraud did not render the contract void or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. This was not controverted at the bar, and it is not necessary to cite authorities for it. And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it, as is stated in *Com. Dig.* Election C, 2, 'if a man once determines his election, it shall be determined for ever'; and as is also stated in the same work C 1, 'the determination of a man's election shall be made by express words or by act.' And consequently, we agree with what seems to be the opinion of all the judges below that if it can be shewn that the London Pianoforte Company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined for ever. But we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract. The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shews his intention to treat the lease as subsisting, he has determined his election for ever and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shews his intention to treat the lease as void, he has determined his election and cannot afterwards waive the forfeiture—*Jones v. Carter* (5). We cannot do better than cite the language of Bramwell, B., in *Croft v. Lumley* (6), which precisely expresses what we mean. He says, 'The common expression, 'waiving a forfeiture,'

though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has a right of re-entry, he may elect to avoid or not avoid the lease, and he may do so by deed or by word; if with notice he says, under circumstances which bind him, that he will not avoid the lease, or does an act inconsistent with his avoiding, as distraining for rent (not under the statute of Anne), or demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid or does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it. In strictness, therefore, the question in such cases is, has the lessor having notice of the breach elected not to avoid the lease? or has he elected to avoid it? or has he made no election?"

"In all this we agree and think that, *mutatis mutandis*, it is applicable to the election to avoid a contract for fraud. In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election, he retains the right to determine it either way—subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to shew that he has so determined. But we cannot see any principle, and are not aware of any authority, for saying that the mere fact that one who is a party to the fraud has issued a writ, and commenced an action before the rescission, is such a change of position as would preclude the defrauded party from exercising his election to rescind."

In the case now before us the learned Judge expressly told the jury that if the defendants had elected to go on they

(4) 41 Law J. Rep. (N.S.) Exch. 22.

(5) 15 Mee. & W. 718.

(6) 6 H. L. Cas. 705; s. c. 27 Law J. Rep. (N.S.) Q.B. 321.

could not afterwards on hearing of the loss repudiate their liability, and left it to the jury to say whether the defendants had elected to go on with the contract, calling their attention pointedly to the fact that Mr. Fisk, whose duty it was to determine the question whether the insurance should be repudiated, knew all the circumstances on the 13th, and that nothing was done by the underwriters to repudiate their liability till the 20th, after the receipt of the news of the loss. It is true that the learned Judge told the jury that he himself attached no weight to the handing out of the stamped policy. But even if we were of opinion that more weight might have been attributable to this view than was given to it by the learned Judge, this would not amount to a misdirection, nor can we see that the learned Judge failed in any way properly to explain to the jury the nature of an act of election.

The learned Judge further told the jury that they were to consider whether the election was exercised within a reasonable time, telling them that the party entitled to elect must do so within a reasonable time. It is not necessary to consider whether this direction is correct, or whether the party entitled to elect may not do so at any time, unless in the meantime he has elected to affirm the contract, or unless the rights of third parties have intervened, or the other party to the contract has altered his position under the belief that the contract was a subsisting one; for, if the latter be the correct view, the direction of the learned Judge was too favourable to the plaintiff, and of course he cannot complain of it. If indeed it had appeared that in consequence of the delay and of any absence of protest by the defendants the plaintiff's position had been altered, and he had thereby been induced to believe that the defendants intended to waive their right to avoid the contract of insurance, and had consequently abstained from effecting insurance elsewhere, we should probably have thought that though there had been in fact no exercise by the defendants of their right of election the case fell within the view taken in *Clough v. The London and North Western Railway Company* (4), and

that this question ought to have been submitted to the jury. But in truth, although the plaintiff was examined as a witness on his own behalf, he did not assert that he was induced by the defendants' conduct to think the policy a binding one, and consequently abstained from effecting a fresh policy. And looking at the letters that passed between the plaintiff and his brokers set out in the appendix to the Case (which shew that the broker could not succeed in covering the ship or freight for any amount beyond that already effected) it is impossible that any such case could have been successfully made, and we therefore think that the learned Judge would have been wrong had he left any such question to the jury.

It remains only to examine the reasons given by Martin, B., and Bramwell, B., for granting a new trial. The letters to which we have alluded do not appear to have been brought before those learned Judges, and we cannot help thinking that if their attention had been drawn to them they would probably have arrived at a different conclusion. Martin, B., treats the case as one of estoppel, but, according to a long series of cases like *Pickard v. Sears* (7), the estoppel would only arise on proof that the plaintiff had been prejudicially affected by a belief that the defendants were treating the contract as binding.

Bramwell, B., does not rest his judgment precisely on this ground, but it is evident that he was a good deal influenced by the belief that the defendants' silence prevented the plaintiff insuring elsewhere, which, as we have pointed out, was not the case. The learned Baron seems to have thought that it was the duty of the defendants within a reasonable time after discovering the concealment to notify to the plaintiff their intention to avoid the policy, and that, by not doing so, and handing out the policy without objection, they, in the absence of any evidence to explain their conduct, entitled the assured to treat it as an election not to avoid the contract. It is to be observed that he does not go the length of saying that

Blackburn, J., ought to have told the jury that the handing out of the policy without protest did in point of law amount to an affirmation of the contract, which precluded the defendants from afterwards raising the question, but that he ought to have left to them the circumstances of the case as putting the burden of proof on the defendants to shew that the plaintiff did not understand or had no right to understand the conduct of the defendants as an election.

For the reasons already given we think that this is not so, and that if there really was no election it is wholly immaterial whether the plaintiff understood or had a right to understand the conduct of the defendants as amounting to an election, unless under that belief he altered his position. For these reasons we think that the charge of the learned Judge is not open to any of the objections made to it.

It was, however, further contended by Mr. Holker that though an application for a new trial on the ground of the verdict being against the evidence cannot be carried to the Exchequer Chamber, it was competent to him, in supporting the judgment of the Court below, to rely on the alleged unsatisfactory character of the verdict as a reason for allowing the rule for a new trial to stand. We are, however, clearly of opinion that this is not so. Sitting here as a Court of Appeal we have no jurisdiction to deal with anything but matters of law, and cannot entertain the question whether the verdict be or be not satisfactory, or any other question of mere discretion. The result is that the judgment of the Court of Exchequer must be reversed, and the rule for a new trial discharged.

Judgment reversed.

Attorneys—Sharpe, Parkers & Co., agents for
Laces, Banner & Co., Liverpool, for plaintiffs;
Thomas & Hollams, for defendants.

NEW SERIES, 42.—EXCHQ.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

1873. { THE COMPANY OF PROPRIETORS
May 12. { OF THE SHEFFIELD WATER-
WORKS v. BENNETT.

Water Company—Water Rate varying according to "Rent" of Houses—"Rent" meaning "Annual Value"—Poor-rates, District Rates and Water Rates to be deducted from Rent.

The plaintiffs were required by their special Act to furnish water to every inhabitant occupying a house within a certain district, at a rate which varied according to the amount of the "rent per annum" of such house. The defendant was the owner of several houses, which he let to tenants for various terms not exceeding three months. In respect of some of the houses the defendant paid poor-rates, district rates and water-rates, instead of the tenants, either because he had let the houses on those terms, or because the obligation was imposed on him by statute:—Held (affirming the judgment of the Court below), that in calculating the water-rate, the payments made by the defendant in either case must be deducted from the rents at which the houses were let.

This was an appeal from the decision of the Court of Exchequer, giving judgment for the defendant on a Special Case. The facts are fully stated in the report of the case below, 41 Law J. Rep. (N.S.) Exch. 233.

Field (H. James, Kemplay and Barker with him), for the plaintiffs, appellants.—The judgment below rested on the ground that if the plaintiffs' construction of "rent" were adopted, strange consequences would follow. There are, however, many anomalies if rent means "annual value;" e.g., when the poor-rate is high the "annual value" of some houses will be below 7*l.*, and when low above 7*l.* In times of distress when the poor-rate is extremely high, the landlord would get hardly any or no rent, and the annual value would be almost nothing; can the legislature have intended to compel the company to supply water for nothing? Suppose by statute a portion of Shef-

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field were freed from rates and taxes, rents would rise, and the sums actually paid as rent would be the annual values; can it make any difference in principle if by statute the owner is obliged to pay the rates on houses below a certain limit? If the rates are to be deducted from the rent, so must repairs and other items, and where are you to stop? Since there are anomalies in either of the two constructions, it is safest to abide by the plain literal meaning of the words of section 79 of the Special Act. Section 68 of the Waterworks Clauses Act, 1847, makes the water-rate depend on the "annual value." That Act is incorporated with the Special Act, except so far as the latter may vary it. When, then, section 79 of the Special Act makes the water-rate depend on the "rent," the intention seems clear that "annual value" shall not be the test.

[QUAIN, J.—In the Special Act "rent" is not always used accurately; section 80 speaks of a "water-rent."]

In 32 & 33 Vict. c. 41, s. 1, "rent" clearly means gross rent. He also cited the cases referred to in the Court below.

Manisty (Wills and Cave with him), for the defendant, was not heard.

BLACKBURN, J.—We are all agreed that the difficulties and objections in the way of the defendant's construction of the Special Act, which Mr. Field has pointed out, are great and real. But there are also many difficulties and objections in the way of the plaintiffs' construction, which were pointed out by the Court below, and we think that the latter preponderate, and that the Court below adopted the true construction.

KEATING, J.; BEETT, J.; QUAIN, J.; GROVE, J.; ARCHIBALD, J.; and HONYMAN, J., concurred.

Judgment affirmed.

Attorneys—Pitman and Lane, agents for Albert Smith & Son, Sheffield, for plaintiffs; Pattison, Wigg & Co., agents for Bromhead, Wightman & Moore, Sheffield, for defendant.

1873. }
April 28. }

SLATER v. JONES.
CAPES v. BALL.

Debtor and Creditor—Composition with Creditors—Bankruptcy Act, 1869, section 126—Resolution for Composition pleadable in Bar to Action for Debt before Default in Payment of Composition.

If—after an extraordinary resolution to accept a composition payable at a future time or by instalments, in satisfaction of the debts due to creditors by their debtors, has been duly passed, confirmed and registered under section 126 of the Bankruptcy Act, 1869—a creditor who is bound by the resolution sues for his original debt before default in payment of the composition, or of any instalment, the resolution is pleadable in bar of the action.

In the first of these cases, *Slater v. Jones*, the declaration alleged that the plaintiff was the trustee of the property of P. and S. in their liquidation under the Bankruptcy Act, 1869, and that Williams & Co., on the 20th of September, 1871, drew a bill of exchange, now over due, payable to their order for 17l. 11s. 6d., three months after date, that the defendant accepted it and Williams & Co. endorsed it to P. & S. before the presentation of the petition for the liquidation, but the defendant did not pay it.

Plea—that while Williams & Co. were the holders of the bill and before it had become due and payable, and after the 31st of December, 1869, the defendant then being a debtor unable to pay his debts, summoned, in the manner prescribed in the Bankruptcy Act, 1869, and the Rules made in pursuance thereof, a general meeting of his creditors, which was duly held accordingly, notice thereof having been duly given in the prescribed manner under the Act and Rules, and that a majority in number and three-fourths in value, estimated according to the Act, of the creditors of the defendant assembled at the meeting, by an extraordinary resolution within the true intent and meaning of the Act, resolved that a composition of six shillings in the pound on the amount of the defendant's debts, whereof two shillings should be payable in four months, and two shillings in eight months,

and two shillings in twelve months from the complete registration of the resolution, should be accepted in satisfaction of the debts due from the defendant to his creditors respectively; that the resolution was afterwards duly confirmed by a majority in number and value, estimated according to the Act, of the defendant's creditors assembled at a subsequent general meeting, of which due notice had been given in the prescribed manner, and which was held at an interval of not less than seven days nor more than fourteen days from the date of the first meeting; that the defendant was present at each of the meetings, and produced to the same respectively a statement shewing the whole of his assets and debts, and the names and addresses of the several creditors to whom the debts respectively were due, and amongst others, shewing the amount of the bill as being due to Williams & Co., who were then the holders thereof whose names and addresses were shewn in the statement as creditors in respect thereof; that Williams & Co. accordingly proved the debt due upon the bill under the proceedings; that all proceedings were duly taken and had as prescribed by the Act and Rules respectively, and that all things happened and were done, and all times elapsed necessary to make the extraordinary resolution binding on all the creditors of the defendant, including Williams & Co. and the plaintiff, and to make the composition a bar to the causes of action herein pleaded to; that the several debts herein pleaded to were and are debts provable in bankruptcy, and that after the making and passing of the resolutions and after registration thereof Williams & Co. endorsed the bill to the plaintiff, who then had notice of the several premises, and that the bill was overdue when first endorsed to the plaintiff; and that the bill was endorsed to the plaintiff, and he always held the same, without any value or consideration.

Replication—that the time for the payment of any part of the composition has not elapsed, and that no part of the same has been paid or tendered to be paid to Williams & Co. or the plaintiff.

Demurrer to the replication and joinder therein.

Sub-section 1 of section 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), enacts—"The creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor." Sub-section 7—"The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shewn in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."

Thesiger, for the defendant, was stopped.

R. T. Reid, for the plaintiff.—It is admitted that section 126 of the Bankruptcy Act, 1869, makes the composition "binding" on the plaintiff, but the defendant must go to the Bankruptcy Court to enforce it, for that Court alone can judge whether he deserves protection. This composition is an accord without satisfaction; the plea ought to allege payment *modo et forma*. It is immaterial that the time for payment has not yet arrived. The Bankruptcy Act, 1869, does not make this composition more binding than would be an agreement between a debtor and creditor, that the creditor shall take less than his debt, and such an agreement the creditor may cancel at any time before satisfaction. The creditors might have agreed to release the debtor but they have not (1), and it was held that a composition deed under section 192 of the Bankruptcy Act, 1861, which did not contain a release, could not be pleaded in bar of an action—*Clarke v. Williams* (2) and

(1) General Rule 281 says, that the resolution may provide that the terms of the composition be embodied in a deed, containing covenants (*inter alia*) for protecting and releasing the debtor.

(2) 3 Hurl. & C. 508, 1001; s. c. 34 Law J. Rep. (n.s.) Exch. 60, 188.

The Ipstones, &c., Company v. Pattinson (3). Martin, B., there said that "a bar whereby a man is to have his debt extinguished must be by the positive enactment of the statute. . . . If the proposition contended for by the defendant were correct, great difficulties would arise, for the debt having gone altogether could not be kept alive for any purpose." The doctrine that a right of action once suspended, for ever so short a time, can never revive, was clearly explained in *Ford v. Beech* (4), and has never been doubted. Now *Edwards v. Combe* (5) decided that a composition such as the present under section 126, could not be pleaded in bar to an action by a creditor brought after the debtor had failed to pay the composition at the appointed time. If that case is good law the plaintiff might have sued before default in payment of the composition, since *Ford v. Beech* (4) shews that the right of action could not revive. *Edwards v. Combe* (5) was followed by the Lords Justices in *Re Hatton* (6). If judgment goes against the plaintiff he is barred for ever, and if the defendant fails to pay the composition the plaintiff can recover neither composition nor original debt.

Thesiger in reply.—Judgment on this plea will not extinguish the original debt nor preclude the plaintiff from suing for it on failure of payment of the composition, for a plea of judgment recovered against the plaintiff must shew that the cause of action was determined against the plaintiff on grounds constituting the judgment a defence to the present action—*Bullen and Leake*, 3rd edit. p. 575 (a), *Phillips v. Ward* (7), *Walker v. Nevill* (8), *Newington v. Levy* (9), and *Jeffs v. Day* (10), where to an action for a debt an equitable plea, that the plaintiff had

assigned the debt to another (who had given notice to the defendant), and was suing in fraud of the assignment, was held good. *Blackburn, J.*, there said that if the right to sue for the debt was ever revested in the plaintiff, the judgment for the defendant would be no bar to the action. No doubt the words of section 126 are similar to those relating to composition deeds in the Act of 1861, but those were deeds between the parties, here the statute steps in. The provision in section 126, sub-section 7, that a composition "shall not affect or prejudice the rights of any other creditors," shews that the rights of the specified creditors were intended to be affected. The framers of the Act and forms certainly never meant (as the plaintiff suggests) that the debtor should be compelled to go to the Bankruptcy Court to enforce the composition, for there is no form for such a proceeding. The forms 80, 81 and 82 for enforcement are all framed for application by a creditor.

The Court then desired to hear the argument for the plaintiff in *Capes v. Ball*.

In that case the declaration was against the defendant as acceptor of a three months' bill of exchange for 25*l.* drawn by Robinson on November, 1, 1872, and payable to his order, and indorsed by him to the plaintiff, and now over due.

Plea.—That after accepting the bill, and before action, the defendant in due conformity with the provisions of the Bankruptcy Act, 1869, and the Rules made pursuant thereto, presented a petition for a liquidation of his affairs by arrangement or composition; that at a general meeting of the creditors convened and held pursuant to the Act and the Rules, on the 20th of December, 1872, a resolution was passed by a majority in number and three-fourths in value of the creditors, agreeing to accept a composition of one shilling in the pound from the defendant, to be paid within three months after the final registration of the resolution; that the resolution was confirmed by a majority in number and value of the creditors as assembled at a subsequent general meeting convened and held in due conformity with the Act and the Rules, on the 2nd

(3) 2 Hurl. & C. 829; s. c. 33 Law J. Rep. (N.S.) Exch. 193, 195.

(4) 11 Q.B. Rep. 842, 867; s. c. 17 Law J. Rep. (N.S.) Q.B. 114, 116.

(5) 41 Law J. Rep. (N.S.) C.P. 202.

(6) 41 Law J. Rep. (N.S.) Bankr. 12.

(7) 2 Hurl. & C. 717; s. c. 33 Law J. Rep. (N.S.) Exch. 7.

(8) 3 Hurl. & C. 403; s. c. 34 Law J. Rep. (N.S.) Exch. 73.

(9) 39 Law J. Rep. (N.S.) C.P. 334.

(10) 7 B. & S. 250; s. c. 36 Law J. Rep. (N.S.) Q.B. 99.

of January, 1873; that the resolution, together with the statement of the defendant as to assets and debts required by the Act and the Rules, and made in due conformity therewith, was duly presented to the Registrar, who forthwith duly registered the same; that the defendant in that statement stated the amount of the bill and the name and address of Robinson; that the plaintiff became and is bound by the resolution; and that the composition was not at the commencement of this action, nor is now payable.

Demurrer to the plea, and joinder therein.

Wood Hill, for the plaintiff.—Though the facts are not precisely identical with those in *Slater v. Jones*, the same principle must decide both. That such a plea is no bar to the action was conclusively decided by *The Ipstones, &c., Co., v. Patkinson* (3) and by *In re Hatton* (6). There Mellish, L.J., said that where the creditors agree to accept a composition the debtor is not discharged unless he pays the composition, and that there is nothing in the Act to alter this state of things. It cannot amount to more than a covenant not to sue while the instalments are paid, and it has been held that such a covenant is not pleadable in bar—*Ray v. Jones* (11). To hold that this plea is a bar will be to add to the statute words which the Courts have always refused to add to composition deeds. It is conceded that payment of the composition would be a bar.

[KELLY, C.B.—If the plaintiff has judgment, perhaps the composition may be paid the next day?]

The Court of Bankruptcy would then restrain the plaintiff from proceeding with his judgment.

Hasselfoot, for the defendant, was not heard.

KELLY, C.B.—I think in both these cases the defendant is entitled to judgment. In both the question is raised whether, when a resolution has been passed under section 126 of the Bankruptcy Act, 1869, to accept a composition to be paid by instalments or at a future

time, a creditor who is bound by that resolution is disabled from suing for his debt before the time for payment of the composition or of any instalment. With reference to the Bankruptcy Act of 1861 and to the cases decided on it, it is unnecessary to say more than that there is this distinction between the statutes—The provisions of the Act of 1861 are to the effect that where a prescribed majority of the creditors agreed to accept a composition, the agreement of the majority should, if certain conditions were complied with, be binding on the whole body. Composition deeds were framed under that Act differing from one another in a great variety of ways, some extinguishing the original debt, and some not. If the deed contained a release or equivalent words, it was pleadable in bar, but not otherwise, and it was necessary to consider the terms of the deed to find out whether the parties intended that the deed should be a bar. But in the Act of 1869 the provisions are entirely different, and the cases decided under the Act of 1861 do not apply, for there is here no deed, and therefore no terms to be considered. The statute does not refer to the terms of the resolution, but simply says the creditors may resolve "that a composition shall be accepted in satisfaction of the debts due to them from the debtor." Can those words possibly mean that immediately after the resolution is made, a creditor who has agreed to that resolution, can bring an action for his debt? A construction so repugnant to every principle of reason would require express words to support it. The debtor may have entered into transactions upon the faith that no demands will be made upon him till the time for payment arrives. The cases collected in note (x) to *Starkie on Evidence* (vol. 2, tit. "Accord") cited by my brother Bramwell during the argument, shew that where many creditors agree to accept a composition the consent of the others is a good consideration to each creditor. It would be entirely inconsistent with those cases to hold that the plaintiff's construction of the statute is the true one.

I think, therefore, that a creditor who is

(11) 19 Com. B. Rep. N.S. 416; s. c. 84 Law J. Rep. (N.S.) C.P. 306.

bound by such a resolution as the present cannot sue for his original debt till the time for payment arrives and default is made.

As to *In re Hatton* (6), the Lords Justices decided no more than this—that a creditor may bring an action to recover his original debt if the condition to be observed by the debtor, the payment of the composition, be not performed. If indeed the words of Mellish, L.J., be read without reference to the facts of the case before him, they might support the interpretation which the plaintiff's counsel endeavoured to put upon them, but they must be taken *secundum subjectam materiam*.

Then in *Edwards v. Combe* (5) the language of Willes, J., shews that in his opinion until the debtor fails to comply with the conditions of the resolution the creditor is restrained from suing. The only reasonable construction of the statute is to hold that the resolution amounts to a satisfaction of the debt on the debtor paying the composition.

As to *Ford v. Beech* (4), and the difficulty raised that if judgment be given, against him the plaintiff cannot maintain another action for the debt if the debtor should fail to pay the composition, I think that looking at the authorities, and especially at *Edwards v. Combe* (5) no such objection can prevail. It is just the same as if to an action for a debt the defendant pleaded a discharge in bankruptcy. If the discharge were afterwards set aside what is there to prevent the plaintiff from bringing another action for the original debt? The circumstances would be totally different—circumstances which formed no part of the judgment in the first action. The same reasoning applies if a bill of exchange is given for the price of goods. If the vendor sues while the bill is running, judgment must be given against him, but that would not stand in the way of his bringing another action for the price after the bill has been dishonoured.

MARTIN, B.—I am of the same opinion. I think that in *Slater v. Jones* the plea is good and the replication bad, and that in *Capes v. Ball* the plea is good. I am not at all embarrassed by the decisions under the former statute, between

which and the present statute there is a distinction. The statute of 1861 enacted that “every deed or instrument made or entered into between a debtor and his creditors, or any of them, shall be as valid and effectual and binding on all the creditors as if they were parties to the same,” provided certain conditions be observed. The operation of that was simply to make a certain instrument binding on persons who had not executed it. To find out the extent to which it was binding you must look at the terms of the instrument. It was justly said that some of the decisions on that Act are contrary to each other, but the truth was the Courts of law could not at first accept the notion that persons should be bound by a document which they had never signed or agreed to. In my judgment those cases have nothing to do with the present one, which depends on the true construction of the Act of 1869. The meaning of bankruptcy is, that a person gives up all his property for the benefit of his creditors that he may get a release from his debts. Under the old law the bankrupt got a certificate, and under the present he gets a discharge. But it was notorious that in many cases a debtor and his creditors agreed that his affairs should be liquidated by arrangement; that is, the parties settled among themselves how the debtor should be released. The Act of 1869 then having in Parts I. to V. provided for bankruptcy, deals with liquidation by arrangement in Part VI., and then in Part VII. with “composition with creditors.” The meaning of a composition is, that instead of transferring all the debtor's property to a trustee as in bankruptcy, the debtor is to keep his property and to get free by paying the composition which the creditors resolve to accept. The first clause of section 126 says, “The creditors . . . may without any proceedings in bankruptcy . . . resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor.” That means that the parties may agree that one shilling shall be paid in satisfaction of a debt of one pound. I do not agree with the view that it means that it shall not operate as a satisfaction till the composition is paid. Then the 7th clause says that the provisions of a composition

accepted by an extraordinary resolution in pursuance of this section shall be binding on certain creditors. Is it in accordance with the true construction of this clause, that after a creditor has agreed to accept a shilling in the pound, and to let the debtor remain in possession of his property, the creditor may nevertheless get judgment for his debt and take all the debtor's property? Impossible; the substance of the arrangement being that the debtor shall keep his own property. I think that what the statute means is an agreement which ties the creditor's hand till the time for payment of the composition; and I have some doubt whether it does not tie his hand still further. I do not wish to bind myself by any expression of opinion on this further point. It may be that the Lords Justices were correct in their decision that the creditor has a right of action for the original debt if the composition is not paid when due, but I think it may well be argued that that is not the true construction of the statute.

Ford v. Beech (4) is no doubt good law. Parke, B., there said, "It is a very old and well established principle of law that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive." That is perfectly correct, but section 126 simply enacts that the provisions of a composition accepted in the manner prescribed shall be binding on the creditors.

BRAMWELL, B.—I am of the same opinion, but not without some hesitation. The object of the statute was not to facilitate agreements between willing parties, but where certain of the creditors agreed to bind themselves, to make that agreement binding also upon the other creditors. Here certain creditors agreed to accept a composition. By incorporating the statute into that agreement, it is an agreement that the provisions of the composition shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom are shewn in the debtor's statement. Mr. Reid and Mr. Hill both admitted that the agreement was binding on the respective plaintiffs; but the question is to what

extent they are bound. My doubt was whether we might not be putting a construction on the statute not contemplated by those who framed it; and there is, in my opinion, nothing so difficult as to draw an Act of Parliament which shall embrace every case: it is almost impossible to anticipate all the circumstances which will arise. Now, do the creditors mean by this agreement—"We make a bargain with you which you can enforce in equity if we sue in violation of our agreement, but it is a bargain which does not preclude us from bringing an action till the composition is due?" Do they mean that, or do they mean that they shall not be at liberty to sue till default in payment of the composition? Every one would say that it is more reasonable to suppose the parties meant to give the debtor a defence without sending him to equity. Therefore, if it is possible, we ought to give effect to the intention of the parties, that the agreement should be a bar to an action before default. Now is it possible? Turning to the authorities, the law is thus stated in *Boyd v. Hind* (12) by Williams, J., "The law with respect to defences founded on compositions between a debtor and his creditors, appears not to have been distinctly defined until the case of *Good v. Oheesman* (13). It used to be sometimes laid down that a right of action once vested could only be barred by a release, or by accord and satisfaction. But since the decision of that case, the law has been regarded as settled that a composition agreement by several creditors, although by parole so as to be incapable of operating as a release, and although unexecuted so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt, if he accepted the new agreement in satisfaction thereof; and that for such an agreement there is a good consideration to each creditor, viz., the undertaking of the other compounding creditors to give up a part of their claim." If that is good law it shews we may hold this agreement a bar to the present action, drawing our conclusion as to the in-

(12) 1 Hurl. & N. 938, 947; s. c. 26 Law J. Rep. (N.S.) Exch. 164, 166.

(13) 2 B. & Ad. 328.

tention of the parties from the facts. And I think that this is the more reasonable as well as the more convenient construction of the statute.

As to the cases decided upon the statute of 1861, many of them were on composition deeds, from which it was impossible to draw the same conclusion as in the present case. I think therefore on principle that this agreement is a bar to the action.

But it is said that there is a difficulty, as *Edwards v. Combe* (5) and *In re Hatton* (6) shew that if default is made in payment of the composition, the original debt may be sued for; and Mr. Reid and Mr. Hill (who argued very well) contended that this proved conclusively that the plaintiff's right of action never could have been barred, since *Ford v. Beech* (4) is an authority that a right of action if once suspended is gone for ever. It is to be observed that neither the Lords Justices in *In re Hatton* (6) nor Willes, J., in *Edwards v. Combe* (5), said what their decision would have been if the present case had been before them. In *Jeffs v. Day* (10), Blackburn, J., said that if the right of action were ever re-vested in the plaintiff, the judgment against him would be no bar to the action. However that may be, the question is how to reconcile *Ford v. Beech* (4) with *In re Hatton* (6) and *Edwards v. Combe* (5). Now neither Mellish, L.J., nor James, L.J., say that the resolution would not be a bar to such an action as the present. Willes, J., not only does not say so, but in saying that the resolution is binding on the creditors if the debtor complies with the conditions of that resolution, rather corrects himself and says (14), "or rather until he fails to comply with them." Now, I reconcile these cases in one of two ways; either the agreement is defeasible on default of payment (which is a possible solution) so that when the defeazance occurs, the plaintiff has the right to sue; or else we must hold (and I incline rather to this view) that by these composition agreements the creditors not only say "we agree to accept the composition,"

(14) 41 Law J. Rep. (N.S.) C.P. 203; s. c. Law Rep. 7 C.P. 622.

but tacitly add, "and we will not sue you, and this agreement shall be a bar to an action;" and that the debtor says, "if I do not pay the composition, then I will pay the original debt." This is, no doubt, putting words which are not there into the agreement, but I think we have authority for doing so, for in *Good v. Cheesman* (13), Parke, J., said that *assumpsit* would have lain on either side to enforce performance of the new agreement, if it had been shewn that the party suing had, as far as lay in him, fulfilled his own share of the contract. There is also another reason. Suppose I am a creditor for a four years old debt, and I agree to a resolution of this kind, that the composition shall not be paid for two years, my hands are tied for the two years. Now if we hold that the debtor by implication agrees to pay his original debt in case he makes default in the composition, then the difficulty which the Statute of Limitations would otherwise raise will be avoided.

I think that this is a reasonable result, and that we may well hold that the agreement is (as was held in *Good v. Cheesman* (13)) a good bar to this action, but that upon default, either there is a defeazance to the bar, or that a new cause of action arises on which the creditors may sue. But since this construction may not have been in the contemplation of those who framed this Statute, it is not unreasonable to say that it is a matter on which I do not feel great confidence.

POLLOCK, B.—I am of the same opinion, but not without considerable doubt. I am guided in this decision by the words of the Act of 1869, to which we must give effect so as to carry out the intention of the statute, which was to free the debtor from his liabilities.

Judgment for the defendants respectively.

Attorneys—W. A. Plunkett, for plaintiff; Piessé & Son, for defendant, in *Slater v. Jones*; T. R. Apps, for plaintiff; J. G. Watson, for defendant, in *Capes v. Ball*.

[IN THE HOUSE OF LORDS.]

1873. } THE LANCASHIRE AND YORKSHIRE
May 11. } RAILWAY COMPANY v. GIDLOW.

Railway Company—Construction of Special Act—Special Services—Tolls—Six-mile Clause.

A special Act, relating to the above company, provided that where goods were carried on the company's railway, or partly on their railway and partly on some other railway of which they were joint owners, or which they had a right to use, for a less distance than six miles, the company should be entitled to take tolls as for six miles. The Act also provided that the tolls for goods carried over the company's line and over portions of other lines of which they were part owners, or which they had a right to use, should be computed as if the company's line and the said portions of the said other lines formed one railway.

Goods were passed over the line of which the company were sole owners for a distance of less than six miles; the same goods on their transit to their ultimate destination passed over another line of which the company was part owner for a distance of more than six miles. This latter line was under the sole management of another company. The goods were accompanied by two declaration notes, one made out in the name of the first company and the other in the name of the other company, but the station of ultimate destination mentioned in both notes was the same:—

Held, that the company was not entitled to split the contract, that the two lines must be treated as one, and that the six-mile clause was not applicable.

The same Act of Parliament, while providing the maximum rate of tolls to be charged, made an exception in respect of special services to be rendered by the company for loading, unloading, collection and delivery of goods:—Held, that the company were not entitled to charge for special services, though found by a jury to have been actually rendered by them; the customer charged for such services, not having had the offer and option first distinctly given him of either availing himself of such services at the company's rate of charge or of doing them himself, such services being incidental to the ordinary busi-

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ness of a carrier, and such as the customer, without notice, might have supposed were covered by the company's charges for toll.

This was an appeal, upon a case stated, from a judgment of the Court of Exchequer Chamber affirming one of the Court of Exchequer in favour of the respondent, the defendant below.

The action was brought by the plaintiff company to recover 673*l.* for conveyance of defendant's coal from Hindley to Wigan Junction upon their railway from 31st of December, 1865, to 13th of June, 1866, and also for services rendered by them incidental to such conveyance, and for the rent of a yard. The defendant paid 76*l.* into Court, and as to the rest of the claim he pleaded never indebted and set-off; the set-off consisting of moneys paid by him to the company for conveyance of his coal from Hindley to Wigan and elsewhere from the 1st of January, 1866, to the 31st of January, 1868, and which he alleged was over-charged; and the question was, whether the company had a right to charge sixpence per ton for conveying defendant's coal from Hindley to Wigan, or how much they were entitled to charge in addition to one penny per ton. The answer to this question depended on the construction of 9 & 10 Vict. c. ccxxxi., and of the 22 & 23 Vict. c. cx. The former of these Acts was an Act by which the North Union Railway was vested in the Lancashire and Yorkshire Railway Company, the appellant company, by its then name of the Manchester and Leeds Railway Company, and in the London and North Western Railway Company, then called the Grand Junction Railway Company. Section 8 of this Act declared the maximum rates and tolls to be charged for passengers and goods carried by the two companies over the North Union Railway, for coal and slack, one penny per ton per mile, and it provided that the companies might charge tolls as for six miles in respect of matters passed over that railway for a less distance than six miles. This latter provision was, however, controlled by section 14, which provided that in estimating the tolls to be charged on coals, &c., passed over either of the railways, viz., the Grand Junction

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or the Manchester and Leeds, as well as over the North Union, the distances should be computed as if the Grand Junction or the Manchester and Leeds Railway, as the case might be, formed one railway with the North Union Railway. Section 17 contained a similar provision for estimating the tolls to be taken for short distances and for fractional parts of a mile. Sections 22 and 23 enacted that an annuity should be paid to the North Union Railway by way of purchase-money in certain proportions by the two companies. Sections 30 and 31 enacted that that portion of the North Union Railway, in respect of which this action arose, should be managed and worked by the two companies jointly, and the profits were to be apportioned between the two companies. But by subsequent traffic arrangements between the two companies, it was worked by the London and North Western Railway Company solely. The Act of 22 & 23 Vict. c. cx., amalgamated the East Lancashire Railway Company with the Lancashire and Yorkshire. Section 62 repealed all provisions and enactments as to tolls contained in any Acts relating to either of the lines thereby amalgamated, and section 63 prescribed fresh tolls for goods carried not in their trucks, viz., for coals, &c., one penny per ton per mile with the six-mile clause. Section 66 provided the rate to be charged, including use of their trucks, but excepting a reasonable charge for loading, unloading and other services incidental to the business of a carrier. Section 67 was that on which the appellant company most relied. It provided that the company should not be compellable to provide waggons, but when waggons were not provided by them, a deduction of one-eighth of a penny per ton per mile should be made from the authorised tolls; "but

where any articles," &c., "shall be conveyed on the said railway, or on the same railway and any other railway of which the company are joint owners or which they have the right to use for a less distance than six miles, the said company are hereby empowered to demand tolls," &c., "for six miles." On the other hand, section 69 provided that tolls in respect of goods carried over the Lancashire and Yorkshire Railway, or those portions of railway of which they were part owners, or which they had a right to use, should be computed as if the Lancashire and Yorkshire Railway and the said portions of the said other railways formed one line of railway.

The defendant was the owner of a colliery, called Ladies' Lane Colliery, at Hindley, about 400 yards west of Hindley Station, on the Lancashire and Yorkshire Railway, Hindley Station being about two miles and a quarter from the Wigan junction, where the North Union Railway joins the appellant company's own line. He was in the habit of sending his coal to Windermere, and of necessity it went from Hindley to Wigan by the Lancashire and Yorkshire Railway, and thence by what had been the North Union Railway to Windermere. The practice was this: The defendant loaded his waggons at a siding of his own. The appellant company's engine would then call for them and convey them away. At the same time two declaration notes, partly in print and partly in writing, were made, and the one was delivered to the servant of the company, the other was affixed to the loaded waggons. The declaration given to the company's servant was as follows—

"Coal Declaration"

"For the Lancashire and Yorkshire Railway Company from the collieries of T. Gidlow, 186 .

For	Destination	Quality	Waggons	Tons	Cwt.
Agency	Windermere	Coal	No. 54	7	15

Per the railway company's engine from Hindley to Wigan, dues to be charged to the account of T. Gidlow.

"(Signature)

"Thomas Partington."

"Coal Declaration.

That affixed to the waggons was as follows—

“For the London and North-Western

Railway Company from the collieries of T. Gidlow, Hindley, 186 .

For	Destination	Quality	Waggons	Tons	Cwt.
Agency	Windermere	Coal	No. 120	9	0

Per the railway company's engine from Wigan to , dues to be charged to the account of Thomas Gidlow.

“(Signature)

“Thomas Partington.”

The company charged him for the conveyance of his coal to Wigan, under the six-mile clause, as if that was a complete contract in itself, and they then in addition charged him the full rate of tolls from Wigan to Windermere, as if that was another complete contract. He having paid at this rate from January, 1866, to January, 1868, claimed to set off the amount paid by him in excess of the amount due for the actual distance against the claim of the company for carriage during 1865. The company thereupon insisted on their right to charge for special services in loading and unloading. The defendant resisted both these claims, and on action brought by the company, before Lush, J., and a special jury, the learned Judge ruled, that the company was entitled to charge as for six miles, and the jury found the company had rendered services, and they assessed the same at a farthing per ton. Leave was reserved for the defendant to move to enter the verdict for him or to reduce the damages. The verdict was subsequently, in Trinity Term, 1868, set aside, and the verdict entered for the defendant. On appeal the Court of Exchequer Chamber affirmed the judgment of the Court of Exchequer, and held that the company were not entitled to charge for the short distance from Hindley to Wigan as if it was six miles. As to the claim for special services, the Court dismissed that part of the plaintiff company's case, as it formed no part of their original demand.

On appeal to this House,

Sir John Karslake and Edwards were heard for the appellant company, and contended that the six-mile clause applied, as on the arrival of the waggons at Wigan, the defendant might if he pleased have altered their destination; also that by the form of the declaration, the London and North Western Railway Company and not the appellant company was responsible for the rest of the journey; that the waggons were conveyed from Wigan by the London and North Western Railway's engines; and that this construction was therefore in conformity with the object of the six-mile proviso, which was that where as here the engines of the company were compelled to convey goods for less than six miles, as the usual mileage tolls would not pay them for doing so, they might in such cases charge as for six miles. As to the charge for services. If they were allowed to charge as for six miles, they would not insist on these charges; otherwise they were entitled to a reasonable sum, such as the jury had found for them.

Holker and J. Kay, for the respondent, were not called on.

THE LORD CHANCELLOR (LORD SELBORNE).—The first question in this case relates to the claims which the appellants have made to charge for the conveyance of goods from Hindley to Wigan, a distance of less than six miles, as if it were equal to six miles; and the question is, whether or not under the Act 9 & 10 Vict. c. 231, goods intended to be carried partly over the railway of the plaintiffs, in this case from Hindley to Wigan, and thence for a distance over the North Union Railway,

which is now vested jointly in the plaintiffs and in the London and North Western Railway Company, can be treated as the subject of two distinct charges, first of all in respect of the distance, which is less than six miles from Hindley to Wigan, and afterwards in respect of the ulterior distance from Wigan towards Windermere. The ground upon which it is contended that the two distances are to be divided, and the charge as for six miles made as between Hindley and Wigan is, that the goods, although intended in all these cases to be sent on towards Windermere, were delivered at Hindley, with two distinct declarations, one applicable to the conveyance from Hindley to Wigan as by the plaintiffs, the Lancashire and Yorkshire Railway Company, and the other applicable to the further conveyance from Wigan to the ultimate destination as by the London and North Western Railway Company; and it is said that that makes two contracts with two distinct companies, and that the case is as if the goods might remain for any time at Wigan, and as if the ulterior transmission of the goods from Wigan had been left to be determined by a subsequent and independent contract.

I think there is not any ground at all upon the facts of the case for that contention. Under the Act 9 & 10 Vict. c. 231, the plaintiff company is part owner with the London and North Western Railway Company of the line beyond Wigan. The powers to levy tolls and make charges in respect of conveyance on the railway beyond Wigan are joint powers vested in the plaintiff company and in the London and North Western Railway Company, and it is for the joint benefit of both that all those tolls and charges are to be collected and paid. The particular arrangements under which the traffic is to be managed, the line worked, and the actual receipts collected and accounted for, are the subject of clauses in the Act, but in substance the two companies own as partners that portion of the line. The defendants' goods were delivered to the plaintiff company at Hindley, under directions in writing that they should be sent to Wigan and from Wigan

to Windermere; but their ultimate destination was expressed in each case to be Windermere, and there was no instance of a contract in which Wigan was the ultimate terminus, and I take it that the company, who were interested not only as sole owners in the line between Hindley and Wigan, but also as part owners in the line beyond, when they received goods to be sent on in that direction, received them under an obligation to send them to Wigan, and from Wigan to see that they were transmitted forwards. Now, in that state of things, the Act of Parliament which created this part ownership in the line beyond, appears to have been expressly careful to prevent such a claim being made as that which is made in the present case, and the effect of which, if it were allowed, might simply be that one of the partners might charge for a distance less than six miles on one side of Wigan, as if it were six miles, and the other partner might charge for a distance less than six miles on the other side of Wigan, as if it were six miles, and though I do not know whether the position of the stations would admit of the case, yet the case may be imagined where the aggregate distance on the two lines might be less than six miles, and yet the charge might be as for two distances of six miles. The Legislature appears to have been careful to provide against that particular case, and having given to the plaintiff company the interest which it has in the line beyond Wigan, and having authorised, by section 8, the charge for a less distance than six miles as if it were six miles, it proceeds in the 14th section to say that in calculating the tolls on coal and other things passing as well over the North Union Railway as over or upon one or other of the railways there mentioned, one of which is the plaintiff company, the distances shall in all cases be computed and the tolls imposed as if the two lines formed one line of railway. It is to be observed that throughout that section no reference is made to the form of any contract with the public, or to the division of any such contract as between one company or the other, but in speaking of the passage of goods over both lines, it says that the computation shall be made and

the tolls shall be imposed in all cases in the same way as if it were a single line. Nothing can be more reasonable, because in point of fact the Legislature had made it a single line so far as proprietorship was concerned, with this difference only, that as to part of the line there was a joint ownership, and as to part only a sole ownership. That construction would be confirmed if it were necessary by a reference to the other clauses of the Act. Section 17 expressly refers, in a manner which the 14th section does not, to the tolls which are authorised to be taken for short distances. The subsequent Act, The Lancashire and Yorkshire and The East Lancashire Railways Amalgamation Act, 22 & 23 Vict. c. x., by the 63rd section, also provides that with respect to all the goods and things passed for a less distance than six miles over the line of which the Lancashire and Yorkshire Railway are sole owners, or over the same line and those portions of railway of which they are part owners, or which they have a right to use, the six mile charge may be made; but, by the 69th section, it expressly repeats the provision contained in the earlier Act, that the tolls, rates and charges to be taken by the company in respect of the passage and conveyance of all goods upon the Lancashire and Yorkshire Railway, and those portions of railway of which they are part owners, shall be so computed and imposed as if the whole formed one line of railway. It seems to me quite clear that that principle of computation ought to be applied here, and the whole must be treated as one line of railway; and if so, then these goods which were delivered for the purpose of passing, and which did actually pass over more than six miles in the aggregate, must be regarded as having passed over so much of one line of railway; therefore it appears to me that the Court of Exchequer Chamber was perfectly right as to this part of the case.

With regard to the other part of the case, it is suggested that if the right to make the six mile charge is not established some special services were rendered at the Hindley station, and also at the Wigan station, for which some extra charge, the value of which is said to be found by a

particular finding of the jury, might lawfully be made by the railway company. It appears to me very clearly that we have not before us any materials from which we can draw in favour of the appellants any such conclusion. It is quite true that by clause 66 of the latter of the two Acts which have been mentioned authority is given to the railway company to charge, beyond the ordinary maximum rate of charge, a reasonable sum for loading, covering and unloading of the goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services are actually performed by the company, but I cannot find in the Special Case, or in that which is said to be the finding of the jury on the subject, that any services of the particular kind described in that clause and for which an extra charge might be made were, in fact, rendered by the company. It may or may not have been so, but the facts are not so before us as to enable us, in my judgment, to come to that conclusion. The finding of the jury mentioned in the Special Case is, that services were rendered by the plaintiff company to the defendant, of which they proceed to find the value, but the jury do not find that these services were for collecting, delivering, loading, covering and unloading of goods and so on, in the words of the clause, nor can I find in the statements in the Special Case as to the services alleged to have been rendered, anything which unequivocally shews such a state of things as to authorise the conclusion, as a conclusion of fact or of law, that the plaintiffs are entitled to make an extra charge in respect of the matters there mentioned. The statements in the Special Case on this matter do not follow in any particular the terms of the clause of the Act of Parliament, which states for what kind of services extra charges may be made, and, as far as I can see, everything which is stated in the Special Case to have been done may have been done by the company in the ordinary course of their own business, and in pursuance of arrangements made by themselves on their own lines, with a view to their own convenience; such arrangements having regard to the most convenient

and suitable manner of receiving and taking charge of the mineral traffic sent by the defendant previous to forwarding it and of afterwards forwarding it on their own line. It is perfectly clear that the case does not say that there was any contract or any communication with the view to a contract on either side under which the option was given to the defendant of accepting from the company any services which they were not bound to render in the ordinary course of the performance of their duty as carriers upon their lines of railway. Until a late date in the dealings of the parties no suggestion that there were any such services appears to have been made; only after the controversy upon the subject of the six mile charge, a suggestion was indeed thrown out in a letter, written on behalf of the company, with a view to justifying the charge which they had made, on the ground of its being a reasonable charge for some kind of services, but the letter does not in any specific manner describe or mention what those services were or might be. I do not find anything in that letter to enable the defendant to understand what were the particular things in respect of which he was required by the company to say that he would or would not have them. There was nothing to suggest to him a question either as to whether the company was bound to do these things without charge, or on the other hand, if they were not bound to do these things, and were entitled if they did them to charge for doing them, whether it would not be better that he should make arrangements for doing them himself, so that the company should not make the charge. There is, therefore, as it appears to me, nothing stated in the Case, and nothing in the company's letter even, which would enable us to separate such services, if any such were rendered which the company could charge for, from those which were not rendered by them, properly speaking, to the defendant, but which were merely arrangements made for the convenience of their own trains on their own line. Therefore it appears to me that the appeal upon that point fails also, and I advise that this appeal be dismissed with costs.

LORD CHELMSFORD, LORD COLONSAY and LORD CAIRNS concurred.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Attorneys—Clarke, Woodcock & Ryland, agents for Grundy & Co., Manchester, for appellants; Chester, Urquhart & Co., agents for Richardson & Dowling, Bolton-le-Moors, for respondent.

1873. } LARCHIN v. THE NORTH WESTERN
Jan. 16. } DEPOSIT BANK.*

Bill of Sale—Description of Grantor's Occupation—"Accountant."

A clerk in the accountant's office of a railway company does not, in styling himself an "accountant," give a sufficient description of his occupation to satisfy the first section of the Bills of Sale Act.

This was an interpleader issue in which the plaintiff claimed as grantee under a bill of sale against the execution creditors of the grantor.

At the trial before Bramwell, B., at the Surrey Summer Assizes, 1872, it appeared that Samuel Whitehead, the grantor of the bill of sale, was a clerk in the accountant's office of the London and North Western Railway, and that he occasionally, after his ordinary office hours, was employed to balance tradesmen's books in the neighbourhood of his residence. He was described in the bill of sale as "of Kingsdown Villa, Avenue Road, Acton, accountant." Bramwell, B., being of opinion that this was an insufficient description of his residence and occupation for the purposes of the Bills of Sale Act (17 & 18 Vict. c. 36), directed a verdict for the defendants, with leave to the plaintiff to move to enter the verdict for himself, if the Court should think the description sufficient to satisfy the Act.

A rule having been obtained accordingly,

W. Willis shewed cause, contending that the description of the grantor's occupation was not sufficient, the word

* Decided in Hilary Term.

"accountant" having now a special meaning as applied to a particular profession.

Day and *Salter*, for the plaintiff, relied on *Briggs v. Boss* (1), where the description of an attesting witness (who was a clerk to an accountant) as "accountant," was held sufficient, as it would enable a stranger to find him without unreasonable trouble, and on *Grant v. Shaw* (2), where a description of the grantor of a bill of sale as "government clerk" was held sufficient.

THE COURT (3) held that "accountant" had reference to a special recognised occupation, and was not a proper description of the grantor, whose real occupation was that of clerk in the accountant's department of the railway company.

Rule discharged.

Attorneys—W. Norris, for plaintiff; Howard & Co., for defendants.

1873.

Feb. 15. }

DIXON v. BIRCH.*

Innkeeper—Liability of Manager holding License for Company.

The salaried manager of an hotel belonging to a company is not an innkeeper so as to be by law responsible for the goods and property of the guests, although the usual license under 9 Geo. 4. c. 61, has been granted to him personally.

This action was brought to recover the value of property lost by the plaintiff while staying at an hotel in Liverpool.

At the trial before Lush, J., at the Liverpool Winter Assize, 1872, it appeared that the plaintiff's goods, to the value of 21l., were stolen from the hotel while he was staying there, and that the defendant was the salaried manager of the hotel, which was the property of the Clifton Arms and Pier Hotel Company, Limited. The hotel license had been granted in the defendant's name, and the defendant's name

(1) 37 Law J. Rep. (n.s.) Q.B. 101; s. c. Law Rep. 3 Q.B. 268.

(2) 41 Law J. Rep. (n.s.) Q.B. 305.

(3) Kelly, C.B.; Martin, B.; Bramwell, B.; and Pigott, B.

* Decided in Sittings after Hilary Term.

as well as that of the company was written up over the door. The company's name was on the hotel bills, and all the furniture was the property of the company. Lush, J., directed a nonsuit, on the ground that the company were the real innkeepers. Leave was reserved to the plaintiff to move to enter a verdict for him for 21l.

A rule having been obtained accordingly—

Leofric Temple and *Sims* shewed cause.—The license granted by the justices, under 9 Geo. 4. c. 61, must be granted to an individual, and the defendant was merely the nominee of the company for this purpose, but no liability as "innkeeper" in respect of the loss of the property of guests is incurred by reason of his being the licensee.

Herschell and *Tomlinson* argued for the plaintiff, that the defendant as the holder of the license must be regarded as the real innkeeper for the purpose of this claim as well as for any offences against the license, in respect of which offences the licensee would clearly be liable. They cited *Brooker v. Wood* (1) and *Milligan v. Wedge* (2).

MARTIN, B.—I am of opinion that the direction of my brother Lush at the trial was right, and that the company here are the real "innkeepers." There is nothing in the Licensing Act to prevent the real innkeeper being some person other than the licensee.

PIGOTT, B.—I am of the same opinion.

POLLOCK, B.—The case must be considered quite apart from the Licensing Acts, which cannot have the effect of turning an agent into a principal. The defendant here clearly would not be liable at common law, and the Licensing Acts do not create the liability contended for by the plaintiff.

Rule discharged.

Attorneys—Torr, Tagart & Janeway, agents for W. Lancaster, Bradford, for plaintiff; Charles Barnard, agent for Wheeler, Deane & Fletcher, Blackburn, for defendant.

(1) 5 B. & Ad. 1052.

(2) 12 Ad. & E. 737; s. c. 10 Law J. Rep. (n.s.) Q.B. 19.

[IN THE EXCHEQUER CHAMBER.]
(Error from the Court of Exchequer.)

1873. { INGOLDBY AND OTHERS (plain-
May 15. { tiffs in error) v. THE PLUM-
STEAD BOARD OF WORKS
(defendants in error).

Metropolis Local Management Act, 1862
(25 & 26 Vict. c. 102), s. 77—*Paving Ex-*
penses—Apportioned Amount of Expenses
payable by Future Owners—Charge on
Land.

The effect of the 77th section of the Me-
tropolis Local Management Act, 1862, is to
make the apportioned amount of paving ex-
penses incurred under the Act a charge on
the premises in respect of which the amount
has been apportioned; and the District
Local Board may recover the amounts so
apportioned from subsequent owners of the
premises accordingly, although no arrange-
ment be made for payment by instalments.

In this case Error was brought on the judgment of the Court of Exchequer upon a Special Case, the question in which turned on the effect of the 77th section of the *Metropolis Local Management Act*,

1862 (25 & 26 Vict. c. 102), as to making the expenses of paving new streets recoverable from persons becoming owners of the premises, in respect of which the charge was made, subsequently to the execution of the paving works.

All the material facts are set out in the report below, *ante*, p. 50.

Waddy (with him *H. E. Prest*), now argued for the plaintiffs in error, the defendants below.

Barrow, *contra*, for the Board, was not called on to argue.

THE COURT (1) were unanimously of opinion that the judgment of the Court below must be affirmed, for the reasons there given.

Judgment affirmed.

Attorneys—Ingle, Cooper & Holmes, for plaintiffs in error, defendants below; Newman, Dale & Stretton, for the Board.

(1) Blackburn, J.; Keating, J.; Brett, J.; Grove, J.; Quain, J.; Archibald, J.; and Honyman, J.

END OF EASTER TERM, 1873.

CASES ARGUED AND DETERMINED

IN THE

Court of Exchequer

AND IN THE

Exchequer Chamber and House of Lords

ON ERROR AND APPEAL IN CASES IN THE COURT OF EXCHEQUER.

TRINITY TERM, 36 VICTORIÆ.

1873. }
June 2. } SAXBY v. KENNET AND OTHERS.

Patent Law Amendment Act (15 & 16 Vict. c. 83), ss. 23, 24—Effect of dating back Grant of Patent to Day of Application.

To an action for infringing letters patent granted to the plaintiff and sealed as of the date of his application for the same, it was held to be no answer that the alleged infringements were done in exercise of certain letters patent for a similar invention granted to the defendant and sealed as of a subsequent date, i.e., the date of his application for the same, although the complete specification of the plaintiff's patent was not filed in the patent office till after the defendant's specification had been filed.

Declaration for infringement of letters patent, bearing date the 20th day of July, 1867, granted to John Saxby for an invention of "Improvements in the mechanical contrivances and apparatus employed for locking and for actuating or setting in motion the locking and interlocking gear used for regulating or governing the action and movement of railway points and signals in relation to each other," subject to his filing within

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six calendar months in the Great Seal Patent Office, an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed and subject also to certain other conditions and provisions relating to the payment at certain periods of the stamp duties required by the statutes to be paid. Averment that the said J. Saxby did within and at the times prescribed fulfil the said conditions and provisions, &c.

Plea that one W. Easterbrook was the true and first inventor of an invention of a certain new manufacture, that is to say, improvements in machinery and apparatus for actuating, setting in motion, locking, interlocking and controlling railway points and signals, and thereupon Her Majesty, Queen Victoria, by letters patent under the Great Seal of the United Kingdom, granted to the said Walter Easterbrook and his assigns, the sole privilege to make, use, exercise and vend, the said invention within the United Kingdom and Ireland and the Isle of Man, for the term of fourteen years from the 23rd July, 1867, subject to a condition, that the said Walter Easterbrook, within six calendar months next after the day of

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the date of the said letters patent, should cause to be filed in the Great Seal Patent Office, an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be and might be performed, and subject also to certain other conditions; that Easterbrook did within the said time perform the said conditions: and the defendants say that the alleged infringements in the declaration complained of, were in respect of certain apparatus in and according to the said above mentioned invention, and the said letters patent and the said alleged infringements were made and done by the defendants under the orders and superintendence of the said W. Easterbrook and on his behalf, and the defendants say that the said letters patent in the declaration mentioned were granted as is therein mentioned, and the condition as to the said instrument in writing in the declaration mentioned was fulfilled at a time subsequent to the time when the said letters patent were granted as aforesaid to the said W. Easterbrook and subsequent to the fulfilment by the said W. Easterbrook of the aforesaid conditions by him to be performed.

Demurrer and joinder.

Holker (with him *T. Aston* and *Macrory*), for the plaintiff, contended that the plea was bad, inasmuch as the patent granted to Easterbrook bore date subsequent to the patent granted to the plaintiff. The 23rd section of the Patent Law Amendment Act (15 & 16 Vict. c. 83) makes it lawful (notwithstanding 18 Hen. 6. c. 1, or any other Act to the contrary) to cause letters patent issued under the Act to be sealed and bear date as of the day of application for the same; and the 24th section enacts that any letters patent sealed and bearing date as of any day prior to the day of actual sealing shall be of the same force and validity as if they had been sealed on the day of which they are expressed to be sealed and bear date (1). They also

urged that the defendants could not set up that the plaintiff's patent became invalid, or that Easterbrook acquired prior rights as against the plaintiffs by reason of the plaintiffs not having filed an instrument in writing until after the date of Easterbrook's patent and after Easterbrook's fulfilment of his condition, without shewing in what respect, or to what extent, or at what time the plaintiffs were obliged to fulfil the condition, and in what respect they failed to fulfil it.

Herschell (with him *A. B. Poole*), for the defendant, contended that the letters patent granted to the plaintiff were void by reason of the prior grant to Easterbrook in respect of the same invention; that the prior grant to Easterbrook was not in any way lessened by the subsequent grant to the plaintiff, although such subsequent grant was dated (and was founded on a provisional specification) of an earlier date; that the grant to Easterbrook was as good as it was on the day when it was granted, notwithstanding the subsequent grant to the plaintiff; that

contrary notwithstanding), to cause any letters patent to be issued in pursuance of this Act to be sealed and bear date as of the day of application for the same, and, in case of such letters patent for any invention previously registered under the "Protection of Inventions Act, 1851," as of the day of such provisional registration, or where the law officer to whom the application was referred, or the Lord Chancellor thinks fit and directs, any such letters patent aforesaid may be sealed and bear date as of the day of the sealing of such letters patent, or of any other day between the day of application or provisional registration and the day of such sealing. The 24th section enacts—Any letters patent issued under this Act sealed and bearing date as of any day prior to the day of actual sealing thereof shall be of the same force and validity as if they had been sealed on the day as of which the same are expressed to be sealed and bear date: Provided always, that save and where such letters patent are granted for any invention, in respect whereof a complete specification has been deposited upon the application for the same under this Act, no proceedings at law or in equity shall be had upon such letters patent in respect of any infringement committed before the same were actually granted.

(1) The 23rd section enacts—It shall be lawful (the Act 18 Hen. 6. c. 1, or any other Act, to the

Her Majesty could not by a subsequent grant to the plaintiff derogate from her previous grant; and that the plaintiff's grant in respect of the same invention could not be valid till Easterbrook's was repealed, and that therefore the plaintiff could not maintain an action against the defendants for infringements committed under the direction of Easterbrook in respect of inventions contained in letters patent sealed and granted to him previously to any grant to the plaintiff. He cited *Ex parte Bates and Redgate* (2) and *Re Henry* (3), to shew that in such a case as this, letters patent would not be granted to the first applicant for any part of his invention, which is covered by the letters actually granted to Easterbrook.

Holker was not heard in reply.

KELLY, C.B.—The scheme of the Act of Parliament is to enable the Crown to give letters patent to anyone who can satisfy the Crown that he is the author of a valuable and useful invention; and where two or more persons about the same time have invented, or believe that they have invented, some valuable and important improvement in anything that may be the subject of a patent, the legislature has provided ample means by which each and every of those inventors may come before the Law Officer of the Crown, and, if necessary, appear before the Lord Chancellor, in order to insist that he, and he alone, is the person entitled to the patent for the invention in question. The mode in which his application is made is by delivering in at the Great Seal and Patent Office either a provisional or a complete specification, and applying for a patent, the title of which is specified at the time, and an advertisement of that application and of the title of the proposed patent appears, and all the world (or all at least in this kingdom who may be interested in the question, or may suppose themselves the inventors of anything coming within the title of the patent which is solicited) may immediately go

to the office and lodge a *caveat* against the patent. Then again at every stage of the proceedings following the original application (and whether upon deposit of a provisional or a complete specification) notice is given from the Patent Office, and the inventor, or supposed inventor, of the rival patent has an opportunity of opposing at every stage of the proceeding any and every application which can be made by the first applicant for the patent upon the subject in question.

Now in this case there having been an application on the 20th of July for a certain patent, Easterbrook, who about the same time, or a very little time afterwards, was the inventor, or supposed himself to be the inventor, of an improvement of exactly the same description, thus had notice that he was in danger of a patent being granted for that very invention to another person—that is, to the plaintiff. He should have lodged a *caveat* at the office; if he had done so he would have had an opportunity of opposing the grant of the patent, and indeed anything else that might have been applied for in respect of such a patent, first before the law officer of the Crown, and afterwards, if dissatisfied with his decision, before the Lord Chancellor. As it appears that he also lodged, I believe, a complete specification at a subsequent period—no great length of time afterwards—and afterwards proceed to obtain a patent, it may be said, and perhaps truly said, that the plaintiff exposed himself to a very considerable danger, for he had notice of the same application on the part of Easterbrook, and he exposed himself to the risk of a patent being granted to the defendant for his invention, and to a great, if not an insuperable difficulty being thrown in his way whenever he should afterwards apply for a patent himself. He ought to have opposed the grant of the patent to Easterbrook. He did not do that. But then, on the other hand, Easterbrook having obtained his patent, the patent in his favour being sealed by the Crown, he ought immediately, if he had not done it before, to have lodged a *caveat* at the patent office, and subsequently to have opposed any application which might afterwards have been made on the part of

(2) 38 Law J. Rep. (N.S.) Chanc. 501; s. c. Law Rep. 4 Chanc. App. 577–580.

(3) 42 Law J. Rep. (N.S.) Chanc. 363.

the plaintiff in respect of his invention. If he had done so, I am not at all prepared to say upon the authorities which have been quoted that the Lord Chancellor would not have held, even if he had thought the plaintiff was the first inventor, that by reason of the patent having been sealed in favour of Easterbrook, no opposition having been made on his part, it was his duty to refuse the plaintiff the granting of the patent. I do not say how that might have been, but no such application was made, no such *caveat* was entered, no such opposition was offered on the part of the Crown; and the question arises whether it was then competent to the Crown to grant the ante-dated patent, which has been granted to the plaintiff in this case.

Now upon that the two provisions of the Act of Parliament (15 & 16 Vict. c. 83) are clear, unambiguous and conclusive. By the 23rd section the provision in the statute of Henry 6 concerning the ante-dating of patents, is in fact repealed in relation to patents for inventions, and the provision is: "That it shall be lawful (the Act of the 18th year of King Henry 6. chap. 1, or any other Act, to the contrary notwithstanding) to cause any letters patent to be issued in pursuance of this Act, to be sealed and bear date as of the day of the application for the same, and in case of any such letters patent for any invention provisionally registered 'under the protection of the Inventions Act of 1851,' as of the day of such provisional registration, or where the law officer to whom the application was referred; or the Lord Chancellor thinks fit, and directs, any such letters patent as aforesaid may be sealed and bear date as of the day of the sealing of such letters patent, or of any other day between the day of such application or provisional registration, and the day of such sealing." Now that enables the Crown, or, in other words, the law officer of the Crown, or afterwards on appeal the Lord Chancellor, to grant letters patent where there are two rival claimants for letters patent, and to antedate them either of the date of the actual grant—that is, of the sealing of the letters patent, or antedating them to any day not earlier than the original

application for the patent, and really the cases of applications to the Crown by rival inventors, or pretended inventors for patents for some improvement, are of such an infinite variety of characters and descriptions that this provision is a very important, useful and just provision. It enables the Crown to grant a patent of the very same date as the patent which has already been granted to another person, if it be thought that the inventions took place at the same time; thus leaving the patentees to fight out the question whether the one was prior to the other; or a second patent may be granted as of a later date, or as of an earlier date, according to what appears to the Lord Chancellor to meet the justice of the case; but when it is once granted, then we have the 24th section, which is just as clear and conclusive in its terms as the provisions of the 23rd section, viz.: "Any letters patent issued under this Act, sealed and bearing date as of any day prior to the day of the actual sealing thereof, shall be of the same force and validity as if they had been sealed on the day as of which the same are expressed to be sealed and bear date." That, applied to the present case, clearly shews that this sealing of the patent, bearing date the 20th July, has exactly the same effect as if the patent itself had been granted on that day.

Under these circumstances the plea nought, and the demurrer to the plea must be sustained.

MARTIN, B.—I am also of the same opinion. It seems to me this plea is a plainly bad plea on the face of it. It purports to be a plea in confession and avoidance, but it does not confess at all. It does not admit that the defendant did the thing which is alleged to be the infringement of the patent, but it states that Easterbrook was the true and first inventor of an invention of a certain manufacture, that is to say of improvements in machinery. It nowhere says that those improvements in machinery are the same improvements for which the patent was granted to the plaintiff; this is nowhere stated in the plea directly or indirectly; the plea only states generally what the patent was granted for. As my Lord says, it is a mere nullity, it does

not go to the cause of action at all, it goes to a different thing altogether. I think myself, assuming there was any ground for defeating the first patent, it ought to be by a *scire facias*, not by a plea at all.

POLLOCK, B.—I entirely agree. I think the words of the statute, sections 23 and 24, are too plain to admit of any doubt. It is said that the decisions of the present and late Lord Chancellors ought to lead us to put a different construction upon the language of the sections; but it seems to me those decisions are only consonant with the well known and long established practice upon which the law officers of the Crown have acted for many years; and it must be presumed that those who drew this Act of Parliament were perfectly well aware of that, and had they intended to interfere with that they would have done so. I do not think they had that intention at all. It is perfectly clear to my mind that it leads to no injustice, when the warning is understood which persons, who are intending to oppose the application for letters patent, have in all these cases.

Judgment for the plaintiff.

Attorneys — George Faithfull, for plaintiff;
Prideaux & Son, agents for G. S. & J. R. Poole,
Brigdwat, for defendant.

1873. } MARCHANT v. THE LEE CON-
June 2, 9. } SERVANCY BOARD.

Corporation—Grant of Annuity by Resolution not under Seal.

Certain trustees were created by Statute a body corporate, for the management of the navigation of a river, with a common seal and perpetual succession. The Statute empowered them to levy tolls, and enacted, "that it shall be lawful for the trustees, from time to time, to pay and allow to any officer or servant of the trustees whose services may, from any other cause than that

of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case, may, in the judgment of the trustees, be reasonable and proper, and the trustees may, from time to time, pay and allow such annuity or allowance out of the moneys which may come to their hands by virtue of the powers and provisions of" certain Acts. The plaintiff, who had been their clerk for forty years, having in 1865 resigned owing to ill health, the trustees duly passed a resolution (which was not sealed), that his resignation "be accepted, and that a retiring pension of 300l. per annum, free of income tax, be granted to him during the remainder of his life." The pension was duly paid quarterly till the end of 1871. Early in 1872 the defendants, who had meanwhile been substituted for the trustees by Statute, duly passed a resolution to reduce the pension to 150l. per annum, to be paid during their pleasure, and paid the pension for the first quarter of 1872 on the reduced scale:—Held, that the resolution of 1865 was irrevocable and that the plaintiff could recover the difference for that quarter from the defendants by action.

At the trial of this action before Martin, B., a verdict was taken for the plaintiff for 37l. 10s., the amount claimed, subject to a

CASE,

of which the following are the parts material to this report.

The Lee Navigation Improvement Act, 1850 (13 & 14 Vict. c. cix.), after reciting five Acts for the improvement of the navigation of the river Lee, 13 Eliz. c. 18, 12 Geo. 2. c. 32, 7 Geo. 3. c. 51, 19 Geo. 3. c. 58, 45 Geo. 3. c. 59, enacted in section 3, "that the trustees acting under the provisions of the recited Acts, and this Act, and their successors to be respectively nominated and appointed as provided by the 7 Geo. 3. c. 51, shall, for the purpose of the recited Acts, and this Act, be incorporated by the name of 'The Trustees of the River Lee,' and by that name shall be a body corporate, and have a common seal with perpetual succession, and shall have power to purchase, and hold, and sell, demise and dispose of lands for the purposes of this and the recited Acts."

Sect. 7 incorporated the Commissioners Clauses Act, 1847, except certain parts.

Sect. 71 enabled the trustees, in respect of goods, &c., carried on the river or canals, to levy such tolls at such places as they should think proper, not exceeding certain rates.

Sect. 76 enacted "that it shall be lawful for the trustees, from time to time, to pay and allow to any officer or servant of the trustees, whose services may from any other cause than that of misconduct be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case, may, in the judgment of the trustees, be reasonable and proper, and the trustees may, from time to time, pay and allow such annuity or allowance out of the moneys which may come to their hands by virtue of the powers and provisions of the recited Acts and this Act."

Sect. 93 made the Act a public one.

On February 1st, 1865, the plaintiff, who had held for forty years the office of clerk to the trustees, addressed to the chairman a letter, saying among other things that owing to ill health he found himself unable to continue business duties; and asking the favourable consideration of the trustees whether under the circumstances a retiring pension should not be allowed him, the Act of 1850 contemplating such an arrangement. The Book of Proceedings of the trustees, kept by the clerk under the superintendence of the trustees, contained the following extracts—

"6th February, 1865, at the annual general meeting of the trustees . . . present, &c. . . . a letter from the clerk, dated 1st February, 1865, addressed to the chairman and trustees, resigning his office in consequence of ill health, was read, and the acceptance of the resignation deferred until the next meeting of the trust. . . . The deputy chairman gave notice that at the next meeting he should propose that the clerk's resignation be accepted, and that he be allowed an annuity, as a retiring pension, of 300*l.* . . ."

" . . . 16th March, 1865, at a meeting of the trustees . . . present, &c. . . . special notice having been given to every

existing trustee, in conformity with the statute, that at this meeting it would be proposed that the resignation of" the plaintiff "be accepted, and that a retiring pension of 300*l.* per annum be granted to him, it was unanimously resolved that the resignation of," the plaintiff, "presented to the annual meeting held on the 6th February last, be accepted, and that a retiring pension of 300*l.* per annum, free of income tax, be granted to him during the remainder of his life."

From 16th March, 1865, the date of the foregoing resolution, the plaintiff retired from the office of clerk.

The Lee Conservancy Act, 1868 (31 & 32 Vict. cliv.) dissolved the trustees, and substituted for them the defendants, a body corporate by the name of "The Lee Conservancy Board," with perpetual succession and a common seal, and with all the property, powers and rights of the trustees, and subject to all their liabilities and obligations.

The pension was duly paid to the plaintiff quarterly by the trustees till their dissolution, and from that time till December 25th, 1871, by the defendants, the payments being entered in the accounts, which shewed the total receipts and expenditure of the funds levied under the Acts, and which were duly certified and audited in the manner required by the Commissioners Clauses Act, 1847. Early in 1872 the defendants gave the plaintiff notice that in consequence of the state of their funds (1), they should consider the question of reducing his pension, and the Book of Proceedings contains the following extract under date 16th February, 1872: "At a meeting of the Board . . . it was resolved by six to three, that the resolution of the 16th March, 1865, granting a pension of 300*l.* per annum to" the plaintiff "be altered by the reduction of the amount to 150*l.* per annum, as from Christmas last, the same to be paid during the pleasure of the Board." The defendants having in accordance with

(1) The receipts for each of the years ending April 1st, 1871, and April 1st, 1872, were over 19,000*l.*, but the "actual trading accounts" shewed a deficiency of 3,562*l.* 5*s.* 8*d.* and 421*l.* 10*s.* 8*d.* for those years respectively.

this resolution paid the plaintiff only 37*l.* 10*s.* for the first quarter of 1872, this action was brought to recover the difference, 37*l.* 10*s.*

The declaration having set out section 76 of the Act of 1850, alleged that at a meeting duly held on March 16th, 1865, the trustees, "by virtue and in exercise of the power given to them by the said Act and of all other powers in that behalf enabling them, and having regard to the facts that the plaintiff had held for forty years the office of clerk to the trustees, and had always conducted himself well in the office, and being incapacitated by illness from further discharging the duties of the office, had resigned the same, and having regard to all the other circumstances of the plaintiff's case, by a resolution duly passed, accepted the plaintiff's resignation of his office, and granted to the plaintiff a retiring pension of 300*l.* per annum, free of income tax during the remainder of his life": that the pension thereupon became payable out of the moneys coming to the trustees by virtue of the powers, &c., of the several Acts: that the pension was, when due, paid by the trustees out of such moneys accordingly, and the payments so charged in the accounts, and the accounts duly certified, &c., under the Act of 1847: that the payment of the pension was one of the purposes for which income received by the trustees under the Acts was by law applicable: that the defendants were by the Act of 1868 substituted for the trustees, with all their powers, &c.: that on March 25th, 1872, 37*l.* 10*s.* became due to the plaintiff in respect of the pension; that on that day and thenceforward, moneys, tolls and income exceeding 37*l.* 10*s.*, and applicable to the payment thereof, had been received by and were in the hands of the defendants; that all conditions, &c., yet the defendants had not paid the 37*l.* 10*s.* The defendants demurred, and pleaded never indebted, and payment. Issue thereon and joinder in demurrer.

The question for the Court (who might draw any inferences and find any facts which in their opinion a jury ought to have drawn or found) was whether the plaintiff was entitled to recover the

37*l.* 10*s.* If yes, the verdict to be entered for the plaintiff for that amount. If no, the verdict to be entered for the defendants.

Benjamin (Hayman with him), for the plaintiff, contended that, though not under seal, the resolution of 1865 conferred a vested right on the plaintiff and was binding on the defendants, and cited *Clarke v. The Imperial Gas, &c., Company* (2). [He was then stopped—

KELLY, C.B., observing that the question whether the defendants were bound did not in his opinion turn on any distinction between a resolution and a deed, or between the trustees and the defendants.]

J. Brown (W. Barnard with him), for the defendants.—The defendants do not rely on any distinction between themselves and the trustees, but contend, first, that the trustees had no power to grant an annuity for life, by deed or in any other way. By section 84 of 7 Geo. 3. c. 51, all receipts are to be applied in carrying that Act into execution, and the trustees would have had no power to make an allowance for a retiring officer but for section 76 of the Act of 1850; that section does not mention an annuity for life, or use any words which contemplate a permanent provision. Secondly, the grant was revocable, not being by deed nor even under seal, and this point is concluded by *Gibson v. The East India Company* (3), where it was held, that no action would lie for payment of a retiring annuity granted by resolution of the company to an officer in the military service, because the grant was not under seal; and by *Innes v. The East India Company* (4), where a similar decision was given on a grant to a civil servant.

[MARTIN, B.—Was there not consideration for the grant? Was it not a bargain between the plaintiff and the trustees, that if he conducted himself properly he should have a retiring pension?]

(2) 4 B. & Ad. 315; s. c. 2 Law J. Rep. (n.s.) K.B. 30.

(3) 5 Bing. N.C. 262; s. c. 8 Law J. Rep. (n.s.) C.P. 193.

(4) 17 Com. B. Rep. 351; s. c. 25 Law J. Rep. (n.s.) C.P. 154.

The grant was a voluntary act of bounty. The plaintiff was, by 7 Geo. 3. c. 51. s. 76, removable at the pleasure of the trustees. A resolution of this kind is not a contract—*Vaughton v. Brine* (5).

[KELLY, C.B.—My doubt is, whether a grant for life was not *ultra vires*.]

Benjamin, in reply.—The word “allow,” in section 76 of the Act of 1850, must contemplate a future provision; for “pay” would be sufficient if the grant were only from year to year. “Annuity” means for more than one year, and if so, the section imposes no limit to the term. Clearly, the trustees might have “paid” the plaintiff a sum which would have bought him a Government annuity; and what is the difference in principle?

[MARTIN, B.—The object of the section seems to be this: If the trustees think fit to pay a sum or allow an annuity the section is a justification to them, and permits them to credit themselves with it in the accounts.]

He was then stopped.

KELLY, C.B.—On the whole, looking at this Act of Parliament, although I cannot say it is free from doubt, I think we ought to resolve the doubt in favour of the plaintiff. The word “annuity” means a sum to be paid yearly and every year, and must necessarily import some term (whatever it may be) during every year of which the money is to be paid; for otherwise, the word “annuity” without more would be nonsense, for nobody would know what an annuity of 300*l.* a-year meant. It might be for a term of years, or it might be for life. Therefore, the legislature must have contemplated that some term should be fixed. If that is so, the term here is fixed within the meaning of the Act of Parliament. Therefore, upon that ground only, I am content to agree with my brother Martin, in saying that the plaintiff is entitled to our judgment.

MARTIN, B.—That is my view: I think that anybody reading the section can very clearly see that the legislature never could mean, that an officer who was incapable of going on with his duties should

give up his office from which he was receiving an annual income, and leave it in the power of the trustees afterwards to say, “We shall do nothing for him.” The intention which I derive from the words of the section is, that when the trustees thought fit to grant a pension to a retiring officer whom they deemed worthy of it, that should be a permanent thing, and that in the words of this resolution he should continue to receive it during his own life.

Mr. Brown cited two cases in connection with the East India Company, but I am always very dubious of following cases where that company were concerned. The East India Company had a double aspect, and it will be found in those cases that these two characters entered into the consideration of the Court. In one character they were concerned for the Sovereign, and their acts were governed by considerations connected with the Supreme Government. In the other, they were to be looked upon as merchants trading in Leadenhall Street by bills of exchange, bills of lading and otherwise. One case related to the pension of a gentleman in the military service, and the other to a gentleman in the civil service. I have no doubt those cases were properly decided on the constitution of that company, but I am not at all prepared to bring those decisions to bear upon a section of an Act of Parliament like this. I think the meaning and spirit of the section was to give a permanent annuity to a servant who had retired from the service of the trustees.

Judgment for the plaintiff.

Attorneys—Mackeson, Taylor & Arnold, agents for Norton & Son, Town Malling, Kent, for plaintiff; R. J. Pead, for defendants.

(5) 1 Sc. N.R. 258; s. c. 9 Law J. Rep. (N.S.) C.P. 326.

(In the Second Division of the Court.)

1873. }
June 5. }

HUME v. DRUYFF.

Prisoner, Discharge of—Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 4, 6—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 60, 61—Imprisonment after Judgment.

A defendant who has been arrested and imprisoned before final judgment, under the 6th section of the Debtors Act, 1869, is entitled to be discharged under the 4th section after final judgment has been obtained, notwithstanding that the judgment is still unsatisfied, and that the absence of the defendant from England may (as by hindering his oral examination under the 60th section of the Common Law Procedure Act, 1854, with regard to debts owing to him) prejudice the plaintiff in obtaining the fruits of the judgment.

This was a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of custody.

It appears that the defendant had been arrested and imprisoned in pursuance of the 6th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), which enacts that, after the commencement of that Act, "a person shall not be arrested upon mesne process in any action;" but that, "where the plaintiff in any action in any of Her Majesty's Superior Courts of Law at Westminster, in which, if brought before the commencement of the Act, the defendant would have been liable to arrest, proves, at any time before final judgment by evidence on oath, to the satisfaction of a judge of one of those Courts, that the plaintiff has good cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such judge may, in the prescribed manner, order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the pre-

NEW SERIES, 42.—EXCHEQ.

scribed security not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court."

Final judgment in the action having been subsequently signed for the plaintiff, an application for his discharge, while the judgment was still unsatisfied, was made to a Judge at Chambers, who referred the matter to the Court.

Thrupp, for the defendant, contended that the object for which he was arrested, namely, to enable the plaintiff to "prosecute his action," was now attained, final judgment having been signed; and the defendant was therefore entitled to be discharged. Also that, as no power to arrest after judgment was given by the Debtors Act (which expressly limited the power to arrest to the period before final judgment), the legislature could not have intended to allow a defendant arrested before final judgment to be kept in prison after judgment, which is really the end of the action. He cited *The Yorkshire Engine Company v. Wright* (1) as expressly in point and decisive of the case.

Petheram, for the plaintiff.—The real end of the action is satisfaction by means of execution, and not judgment merely. The absence of the defendant from England may still prejudice the plaintiff in the prosecution of his claim, for it may prevent him ascertaining whom to make garnishees. He will be unable to avail himself of the power given by the Common Law Procedure Act, 1854, which would enable him to get an order for the examination of the defendant, "as to any and what debts are owing to him, before a master of the Court, or such other person as the Court or Judge shall appoint; and the Court or Judge may make such rule or order for the examination of such judgment debtor, and for the production of any books or documents, &c."

Thrupp, in reply.—*Waine v. Wilkins* (2) shews that the defendant could only be detained till judgment signed. In that case it was held that where in a

(1) 21 *Weekly Reporter* 15 (Exch.)

(2) 42 *Law J. Rep.* (N.S.) Q.B. 95.

proceeding by foreign attachment, the defendant renders himself in dissolution of the attachment, and the plaintiff goes on in the action and recovers judgment, the defendant is entitled to be discharged from custody by virtue of section 4 of the Debtors Act, 1869.

BRAMWELL, B.—The case of *The Yorkshire Engine Company v. Wright* (1) is decisive on the point here raised. Whatever the legislature may have meant, the true construction of what they have said is, that there is to be no imprisonment after the action has been prosecuted to its end; and as the action comes to an end on final judgment being signed, this defendant is entitled to be discharged. If it were not so, then, although a defendant could not be arrested after judgment, yet, if he had been arrested before, he might be detained in prison after judgment.

PIGOTT, B., and CLEASBY, B., concurred.

Rule absolute.

Attorneys—Hoylo, for plaintiff; Wright & Son, for defendant.

1873. } THE SOLICITOR-GENERAL v. THE
May 30. } LAW REVERSIONARY INTEREST
June 11. } SOCIETY.

Succession Duty—Alienation by Remainderman to Body Corporate—Alienee liable as Successor—The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 2, 15, 27.

A testatrix by will, made in 1839, devised real property to one for life, and after his death to a remainderman in fee, and died in 1841. The remainderman, a cousin of the testatrix, died in 1870, having previously sold his reversion in fee to a corporation. The tenant for life died in 1872:—Held (on an information against the corporation), first, that the corpora-

tion, upon the death of the tenant for life, were "successors" within ss. 2 and 27 of the Succession Duty Act, 1853, and were liable to pay succession duty upon the full value.

Secondly, that if necessary the Court would have decided the death of the remainderman to be immaterial, and the rate of duty to be the same as would have been payable by him if he had survived the tenant for life without selling, but that at all events the Crown had made out a prima facie case to duty at that rate, since the Crown need not prove the death of the remainderman, nor who his heir was; and that if events had happened by which the duty would be less, the corporation must prove them.

This was an information filed by the Solicitor-General (the Attorney-General having an interest in the defendant society), and contained the following allegations.—

In 1839 one Deborah Smith Dermer by her will devised real estates to Thomas Dermer for life, and after his death to William Dermer in fee. She died on the 9th January, 1841, leaving both William Dermer and Thomas Dermer surviving. The defendants, a corporation, in 1864 and 1868, became the purchasers of the reversion in fee from William Dermer. William Dermer died on the 5th August, 1870, and on the 14th August, 1872, Thomas Dermer died. The defendants, upon the death of Thomas, became seised in fee in possession. William Dermer was a cousin of the testatrix, being a descendant of the brother of her father. The Commissioners of Inland Revenue accordingly claimed from the defendants succession duty at the rate of five per cent. on the principal value of the estates. The defendants disputed the claim, and the bill prayed a decree for the payment of the duty as claimed.

The Solicitor-General (Sir G. Jessel) and W. W. Karslake, for the Crown.—The defendants are "successors" within the meaning of the Succession Duty Act, 1853, since they acquired the property under the testatrix's will, and that will is within the definition of a succession

in s. 2 (1), viz., "a disposition of property by reason whereof" the defendants became entitled upon Thomas Dermer's death. The defendants being a body corporate must, under s. 27, be assessed upon the principal value of the property. Being alienees they must, under s. 15, pay duty at the same rate

(1) That section enacts—"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession;' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor or other person from whom the interest of the successor is or shall be derived."

The second part of Section 15 enacts—"Where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto, or to the income thereof in possession, have become vested by alienation, or by any title not conferring a new succession, in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

Section 27. "Where any body corporate, company, or society shall become entitled, as succe-

and time as if no alienation had been made, that is, the same duty as William Dermer's heir would have paid if William Dermer had not alienated. Who that heir is the Inland Revenue Office has not thought it worth the expense and trouble to discover, but since the testatrix was a spinster the heir cannot have been nearer in blood than William Dermer himself (that is cousin), and may have been more distant. The duty, therefore, cannot be less than five per cent. under s. 10, and may be more, but if more the office is willing to remit the difference.

Sir J. Karslake, Joshua Williams and Gates, for the defendants.—No duty is payable. The defendants are not "successors." William became entitled to the property "by reason of" the will within section 2, and those words cannot be stretched to include any persons taking by purchase from him; for if so, they would include purchasers from the defendants, and so on for all time—*The Attorney-General v. Upton* (2). Moreover, purchasers for value who paid for all they obtain cannot be "successors" within section 2, which contemplates only donees by will or settlement, and heirs. If the defendants are not "successors" within section 2, neither are they within section 27. The property has no doubt "become vested by alienation" in the defendants within section 15, and if William had been alive when the defendants came into possession, they would under that section have had to pay the same duty as William

sors, to any real property, the duty in respect thereof shall be assessed upon the principal value of such property, but shall be payable by such instalments, at such times, and in such manner as the same would be payable if assessed in respect of property devolving on a successor in fee simple; and it shall be lawful for such body corporate, company, or society, or any trustee thereof, to raise the amount of any duty due in respect of their succession upon the security thereof, at interest, with power for them to give effectual discharges for the money so raised."

(2) 4 Hurl. & C. 336; s. c. 35 Law J. Rep. (N.S.) Exch. 138.

would have paid had he not alienated, and that would have been a duty calculated on William's life according to the tables in the schedule. But since he is dead there is no life on which to calculate the duty, and therefore no duty is payable. Section 15 "enacts or imposes no tax or duty"—per Bramwell, B., in *The Attorney-General v. Littledale* (3), but places the alienee on the same footing as the alienor with respect to duty—per Lord Wensleydale in *Lord Braybrooke v. The Attorney-General* (4), and per Martin, B., in *The Attorney-General v. Cecil* (5). Now if the alienor be dead he is not liable to duty, therefore the alienee is not. It is a case omitted from the provisions in the Act, either accidentally or intentionally, probably the latter; and a tax requires express words to impose it. The argument *contra* makes the life of the alienee the basis of calculation instead of the life of the alienor, but that is contrary to the plain words of section 15.

[CLEASBY, B.—Why not consider the alienor to be alive, and then calculate the value of his life?]

That would be to interpolate in section 15 the words, "as if the alienor had survived and had not alienated." Besides, the Crown does not claim that, but the value in fee simple under section 27. The defendants' view is confirmed by sections 42 and 44.

Secondly, even if the defendants are (as contended *contra*) liable to the same rate as would have been payable by William's heir, that rate may be less than five per cent. If, for instance, William had died intestate leaving a son, that son would have paid one per cent. under section 10, because that would have been a "devolution by law" within section 2, and not a succession "by reason of" the testatrix's will. Since the Crown has not thought proper to inform the Court who that heir is, there are no materials on which to calculate the rate, and the burden being on the Crown to make out the liability, the defendants are entitled to

judgment. The fact that much trouble and expense are necessary to discover the alienor's heir, is an additional argument to shew that the legislature in such cases intentionally omitted to impose duty on the alienee. If there is any reasonable doubt as to the meaning of an Act imposing duties, the subject is entitled to the benefit of the doubt—per Kindersley, V.C., in *Wilcox v. Smith* (6).

The Solicitor-General, in reply.—Under section 2 there may be many successions (see section 14), and the first does not cease to be a succession because a second is created by a second instrument or a devolution. It may be that two duties are payable, but the Crown only claims one. The testatrix's will having created an expectant succession in William the liability to duty attached, and nothing that happened afterwards can get rid of that liability. Section 15 does not do away with any liability—*The Attorney-General v. Littledale* (3), but leaves the party liable. The defendants read that section as if it said "the same duty shall be paid by the alienee as would have been payable by the heir of the alienor if the alienor had not alienated." But the words regulate only the rate and time (see section 20), and not the value of the succession, which is regulated by sections 21-27. Under section 27 the defendants must pay for the value as a corporation, and under section 15 they must pay the same rate as William's heir would have paid. That rate would be determined by the relationship of the heir to the testatrix, not to William, for it would be a "succession by reason of" the will under section 2, and not a "devolution by law."

[KELLY, C.B.—Ought we not to know whether William devised his real property by will, and if so, what relationship the devisee was to him?]

That is not necessary, because as William had alienated, a devise would have no effect. If the Court should think the Crown entitled to some duty, but cannot determine the rate, a decree may be made

(3) 39 Law J. Rep. (N.S.) Exch. 207, 211.

(4) 9 H.L. Cas. 178; s. c. 31 Law J. Rep. (N.S.) Exch. 185.

(5) 39 Law J. Rep. (N.S.) Exch. 201, 205.

(6) 4 Drew. 49; s. c. 26 Law J. Rep. (N.S.) Chanc. 596 598.

and an enquiry directed to discover the heir. If the defendants' contention is right, the Act may always be defeated by an expectant successor selling to a purchaser and buying again from him. Section 44 offers no difficulty; it is only a gathering net to prevent anyone from escaping.

Cur. adv. vult.

On the 11th of June—

CLEASBY, B., read the judgment of himself and KELLY, C.B., and POLLOCK, B.—

In this case the facts may be stated as follows, for the purpose of raising the question which has been argued before us. [After stating the facts as above, the judgment proceeded.]

William Dermer was a cousin of the testatrix, and if he had succeeded to the enjoyment of the property, would have been liable under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), to succession duty, calculated in the usual way at the rate of five per cent. The question is, what succession duty, if any, the defendants ought to pay. It was contended for the Crown that the defendants were liable to pay at the same rate as William Dermer, viz., five per cent., and that as they were a corporation, the amount must be calculated in the manner pointed out by section 27 of the Act, that is to say upon the principal value of the property. It was contended for the defendants that as William Dermer, the devisee of the reversion, never came to the actual enjoyment of it, but conveyed it away to the defendants before doing so, and died before the tenant for life, either no succession duty became payable upon the death of Thomas, or at all events only such a sum as the heir of William if he had succeeded would have been liable to pay.

Upon consideration of the various sections of the Act, the following conclusions seem clearly established.—

First. By the operation of section 2 (which embodies the whole principle of the Act) every person who by reason of any disposition of property now becomes entitled to any beneficial interest after the death of another has conferred upon him a succession—that is, according to

the interpretation clause, property liable to succession duty.

Secondly. Though the title to the succession dates from the disposition, and there is never any title to the property free from the duty, yet the duty is not payable until the person taking under the disposition comes to the actual enjoyment of the property; out of which enjoyment it is supposed the payment will be made.

Thirdly. If the interest taken under the disposition comes to an end before the enjoyment commences—as in the case of successive tenancies for life, when the later life dies before the earlier one—the liability to duty ceases along with the interest. In other words the duty never becomes payable.

Fourthly. The amount of duty is calculated upon the enjoyment of the property which the person actually taking is expected to have; for example, in the case of a person taking in fee, it is made upon the probable duration of the life of the person taking. And this is only reasonable, because a fresh duty will be payable at his death, and the interval will be longer or shorter according to his age. It is also payable by eight instalments, the first at the expiration of one year from his coming into possession (section 21), so as to enable him to pay it out of his enjoyment. But in the case of a corporation taking in fee, though the duty is still payable by instalments, their life is supposed to be permanent, and, as there can be no further succession, the amount is collected upon the principal value of the property.

Fifthly. If the person has had a succession conferred upon him, he cannot, by parting with it, prevent it from being a succession, that is, prevent it from being property liable to the duty. It continues a succession, and will be, when the proper time comes, a succession enjoyed in possession, into whatever hands it has come.

All the conclusions previous to the fifth are little more than statements of the nature of a succession and of the enactments, or are such clear inferences as to need no further observations; and we think the 5th is an inevitable inference

from the nature of a succession, from the language of the second part of the 15th section, and from the absurd consequences which would follow from holding the contrary. The succession (created by the 2nd section) being property liable to duty, the charge imposed is not upon the person (until it becomes payable) but upon the property, and must go with it, unless there is something in the Act to remove it, which there is not. The language of the 2nd section does not deal at all with the position of the alienee of a succession, and therefore all the argument addressed to us upon the words "by reason whereof," not covering an alienee who took by reason of his conveyance, was inapplicable. The position of alienee is a matter of legal consequence from the 2nd section, and not touched by the words of it.

Again the second part of the 15th section provides for the mode of paying the succession duty in the case of alienation. It assumes therefore that the charge continues. But it was argued that the second part of the 15th section would have been applicable if William Dermer had outlived Thomas, but is not applicable if the remainderman dies before the tenant for life. We think there is nothing in the words to warrant this limitation of meaning, and that it is a most unreasonable construction. For the absurd consequence would follow that if there was no alienation a duty would be payable on the death of the tenant for life, whether the remainderman died before him or not; but if there is an alienation no duty would be payable in one event, and thus a man would have the power by alienation to relieve the property from a charge imposed for public purposes.

We have been induced to consider more fully than might seem to be necessary the question of the property being chargeable upon the death of the tenant for life, because it was made the subject of a serious argument before us, and is a matter of general application involving a charge upon the subject.

The other questions which remain, and which were more arguable, were—First, the rate and percentage under section 10

at which the duty was payable by the effect of the second part of the 15th section; and secondly, the manner in which the amount should be calculated, the defendants being a corporation, and taking as alienees after the death of the tenant for life, and not taking directly under the instrument.

With respect to the rate of duty it is provided for by the second part of the 15th section, but the language is susceptible of two meanings. The rate is to be the same "as if no such alienation had been made." Does this mean the same rate as the alienor would have been liable to pay, or are we to trace the course or events and find what would have been the position of the successor at the death of the tenant for life? If the remainderman outlived the tenant for life there would be no difficulty, but if he died before, then it would be necessary to find out who would have been his heir, and thus from his relationship to the predecessor get at the rate of duty under section 10. It was said by the learned Solicitor-General that the rate payable by the alienor himself would almost always be less, or at all events not greater than the rate payable by his heir; and that the Crown was content to adopt the construction which in general imposes the lower duty. And this would be in conformity with the general rule that if two constructions are open and no preponderating reason in favour of either as a matter of construction, then the construction should be taken which imposed the lighter burden. It may be that taken literally the words would rather point to the real position of things at the death of the tenant for life; but still it is not an unreasonable construction that the time of the alienation should fix the rate, because from that time the alienor has no connection with the property, and his history is unimportant. The words, "as if no alienation had been made," may thus be read as equivalent to, "as if the alienor had succeeded and paid the duty." It should be borne in mind that the interval between the alienation and the death of the tenant for life may be the period of a long life. And although the person entitled to succeed would be able to trace his own pedi-

gree and then shew what duty he had to pay, it never could have been intended that the Crown, in order to entitle itself to the duty, should be compelled to trace the history and descendants of a person wholly unconnected with the property, of whom it may not be known whether he be dead or alive, or in what quarter of the world he died, or what relations he had. It is much more rational to hold that from the time of alienation the life or death of the alienor is immaterial, and that the duty must be paid as if he succeeded. We should be ready to adopt this construction, but for the decision of the present case it is enough to say that the Crown at all events make out a *prima facie* case to be paid the duty which would be payable by the alienor, as they need not prove the death of the alienor; and that if events have happened by which the duty would be less the defendants must prove them. The rate of duty then is five per cent. As to the mode of calculating it we think there is no difficulty. The defendants take a succession. In the words of the second part of the 15th section, "the succession has been vested in them by alienation." They are a corporation, and within the words of the 27th section, they have become entitled as successors to the property. It is quite true that the words of this section would exactly meet the case of a corporation taking, not as alienees, but directly by reason of the disposition. But, as it is obvious from the 15th section that the persons who take as alienees also take as successors within the Act, so when the 27th section uses the words, "Where any body corporate shall become entitled as successors," it covers the case of their becoming entitled to the succession by alienation, as well as directly by reason of the disposition.

We think the words properly considered with reference to the subject matter ought to receive this construction, independently of the strong objection to any conclusion which would enable a corporation to acquire a succession to real property discharged from the full burden which it would have to bear—though in a different manner—if in the hands of the alienor or of individual alienees. The words of the

Act must have been very different to compel us to hold that the present case is a *casus omissus* out of the Act.

For the above reasons we think that the Crown is entitled to a decree upon this information, and that the defendants must pay succession duty at the rate of five per cent. upon the full value.

Decree accordingly.

Attorneys—The Solicitor to the Inland Revenue Office, for the Crown; Capron, Dalton & Hitchens, for the defendants.

1873. } *In the matter of a plaint by*
June 12. } GREEN v. BEACH.

County Court—Jurisdiction—Cause of Action arising wholly or in part within District—30 & 31 Vict. c. 142. s. 1.

A verbal offer to buy goods for more than 10l. having been made to the vendor's agent within the district of a County Court, was communicated to the vendor at his residence outside the district, where he accepted it and signed a memorandum within s. 17 of the Statute of Frauds. This memorandum with a counterpart he sent by post to the purchaser, who signed the counterpart within the district. The vendor delivered the goods to the plaintiff's agents outside the district. The purchaser having issued a plaint in the County Court against the vendor to recover damages for deficiency in weight,—Held, that the cause of action arose in part in the district so as to give the County Court jurisdiction under 30 & 31 Vict. c. 142. s. 1.

This was a motion on behalf of the defendant for a rule calling on the plaintiff and the Judge of the County Court of Lancashire, held at Blackburn, to shew cause why a writ should not issue to prohibit the Judge from further proceeding in a certain plaint, on the ground that the County Court had no jurisdiction over it.

The following facts were stated to the Court.—

The plaintiff is a manufacturer residing and carrying on business in Blackburn, and the defendant is a commission merchant residing and carrying on business in Liverpool, which is outside the district of the Blackburn County Court. On the 5th of March, 1873, the plaintiff met an agent of the defendant, named Brazil, in Blackburn, and made him a verbal offer to buy 66 bales of the defendant's cotton at 9½d. per lb. to be delivered at Liverpool, and requested Brazil to communicate this offer to the defendant. Brazil accordingly went to his residence at Preston, and thence communicated the offer on the same day to the defendant by telegraph. On the 7th of March, the defendant wrote to the plaintiff that he had decided to accept his offer, and sent the letter by post from Liverpool addressed to the plaintiff at Blackburn. With this were enclosed a "bought note" for the plaintiff's signature, and a counterpart or "sold note" signed by the defendant. The "sold note" was a letter addressed by the defendant to the plaintiff, and beginning—"We have this day sold you 66 bales of Barely Low Middling Uplands Cotton, per *Algeria*, @ Charleston, @ 9½d. per lb.;" and contained other terms not material to this report. These were received by the plaintiff at Blackburn on the 8th of March, where on the same day he signed the "bought note" and gave it to Brazil, who forwarded it by post from Preston to the defendant. The cotton on arrival at Liverpool was delivered to the plaintiff's agents, when, as the plaintiff alleged, it weighed less than the invoice weight. For this deficiency the plaintiff thereupon claimed damages to the amount of 30l. 12s. 10d., and on May the 31st issued a plaint to recover that sum in the Blackburn County Court, requiring the defendant to appear at the said Court on the 16th of June.

W. H. Butler, for the defendant.—The question in this case is whether part of the cause of action arose within the district of the Blackburn County Court, within the meaning of the 30 & 31 Vict.

c. 142. s. 1 (1), whereby a plaint may be entered, by leave of the Judge or Registrar, in the County Court in the district of which the cause of action or suit wholly or in part arose. The verbal offer was no part of the cause of action, for the contract was not complete till the defendant signed the sold note. The case falls within *Aris v. Orchard* (2).

[*POLLOCK, B.*—That was a decision on the words of the old Act, "in which the cause of action arose," which meant the whole cause. The present Act says "wholly or in part." *MARTIN, B.*—No doubt the contract was not complete till the defendant signed the note, but the offer is surely part of the cause of action; the plaintiff would be nonsuited if he did not prove it. Suppose the defendant, standing just inside the jurisdiction, gives an order for work to be done by the plaintiff, who standing just outside the jurisdiction, agrees to do it, and does it outside the jurisdiction, and sues for the work done. Though the contract is completed out of the jurisdiction, part of the cause of action arises within it.]

No, *Hill, J.*, put that very case and took the contrary view in *Newcombe v. De Rooe* (3). There the defendant, by a letter written and posted out of the district, ordered the plaintiff to do certain work; the letter was received and the work done within the district, and it was held, that the whole cause of action arose

(1) Which enacts—"A plaint may be entered in the County Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of bringing the action or suit, or it may be entered, by leave of the judge or registrar, in the County Court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before the time of action or suit brought; or, with the like leave, in the County Court in the district of which the cause of action or suit wholly or in part arose."

(2) 6 Hurl. & N. 160, 164; s. c. 30 Law J. Rep. (N.S.) Exch. 21, 23.

(3) 29 Law J. Rep. (N.S.) Q.B. 4, 6.

within the district. If so, part of could not arise out of the district.

[POLLOCK, B.—*Borthwick v. Walton* (4) is more like your case.]

That case was considered in *Newcombe v. De Roos* (8).

[KELLY, C.B.—The contract was not complete so as to satisfy the Statute of Frauds till the plaintiff signed the bought note, and that was in Blackburn.]

Till then no doubt the defendant could not have sued the plaintiff, but the contract was complete so as to charge the defendant as soon as he had signed the sold note, and for that purpose it was immaterial under section 17 of the Statute of Frauds whether the plaintiff signed any memorandum or not.

KELLY, C.B.—Where a cause of action arises wholly or in part in a district, the County Court of that district has jurisdiction. The question is not whether the whole cause of action arose, nor whether the contract was completed, in the Liverpool district, but whether any part of the cause of action arose in the Blackburn district. Now, though there was no contract till the defendant signed the sold note in Liverpool, yet the plaintiff's offer was made in the Blackburn district.

The contract was not complete so as to satisfy the Statute of Frauds till there was part payment or acceptance, or the contract was assented to in writing signed by the plaintiff. That assent was signed by the plaintiff in the Blackburn district. I think, therefore, that a part of the cause of action arose in the Blackburn district, and that the County Court of that district had jurisdiction.

MARTIN, B., and POLLOCK, B., concurred.

Rule refused.

Attorneys—Gregory & Rowcliffe, agents for Hall, Stone & Fletcher, Liverpool, for defendant.

(4) 15 Com. B. Rep. 501; s. c. 24 Law J. Rep. (n.s.) C.P. 83.

N W SERIES, 42.—ECHOES.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Exchequer.)

1878. } BOWLEY v. THE LONDON AND
May 14. } NORTH-WESTERN RAILWAY
June 26. } COMPANY.

Damages—Principle of Assessing under Lord Campbell's Act, 9 & 10 Vict. c. 93—Compensation for Loss of Annuity—Present Value of Annuity—Average and Probable Duration of Life—Evidence on Matters of Opinion—Skilled Witness.

In actions under Lord Campbell's Act, 9 & 10 Vict. c. 93, to recover damages for the benefit of a relative to whom the deceased had covenanted to pay an annuity during their joint lives, it is unobjectionable to direct the jury that they may estimate the damages to the annuitant by calculating what sum would buy him an equally good annuity. That sum must depend, in addition to other contingencies, on the probable duration of the lives, to ascertain which it is material to know the average duration of the lives of persons of the same age as the lives in question. Such average and probable duration cannot be better shewn than by proving the practice of Life Insurance Companies who learn it by experience; evidence may therefore be given of such practice, and tables—which purport to shew the average duration of the lives of persons of all ages and the value of annuities on Government or other very good security for such lives, and to which those companies refer for information—may be consulted to ascertain what is the average and probable duration of the lives in question, and what is the present value of the annuity, provided the attention of the jury be called to the difference in value between an annuity on Government security, and one secured by a personal covenant.—So held per BLACKBURN, J.; KEATING, J.; GROVE, J.; and ARCHIBALD, J. (dissentients BRETT, J.)

Per BRETT, J.—In such cases the only legal direction to the jury is that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation. A direction, therefore, which leaves it open to the jury to give the present

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value of an annuity equal in annual amount to the income lost, for a period supposed to be equal to that which would have continued if there had been no accident, is a misdirection, and any evidence (such as that instanced above) given solely to enable a jury to calculate such present value is inadmissible, because necessarily misleading and legally irrelevant.

A person who though not an actuary is acquainted with the business of life insurance is competent to give evidence as to the average and probable duration of lives and the present value of annuities as given by the tables and accepted by Life Insurance Companies.—So held per BLACKBURN, J.; KEATING, J.; GROVE, J.; and ARCHIBALD, J. (dubitante BRETT, J.).

The jury may properly be directed to consider the lives in question as average lives unless there is evidence to the contrary; and if there is such evidence it is for the party excepting to the direction to place the evidence on the bill of exceptions.—So held per BLACKBURN, J.; KEATING, J.; GROVE, J.; ARCHIBALD, J. (dissentiente HONYMAN, J.).

Error on a bill of exceptions.

The following are the material parts of the record and bill.

This action was brought under Lord Campbell's Act, 9 & 10 Vict. c. 93 (1), by the executrix of J. O. Rowley, for the benefit of the mother, wife and children of the deceased. The declaration alleged, in the usual form, that the deceased, while a passenger on the defendants' line, was killed

by their negligence. The defendants pleaded not guilty. Issue was taken thereon; and at the trial at the Manchester Summer Assizes, 1871, before Kelly, C.B., the defendants admitted the negligence, and that the plaintiff was entitled to a verdict.

On the question of damages the plaintiff's counsel gave evidence—That the deceased was an attorney and solicitor practising at Manchester: that by articles of partnership, made in 1858 between him and his late father, he covenanted that during the joint lives of himself and his mother he would pay to his mother during her life, if he should so long live, an annuity of 200*l.* per annum: and that at the time of his death the deceased was aged forty, and his mother sixty-one.

Adamson, an accountant, having been sworn as a witness for the plaintiff, gave evidence as to the income of the deceased, as it appeared from his books. After the witness had been cross-examined, the Lord Chief Baron, addressing Mr. Pope, the counsel for the plaintiff, said—"Are you going to call an actuary?" Mr. Pope answered—"I have no actuary in my brief, but I think we can ask Mr. Adamson." The Lord Chief Baron replied—"There are two matters which it is utterly impossible for the jury, unless there be an actuary among them, to know. It will be impossible for them to know what is the value of 200*l.* a year for the life of a lady of sixty-one, and also what is the calculated probable duration of the life of a man of forty years of age." Thereupon, in answer to the above two questions put by the Lord Chief Baron, the witness,—having first stated that he was acquainted with the business of life insurance, and, having by leave of the Lord Chief Baron referred to a copy of the "Carlisle Tables" which purport to shew the average duration of lives of persons of all ages, and to which Life Insurance Companies refer for obtaining information as to the average duration of human lives,—deposed that, according to those tables, the average and probable duration of the life of a person aged forty is 27-61 years, and that the average and probable duration of the life of a person aged sixty-one is 13-82 years; and that the sum of

(1) The 9 & 10 Vict. c. 93. s. 1 enacts—"That whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable in an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as to amount in law to felony."

And by section 5, the word "person" is to apply to bodies politic and corporate.

money which would purchase an annuity of 200*l.* a year for the life of a person aged sixty-one is 2,000*l.* The defendants' counsel, both before and after the evidence was given, objected that it was not admissible, and prayed the Lord Chief Baron to exclude it from the consideration of the jury, but the Lord Chief Baron ruled that it was admissible. To this ruling the defendants' counsel made their first exception.

The Lord Chief Baron, in his summing up, stated to the jury that they might, if they thought proper, calculate the damages which the mother was entitled to recover, by ascertaining what is the sum of money which would purchase an annuity of 200*l.* a year for a person aged sixty-one, according to the average duration of human life. To this direction the defendants' counsel made their second exception.

The Lord Chief Baron also remarked that, according to the "Carlisle Tables," it had been stated that the average duration of a man in good health and vigour who has arrived at the age of forty years is twenty-seven years; and he stated to the jury that they might, if they thought proper, take as a guide in their calculation of the damages recoverable for the wife and children of the deceased, that the probable duration of the life of a man forty years of age, in the circumstances in which the deceased was, is twenty-seven years, according to the "Carlisle Tables." To this direction the defendants' counsel made their third exception, and tendered a bill of the above three exceptions. The jury, by their verdict, assessed the total damages at 6,200*l.*, and apportioned the sum thus: 1,200*l.* to the mother, 1,400*l.* to the wife, and 600*l.* to each of the six children.

Holker (Part with him), for the defendants.—Adamson's evidence was inadmissible, for two reasons; first, because the matter was one of opinion, and he was not a skilled witness. An actuary makes the calculations about lives himself, an accountant does not. An analogous case is that of foreign law, which can be proved only by a professional man belonging to the country

whose laws are in question, or by a person *peritus virtute officii*—*Taylor on Ev.*, 6th ed., vol. 2, sec. 1,281, p. 1,233; *Sussex Peerage Case* (2), overruling *The Queen v. Dent* (3). "The law of a foreign country cannot be proved even by a juriconsult, if his knowledge of it be derived solely from his having studied it at a university in another country"—*Bristow v. Sequeville* (4), and see the notes to *Carter v. Boehm* (5). It was also inadmissible, because if the jury acted on it the damages would be excessive. The true rule was laid down by Parke, B., in *Armstrong v. The South Eastern Railway Company* (6), where he told the jury they were not to consider the value of the life as if they were bargaining with an annuity office, nor to give the utmost amount which they thought an equivalent for the mischief, but must take a reasonable view of the case, and give what they considered a fair compensation. It would therefore be wrong to direct the jury to give the sum for which the annuity might have been sold by the mother, but the Lord Chief Baron told the jury they might give a larger sum even than that, viz., the sum that would purchase the annuity. The tables, it is believed, are founded on lives accepted by insurance companies, i.e. on unusually good lives; at the least they are average lives; but there was no proof that the mother's or the son's lives were as good as the average. The direction ignored all the circumstances which would make the value of the annuity less than the amount given by the tables, viz., the health of mother and son, their habits, whether frequent travellers by railway or not, and the possibility that the son might become unable to pay the annuity through insolvency, illness, or loss of business. All such considerations the jury were told to put out of sight in calculating the damages recoverable for the wife and children, for this must be the meaning of the

(2) 11 Cl. & F. 85, 124, 134.

(3) 1 Car. & K. 97.

(4) 5 Exch. Rep. 275; a. c. 19 Law J. Rep. (N.S.) Exch. 289.

(5) 1 Smith L.C. 472, 491.

(6) 11 Jur. 759, 760.

direction to take as their "guide" the probability of life as given by the tables. For all these reasons the direction was such that the jury might go wrong, and that is sufficient ground for a new trial—*Blake v. The Midland Railway Company* (7). There is, moreover, the manifest error of directing the jury that they were to calculate the value of the annuity on the probable duration of the mother's life alone, the covenant being to pay during the joint lives.

J. Edwards (*Grundy* with him), for the plaintiff.—The evidence of an actuary would not have been more valuable than that of Adamson; an actuary does not compile the tables, but only refers to them. To entitle a witness to speak as an expert on matters of opinion, such as the probable duration of life, it is only necessary that he should (in the words of Lord Tenterden in *Richards v. Murdoch* (8)) be a "person conversant with the subject matter of the enquiry." Provided he has this qualification it is not essential that he should have made the subject his profession. This is well pointed out in *Best on Evidence*, 5th ed., sec. 516; see also *Chapman v. Walton* (9).

[GROVE, J.—On questions of chemical science it is usual to receive the evidence of skilled witnesses who have made that subject their special study, though they are not professional chemists.]

The reason of the distinction as to foreign law is that that is a question of fact, not of opinion, and the best evidence of such a fact is that of a person who knows it from actual practice, and not secondhand. As to the objection to this class of evidence, it has been the invariable custom of judges to receive it, subject to observations on its weight. The direction must be looked at as a whole, and so read it meant that the value given by the tables should not be adopted by the jury, but referred to as an aid in the

calculation; and so the jury understood it, for they did not give the value in the tables. In *Blake v. The Midland Railway Company* (7) tables were consulted to prove the value of an annuity for joint lives, and the jury were directed to take that value as the basis of their calculation, and no objection was made at the trial or in banco, though every possible point was taken. Except that case and *Armstrong v. The South Eastern Railway Company* (6), there is no reported authority. The rule of American law is discussed in *Redfield on Carriers and Bailments*, p. 298, and in *Redfield on the Law of Railways*, 3rd ed., vol. 2, sec. 179, p. 209, n. 4, where it is said, "In the trial of such an action, it is proper for the judge, in charging the jury, to allude to the expectation of life at certain ages, as determined by tables deduced from the bills of mortality—*Smith v. The New York and Harlem Railway* (10), *The City of Chicago v. Major* (11)." But in the case in 6 Duer. the point does not appear to have been discussed. The objection that the jury were directed to calculate the value on the mother's life alone, instead of on the joint lives, was not taken at the trial, nor is it pointed out by the bill, and cannot prevail now.

Holker was heard in reply.

[BLACKBURN, J., on the mode of proving foreign law, referred to *Vanderdonckt v. Thellusson* (12), in which case, a person, who was an hotel keeper in London, but had formerly been a merchant and stockbroker in Brussels, and who stated that he was acquainted with the law of Belgium with regard to promissory notes, was held to be a competent witness to prove, that by the law of Belgium, it is unnecessary to present a promissory note at the place where it is stated to be payable in the body of that note.]

Our. adv. vult.

The following judgments were read on June 26. That of Blackburn, J., Keating, J., Grove, J., and Archibald, J., by—

(7) 18 Q.B. Rep. 93; s. c. 21 Law J. Rep. (n.s.) Q.B. 233.

(8) 10 B. & C. 527, 541; s. c. 8 Law J. Rep. K.B. 210, 214.

(9) 10 Bing. 57; s. c. 3 Law J. Rep. (n.s.) C.P. 210; and 1 Sm. L.C. 6th ed. 509.

(10) 6 Duer. 225.

(11) 18 Ill. Rep. 349.

(12) 8 Com. B. Rep. 812; s. c. 19 Law J. Rep. (n.s.) C.P. 12.

BLACKBURN, J.—In this case the plaintiff, as executrix of James Campbell Rowley, sued the defendants under Lord Campbell's Act, for the benefit of the mother, wife and children of the deceased, for negligence occasioning the death of the deceased.

It appears by the bill of exceptions that the mother was entitled to an annuity of 200*l.* a year during the joint lives of herself and the deceased, secured by the personal covenant of the deceased, who was an attorney practising at Manchester, and that at the time of his death he was forty years of age and the mother sixty-one. It does not appear on the bill of exceptions, that any evidence was given as to the state of health of either the deceased or his mother. Nor does it appear on the bill of exceptions, whether any and what evidence was given as to the means of the deceased.

It is clear on this statement that as the mother had actually lost the annuity of 200*l.* a year, it was material to ascertain what was the value of that annuity; a question which must, in addition to other contingencies, depend upon the probable duration of the lives of the mother and her son. Now with the view of ascertaining the probable duration of a particular life at a given age, it is material to know what is the average duration of the life of a person of that age. The particular life on which an annuity is secured may be unusually healthy, in which case the value of the annuity would be greater than the average; or it may be unusually bad, in which case the value would be less than the average; but it must be material to know what, according to the experience of insurance companies, the value of an annuity secured on an average life of that age would be.

In the present case, with a view of enabling the jury to estimate the value of the annuity, a witness was called, who said he was an accountant acquainted with the business of insurance companies, and who referred to the Carlisle Tables, to which he said life insurance companies refer for obtaining information as to the average duration of lives. He gave evidence that, according to those tables, the

average and probable duration of a life of forty years is, 27·6, and that of a life of sixty-one is, 18·8 of a year; and that the sum which would purchase an annuity of 200*l.* on the life of a person of sixty-one years, is 2,000*l.* It is observable, that as the mother's annuity was for the joint lives of herself and son, not for her own life, this last question was not relevant, but that seems to have escaped notice.

The first exception is as to the reception of this evidence. We think the average and probable duration of a life of that age was material, and we do not see how that could be better shewn, than by proving the practice of life insurance companies, who learn it by experience. It was objected, that the witness was not an actuary, but only an accountant, but as he gave evidence that he was experienced in the business of life insurance, we think his evidence was admissible, though subject to remarks on its weight. We therefore think that the first exception cannot be maintained.

The next exception is to the Judge's direction to the jury, "That they might, if they thought proper, calculate the damages which the said mother of the deceased was entitled to recover, by ascertaining what is the sum which would purchase an annuity of 200*l.* a year for a person sixty-one years of age, according to the average duration of human life." As the mother had lost an annuity for the joint lives of herself, aged sixty-one, and her son, aged forty, secured only by his personal covenant, it seems unobjectionable to direct the jury that they might estimate the damages to her, by calculating what sum would buy her an equally good annuity. But three errors are pointed out in the direction given: First, that she had lost an annuity for the joint lives of herself and son, and that an annuity for her own life only would be of considerably greater value. Second, that the value of an annuity, according to the evidence given, would be that of an annuity on an average life, and that the jury ought to have been told to make an allowance for any defect in the health of the life. Third, that the value of the annuity spoken to in the evidence, was the value of an annuity on government

or other very good security, and that the annuity lost was that secured by the personal security of the deceased and therefore of much less value.

We think that, as far as the second of these objections is concerned, the jury might properly be directed to consider the lives in question as average lives, unless there was some evidence to the contrary; and if there was evidence to the contrary, the party excepting ought to have placed it on the bill of exceptions.

But the first and third of these exceptions seem well founded. The mistake in the first is so obvious, when attention is called to it, that we can but suppose it to have been a slip, which would have been corrected at once if it had been pointed out; and if we could suppose that the counsel for the defendant had lain by to take advantage of such a slip we would not permit them to do so. But though the error occurred in taking the evidence of the witness, and again in the summing up, it seems to have escaped the notice of everyone, as well of the counsel for the defendant as of the Judge and of the counsel for the plaintiff; and though the counsel excepting to the charge of a Judge is bound to point out to him what it is that he asserts is wrong, in order that the Judge may, if he thinks fit, withdraw or correct his direction in that respect, he is not bound to tell the Judge what he conceives is right, and indeed it would in many cases be unbecoming to do so.

On the third of these objections it is true that there might have been evidence that the circumstances of the deceased were such, that an annuity secured by his personal covenant only, was quite as good as a government annuity. But this is not what is ordinary and usual, and if there was evidence of this sort, the plaintiff should have taken care to insert it on the bill of exceptions.

There is a further exception to the direction, "That the jury might, if they thought proper, take as a guide in the calculation of the damages recoverable for the wife and children of the deceased, that the probable duration of the life of a man of forty years of age in the cir-

cumstances in which the deceased was, is twenty-seven years according to the said Carlisle Tables." We think that this cannot be construed as meaning more than that this was an element to be taken into calculation by the jury with the rest of the evidence. And if so it was unexceptionable. But there is one good exception. And we think, therefore, that there must be in this case a *venire de novo*.

BRETT, J.—In this case it seems to me that the bill of exceptions does not properly raise the point whether the evidence of the witness Adamson ought to have been rejected on the ground that he was not such a skilled witness as could properly be admitted to give evidence on the question of science proposed to him. Nor does it properly raise the point whether the subject matter of the question was a matter of science or of opinion. The objections stated to have been made are not that the witness was not a proper witness to give the proposed evidence, or that the proposed evidence was not a question of science, but that the evidence given by the witness was not admissible in this case. The objection taken at the trial and insisted upon in the exception seems to me to be, that even if the evidence were—or assuming it to be—given by a properly competent witness on a proper subject matter for skilled evidence, yet it was not admissible because it was immaterial. It becomes, therefore, unnecessary, as it seems to me, to decide whether Adamson, an accountant, was such a witness as could properly be allowed to give evidence on a matter, which, if it be a matter of science, is so in and according to the business of actuaries. It is sufficient to say that, having regard to what was said by Pollock, C.B., and by Alderson, B., and Rolfe, B., in *Bristol v. Sequenville* (4), I think it doubtful whether he was a competent witness.

The bill of exceptions seems to me to raise properly the question whether the evidence was rightly admitted as relevant or ought to have been rejected as immaterial.

The bill of exceptions also seems to me to raise the question by way of alleged

misdirection, whether in this class of cases a jury is entitled to assess as damages a sum of money equal to the present price or value of such an annuity as would give for the probable duration of the life of the person on whose behalf the action is brought, or of the deceased or their joint lives, an annual income equal or nearly equal to the income which was enjoyed by the person on whose behalf the action is brought before and at the time of the death, or would have been enjoyed by such person during the life of the deceased. Disregarding the oversight common to all parties at the trial as to the annuity of the mother being dependant on the son's life as well as on the mother's, and even disregarding the omission to point out the many contingencies which might have rendered the son unable to pay the annuity even if he had lived, it seems to me that the Lord Chief Baron did leave it open to the jury to suppose that they might properly assess as the proper damages a sum of money which would be the present value or price of an annuity which would give to the mother an annual income equal to that she would have received from her son for the probable duration of time during which the covenanted annuity would have been paid to her if her son had not been killed. That is, in other words, to hold that the damages in such cases may be "the fully calculated equivalent of the pecuniary loss sustained by the person on whose behalf the action is brought."

Both questions, namely, that as to the admission of evidence, and that as to the direction to be given to the jury, are of the greatest practical importance. If such evidence may be given it seems to me impossible to say that juries may not, and impossible to suppose that they will not, in many instances act upon it. If juries do give such damages poor defendants will be ruined, and the defendants most liable to such actions will not be able to carry on their business upon the same terms to the public as now.

With regard to the alleged misdirection, when Lord Campbell's Act was passed it was thought for a short time by some that damages might be given "to the full extent of a perfect compensation."

Such was in substance the direction of Parke, B., in *Blake v. The Midland Railway Company* (7); there the jury were invited, or it was left open to them to give an annuity equal to the money loss, and further damages by way of consolation. It was held that there must be a new trial on the ground of misdirection. The only point judicially decided was that the statute gave a right to damages only in respect of pecuniary injury. The case did not determine what was the right rule as to the amount of damages for the pecuniary injury. But in the argument was cited and certainly without disapproval from the Court, the direction of Parke, B., in the case of *Armstrong v. The South Eastern Railway Company* (6). That direction is no doubt partly pointed to the question of damages by way of consolation, but it lays down propositions also as to the amount of damages which should be given. "It would be most unjust" (it is said) "if whenever an accident occurs juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done." And, again, "scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life. . . . You are not to consider the value of existence as if you were bargaining with an annuity office. . . . I advise you to take a reasonable view of the case and give what you consider a fair compensation." This seems to be in accordance with the general rule, that in actions of tort for personal injury, the amount of damages is entirely in the disposition of the jury subject to supervision by the superior Court of Law if unreasonably large or unreasonably inadequate.

To the best of my belief the almost invariable direction to juries from the time of the cases I have cited until now has been "that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider *under all the circumstances a fair compensation*." I have a clear conviction that any verdict founded on the idea of giving damages to

the utmost amount which would be an equivalent for the pecuniary injury would be unjust. Founding my opinion on that conviction, on the declaration of it by Parke, B., and on the ordinary directions of judges, which directions have not been for years challenged, I conclude that the direction I have enunciated is the legal and only legal direction. A direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that which would have continued if there had been no accident, is a direction as it seems to me leaving it open to a jury to give the utmost amount which they think an equivalent for the pecuniary mischief done; and such a direction is a misdirection according to law. And such in my opinion was the direction in the present case of the Lord Chief Baron.

If it be wrong in a jury to give an amount founded on a calculation of the present value of an annuity, any evidence given solely for the purpose of enabling a jury to make such a calculation seems to me to be necessarily misleading and legally irrelevant. It is irrelevant to any decision to which the jury ought to come. It is, in the words of Lord Mansfield in *Carter v. Boehm* (4), "evidence to which the jury ought not to pay the least regard. Such evidence is and must be irrelevant, and therefore is not evidence." It seems to me that the evidence in this case which was given and received notwithstanding objection taken to it, and to which reexception the first exception is pointed, was given solely for the purpose of inviting the jury to found upon it a calculation of the price of an annuity, a calculation upon which they were not legally entitled to enter. I think, therefore, that the evidence was improperly admitted. And I am of opinion that upon both exceptions the defendants are entitled to judgment, and that there ought to be a *venire de novo*.

HONTMAN, J.—I agree with the rest of the Court that in this case there must be a *venire de novo*.

It seems to me that the language used by the Lord Chief Baron in his summing

up with reference to the damages recoverable by the mother amounted substantially to a direction to the jury that they might, if they thought fit, fix the amount payable to the mother by ascertaining merely the amount required for the purchase of an annuity for a person of the age of the mother according to the average duration of the life of persons of that age.

Without relying on the evident slip (common apparently to all parties) of omitting to notice that the annuity payable to his mother by the deceased was not an annuity for her life but only for the joint lives of the two, I think that this direction is objectionable on two grounds; first, as authorising the jury to fix the term for which an annuity is to be purchased solely by reference to the average duration of human life, without taking into account the state of health and condition of the mother; and, secondly, in allowing the jury to disregard the admitted fact that the annuity which the mother had lost by the defendant's negligence was secured only by the personal covenant of a professional man, and would therefore become practically valueless by the inability of the grantor through ill health or the loss of business to keep up the annual payment.

Having come to the conclusion that on this ground there must be a *venire de novo*, I purposely abstain from expressing any opinion on the other exceptions to the Lord Chief Baron's ruling and to the admissibility of Mr. Adamson's evidence.

Venire de Novo.

Attorneys—Phelps & Sedgwick, agents for Sale & Co., Manchester, for plaintiff; R. F. Roberts, for defendants.

[IN THE EXCHEQUER CHAMBER.]

(Error from the Court of Exchequer.)

1871.	} GRAY v. FOWLER.
May 30, 31.	
1873.	
May 10, 12.	
June 26.	

Vendor and Purchaser—Contract of Sale of Real Property—Objections to and Requisitions on Title—Delivery of untrue Abstract without Fraud—Rescission of Contract—Damages for Loss of Bargain.

Real property was sold on the conditions that the vendor should deliver an abstract of the title, and the purchaser should make his objections and requisitions in respect of the title within twenty-one days from the delivery of the abstract; that all objections and requisitions which should not be made within the time specified should be taken to be waived; and that in case the purchaser should make any objection to or requisition on the title which the vendor should be unwilling or unable to answer or comply with, the vendor reserved to himself the option at any time to rescind the contract.

The vendor having delivered an abstract, the purchaser within the twenty-one days made a frivolous objection to the title as disclosed in the abstract, and as he insisted on it the vendor filed a bill for specific performance. The purchaser having meanwhile discovered the existence of certain deeds which materially affected the title, and which were omitted from the abstract, raised an objection on this ground, for the first time, in his answer to the bill. This omission was made intentionally, but bona fide and under the advice of counsel, as it was supposed that the deeds did not affect the title. (The vendor, however, had, under a previous contract to sell this property, disclosed these deeds on the abstract then delivered, and had abandoned such contract when an objection founded on these deeds was raised to the title.) Several months after the filing of the answer, the vendor gave the purchaser notice that he rescinded the contract, and the bill was eventually dismissed on the purchaser's motion, without costs.

The purchaser having brought an action against the vendor for breach of contract

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in not deducing a good title,—Held, in the Exchequer Chamber, per BLACKBURN, J., KEATING, J., BRETT, J., ARCHIBALD, J., and HONYMAN, J., that the objection founded on the omission of the deeds was an "objection to the title" within the meaning of the condition, and entitled the vendor to rescind, and that the action was not maintainable.

Per GROVE, J. (agreeing with the decision of BRAMWELL, B., in the Court below), that the vendor was not entitled to rescind since the option reserved by the condition applied only to objections to the title as disclosed in the abstract.

Error on a Special Case.

The following facts were found by an arbitrator to whom this action was referred by order of Martin, B., and by consent, that he might state a

SPECIAL CASE.

1. The plaintiff is executor of John Griffith Leete. The defendant is sole surviving trustee under the will of W. Parker, who died on the 6th of June, 1867, having by his will, dated the 18th of April, 1859, devised his real estate, situate in Thrapston or elsewhere, to the defendant and R. Archbould, and their heirs upon trust to sell. Archbould, who was a solicitor at Thrapston, died on the 15th of March, 1868.

2. The defendant as surviving devisee in trust caused certain real estate of Parker, and certain tolls of the fairs and markets at Thrapston, to be put up for sale by public auction on the 26th of March, 1868, at Thrapston, in lots according to certain particulars and conditions of sale. At the sale Leete was declared to be the purchaser of Lot 3 for 450*l.* and Lot 4 for 100*l.*, and he thereupon paid a deposit of 55*l.* to the auctioneer, and signed one agreement for the purchase of both lots for 550*l.*

3. Lots 3 and 4 are thus described in the particulars so far as the description is material. "Lot 3 comprises the tolls arising from the fairs and markets held at Thrapston, also a plot of ground used for storing, market stalls, and a quantity of market stall fittings. The receipts in 1867 amounted to 41*l.* 5*s.* 5*d.*" "Lot 4 comprises all that one equal undivided

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third part or share, the whole into three equal parts being considered as divided, of and in six freehold cottages."

4. The material conditions are the third, and in part the fifth, eighth and tenth.

The third is—"Within seven days from the day of sale the vendor shall at his own expense make and deliver to every purchaser, or his solicitor, an abstract of the title of the vendor according to these conditions, to the lot or lots purchased by him respectively. And the purchaser shall make his objections and requisitions (if any) in respect of the title, and send the same to Messrs. Palmer, Eland & Nettleship within twenty-one days from the day of delivery of the abstract. And all objections and requisitions which shall not be made and so sent within the time specified shall be taken to be waived, and for this purpose time shall be of the essence of the contract. And in case any purchaser shall make any objection to, or requisition on the title of the respective lots which the vendor shall be unwilling, or unable to answer or comply with, the vendor reserves to himself the option (notwithstanding he may have attempted to answer, or comply with such objections, or requisitions, or may have partly done so) at any time to rescind the contract for sale of the lot or lots in respect of which such objections or requisitions shall be made, upon repaying or tendering to such purchaser or purchasers the deposit money, without interest, costs or expenses, in full of all claims or demands for the investigation of the title or otherwise."

The fifth condition states that the abstract to be delivered by the vendor at his expense shall as to Lot 3 commence with the conveyance to Parker, dated the 11th day of October, 1860, from the trustees under the will of the late T. Burton, but the purchaser shall be entitled to an abstract of any earlier title thereto which is in the possession or power of the vendor on making a written application to his solicitors and undertaking to pay the vendor's costs of preparing and furnishing such abstract; and proceeds—"Lot 4 is sold by the said trustees under a power of sale in a mort-

gage made to Mr. Parker, and the abstract to such lot will commence with a will dated in 1802. A former owner of this lot, who died in 1849, made a will dated in 1846 and a codicil dated in 1848, which codicil referred to a will and codicil, but no prior codicil appeared to exist; the codicil of 1848 alone was proved with the will, and it shall be assumed that no prior codicil did exist. The vendor shall not be required to verify the abstract of title to Lot 4 further than by the production of the mortgage deed under which they sell, no earlier documents of title being in their possession or power."

The eighth condition states that the muniments of title in the vendor's possession relating to Lot 4 will be handed to the purchaser thereof on completion.

The tenth is—"If any mistake be made in the description of the property, extent of any undivided share, or any other error whatever shall appear in the particulars of sale, except as to quantities which shall be taken to be correct, such mistake or error (if capable of compensation) shall not annul the sale, but a compensation shall be allowed or given by the vendor or purchaser as the case may require."

5. On March 27, 1868, Hawkins—who had been a clerk to Archbould from June, 1867, down to the time of his decease, and who on March 26, 1868, commenced business as a solicitor on his own account—became, and acted as Leete's solicitor in investigating the title to Lots 3 and 4, and otherwise in relation to the same. Neither Hawkins nor Archbould had previously acted as Leete's solicitor.

6. Abstracts of the title to Lots 3 and 4, commencing as to Lot 3 with the conveyance of the 11th day of October, 1860, and as to Lot 4 with the will of 1802, were delivered within the time specified by the conditions.

On April 15, 1868, Hawkins made the following requisitions, amongst others, on the title to Lot 3. "1. No title is at present made out to this lot. Burton by his will devised all his hereditaments situate, lying and being in the several parishes of Thrapston, &c., and W. Parker again devised all his hereditaments situate in

Thrapston or elsewhere. Market tolls are in the nature of incorporeal hereditaments, and cannot be said to be situate anywhere." The vendor's solicitors answered that there was no doubt but that the tolls passed by both wills. "2. The purchaser requires the right to hold the fair and market to be made out either by production of the original grant, or by shewing some recognition of it in a Court of Record." The vendor's solicitors answered by relying on the fifth condition.

As to Lot 4, one objection was that it appeared by a will and codicil that the vendor could make a title only to one-fourth instead of one-third part of the six cottages. The vendor's solicitors answered that if this objection were pressed, the purchaser would be entitled to an abatement of the purchase money according to the tenth condition, but that of course the vendor in such case would only convey one-fourth. On May 25, Hawkins without noticing the replies of the vendor's solicitors as to Lot 4, adhered to the second requisition as to Lot 3, and on May 26, the defendant's solicitors threatened a bill for specific performance. The purchaser expressed his willingness to waive his objection as to Lot 4 upon having the said abatement made, and offered to separate the contract into two if the vendor desired it, which offer the vendor's solicitors accepted, but the purchaser persisted in his objection to the title to Lot 3, whereupon the vendor offered to furnish reasonable evidence of the actual enjoyment of the tolls.

7. The purchaser still refusing to accept the title, the vendor filed a bill against him to compel specific performance of the contract. The bill contained no reference to the objection made to Lot 4 or to the agreement to waive that objection on having an abatement in the price, and in paragraph 30 alleged—"the defendant now raises no objection to the title to the said Lot 4, which lies apart from, and is unconnected with Lot 3, and he is willing to complete the purchase of Lot 4 at the said price of 100*l.* without prejudice to any question as to Lot 3." The bill prayed, *inter alia*, that the defendant "may be decreed specifically to perform his said contract, or in case the said pur-

chase of Lot 4 at 100*l.* shall have been previously completed, then may be decreed specifically to perform the said contract as to Lot 3, and to complete the purchase of the said premises or of the said Lot 3 as the case may require, and pay the balance of the said sum of 550*l.*, or 450*l.* as the case may be, with interest according to the said contract, the plaintiff hereby offering specifically to perform the said contract on his part."

8. In the answer filed September 23, 1868, by Hawkins who acted as solicitor for the purchaser in the suit through Milne & Co., the London agents, the purchaser repeated his old objections and requisitions as to Lot 3, and in paragraph (10) said—"And as to Lot 4, I say that the abstract so delivered was defective in several material particulars, and especially I allege that between the date of the will of 1802 and the sale of March 26, 1868, the plaintiff or the testator Parker had dealt with the property comprised in Lot 4 in a manner materially affecting the title thereto, and such dealing, although well known both to the plaintiff and to Palmer & Co., his solicitors, was improperly omitted from the abstract; and, except as hereinbefore appears, I deny that abstracts of the title to Lots 3 and 4, commencing as to Lot 3 with the conveyance of October 11, 1860, and as to Lot 4 with the will of 1802, in the said conditions of sale respectively mentioned, were duly delivered within the time specified by the conditions.

"(31.)—I do raise an objection to the title to Lot 4 in the plaintiff's bill mentioned. Such objection was raised for the first time in the requisitions delivered to the purchaser's solicitors, and was to the effect that the plaintiff's title extended only to one undivided fourth part of certain cottages, instead of one undivided third part as described in the particulars of sale, and the objection has been acquiesced in by the plaintiff's solicitors. I also now object to the title to Lot 4, on the ground that the true state of such title was not disclosed by the abstract furnished to me by the vendor's solicitors, inasmuch as such abstract was defective, as stated in the 10th paragraph of this my answer.

"(32.)—I admit that Lot 4 lies apart from Lot 3, and except that it is comprised in the same contract it is unconnected with it. But I say I am not willing to complete the purchase of Lot 4 at the price of 100*l.*, or at all, either with or without prejudice to any question as to Lot 3. On the contrary I insist on all the objections to the title of each of the said lots as a ground for refusing to complete the purchase of either of them."

This was the first time that any objection was raised on the ground mentioned in paragraph (10), that the abstract of title to Lot 4 was defective, and the arbitrator found with respect to it the following facts—On June 7th, 1860, an indenture was made between, first, Parker; second, Castle and Parker; third, Smith; and fourth, Archbould, whereby—(after reciting that by a mortgage of October 28th, 1858, Collier conveyed the undivided third part of the said six cottages to Parker in fee, subject to a proviso for redemption on payment of 100*l.* with interest on April 28th then next, but which sum had not been paid, and that by indenture of April 19th, 1859, made between, first, Collier; second, Castle and Parker; and third, Collier's creditors, Collier conveyed all his real estate to Castle and Parker upon trust to sell and apply the proceeds for the benefit of the said creditors; and that there was due to Parker 111*l.* upon the said mortgage)—it was witnessed that in consideration of the payment of that sum to Parker at the request of Castle and Parker, as trustees, by Smith in full satisfaction of all moneys secured by the mortgage, Parker conveyed, and Castle and Parker granted and confirmed to Smith, his heirs and assigns, all that undivided third part of the said six cottages, absolutely discharged from the said mortgage and all principal and interest moneys thereby secured; and on the deed is endorsed a receipt for the 111*l.*, signed by Parker. On January 25th, 1866, Smith signed a memorandum that the property conveyed to him by the indenture of June 7th, 1860, "is now the absolute property of" Parker, and that his (Smith's) name was inserted in the indenture as the grantee of the premises

therein comprised, to the intent that he should hold the same as trustee for Parker, and to be disposed of as he should direct. On March 11th, 1868, an indenture, indorsed on the indenture of June 7th, was made between, first, Smith; second, Fowler, the now defendant, and Archbould, whereby—(after reciting that the sale purported to be effected by the deed of June 7th, 1860, in favour of Smith, was in fact made to him as agent and trustee for Parker, who by his will, dated April 18th, 1859, and proved July 12th, 1867, devised all his real estate, including estates vested in him as mortgagee, to Fowler and Archbould, upon the trusts therein mentioned, and that Smith had at their request agreed to execute a conveyance of his estate in the cottages to them as such devisees)—it was witnessed that Smith conveyed to Fowler and Archbould in fee, all the share so conveyed to him of the said six cottages, to hold upon the trusts declared thereof by the said will, and subject to such equity of redemption as was subsisting in the premises.

The arbitrator found as facts that the recitals in the deeds are true, and that the indenture of June 7th, 1860, and the memorandum of January 25th, 1866, and the indenture of March 11th, 1868, were omitted from the abstract intentionally, but *bona fide* and under the advice of counsel, as it was supposed that they did not affect the title; that they were well known, from their respective dates, to Archbould; that the draft of the indenture of 1868 was prepared and settled by Palmer & Co. on behalf of the vendor and Archbould, the devisees in trust of Parker's will, and on February 29th, 1868, was approved on Smith's behalf by Archbould; that Hawkins was a clerk in Archbould's office at that time, and so gained a knowledge of the contents of those documents, that Archbould's approval of the deed of 1868 is in Hawkins's handwriting; that the deeds of 1860 and 1868 and the memorandum of 1866 were in the possession of the vendor, and that the existence of them was not known to the purchaser at the time of the auction, and that the contents thereof were first communicated by the vendor

to the plaintiff in an affidavit of the vendor made in this action, pursuant to an order for discovery of documents. That in 1867 the vendor had contracted to sell the property comprised in Lot 4 to Lord Lyvedon; that an abstract of the vendor's title thereto was delivered by Palmer & Co. on his behalf to Archbould as Lord Lyvedon's solicitor; that the abstract included the will of 1802, the mortgage deed of 1858, the indenture of June 7th, 1860, and the memorandum of January 25th, 1866; that objection was taken to the title on behalf of Lord Lyvedon in respect of the conveyance to Smith, and that the contract of sale was thereupon, in January, 1868, abandoned, and afterwards and before the sale to Leete, namely, on March 11th, 1868, the indenture of that date was executed.

9. On December 2nd, 1868, and while the suit was pending, the purchaser died. On January 26th, 1869, the vendor's solicitors, Palmer & Co., by letter asked the purchaser's solicitors for an extract from the purchaser's will, shewing the appointment of executors and particulars as to the probate, and added—"We have been waiting for probate of the will in order to revive the suit, which we shall do at once." On February 11th, Hawkins wrote to the vendor's solicitors that the will was dated June 6th, 1868, and had been proved on February 2nd, 1869, by the now plaintiff one of the executors. On February 12th the vendor's solicitors wrote to Milne & Co.: "We shall rescind the contract and present petition to dismiss bill, upon grounds which we will explain in a future letter." On February 13th the vendor's solicitors presented to the Master of the Rolls a petition that the bill might stand dismissed with costs, upon the grounds that the defendant in the suit was dead, that no order had been made to revive the suit against his executor, and that the plaintiff in the suit had been advised to proceed no further with it. Thereupon, an order dated February 13th was made that the bill be dismissed with costs; and on February 17th the vendor's solicitors sent to Milne & Co. a copy of the order and a formal notice to rescind the contract, saying, "We send you copy

order to dismiss bill and formal notice rescinding contract. We are prepared to pay over the 55*l.* deposit on the order of Mr. Leete's executor. The difficulties as to title with reference to Lot 4 were such, though as we conceive they have been most improperly raised by the defendant's answer in this suit, that we are advised, however clear the title to Lot 3 may be, the vendor would probably fail to enforce specific performance, the two lots having been included in one contract."

On the following day Milne & Co. replied, "We have received copy order to dismiss, which we submit is wrong, as it directs payment of costs to a dead man, and we think if the fact of the death had appeared upon the petition, the order would not have been granted. Assuming the plaintiff did not pay the costs voluntarily, how could we enforce the payment? And we cannot tax the costs, as it seems to us, without a client on the record. Will you consider this and set the error right?" On February 19, the vendor's solicitors answer—"The facts of the death of the defendant and appointment of executors were fully stated on the petition, and the Rolls secretary felt some little difficulty in framing the order for payment of costs to a dead man, in the absence of an order to revive. There is, however, no necessity to incur the expense of obtaining such order, as we personally undertake to pay the costs when taxed to the order of defendant's executor." Milne & Co. replied on February 20, that their clients would prefer that the bill should be properly dismissed; and on February 23 they wrote—"We cannot recognise the order, and our clients have reason for wishing the proceedings to be regular. We must, therefore, ask you again to revive the suit, and if you decline we shall be obliged to take such steps as we may be advised." On the 26th of February, the vendor's solicitors wrote to Milne & Co.—"We are advised the order is wrong, and we therefore withdraw it and you may consider it abandoned, and we leave you to take any course you may think fit. We expressly withdraw our personal undertaking to pay the late defendant's costs." And on February 27th they

further wrote to Milne & Co.—“We are ready to pay the deposit at any time and shall be glad to receive the executor's directions.” On March 3, Milne & Co. served the vendor's solicitors with a notice of motion that the plaintiff in the suit should be ordered, within one month, to obtain and serve on Leete's executor an order to revive the suit, or in default thereof, that the bill should stand dismissed for want of prosecution, with costs; and on March 11 the motion was made before Stuart, V.C., who, after hearing counsel for the now plaintiff Gray, the legal personal representative of the purchaser, and for the vendor, ordered “that the plaintiff do within one calendar month from this time, obtain and serve on Gray, as such legal personal representative, an order to revive the suit, or, in default thereof, that the plaintiff's bill do stand dismissed out of this Court without further order, without costs.” Milne & Co. not having drawn up this order, the vendor's solicitors, before the month had expired, drew it up. No order to revive the suit was obtained or served; and on the 12th of April Milne and Co. wrote to the vendor's solicitors—“The time limited for reviving having expired, we beg to enquire whether the vendor will, without action, compensate purchaser's executor, who claims more than a return of the bare deposit, for the breach of contract.” On the 13th of April, a tender of 55*l.* was duly made to the now plaintiff, but he refused to receive it upon the ground that a larger sum was due to him.

10. The arbitrator further found, as facts, that, as admitted on the pleadings, the vendor did not deduce or make a good title to the property sold to Leete; but that there was no fraud or fraudulent misrepresentation on the part of the vendor, and that he always believed he had and could make a good title to both of the lots; that the election made by him to rescind the contract of sale always continued from the 17th of February, 1869, hitherto; and that according to the true construction of the will and codicil he could not make a title to more than one-fourth of Lot 4, or remove the objection to that effect originally made by the purchaser and insisted on by the 10th and

31st paragraphs of the purchaser's answer; but the arbitrator also found as a fact “that the said rescission or attempted rescission of the contract by the vendor was not from unwillingness or inability on his part to answer or comply with objections to or requisitions on the title to the said lots or either of them.”

11. On the 20th of April, 1869, this action was commenced. The first count was for not deducing a good title, whereby Leete lost the benefit which would have accrued from the completion of the purchase, and incurred expenses in negotiating and investigating the title, and lost the use of the deposit, and Leete and the plaintiff, as executor, incurred expenses in defending, &c., the Chancery suit. The second count was for a fraudulent misrepresentation to Leete by the defendant, that he had and would deduce a good title whereby, &c. The third count was for money received by the defendant to the use of Leete, and for interest upon money due from the defendant to him, and for money due on accounts stated.

The pleas were (*inter alia*) second, That the property was sold subject to the conditions of sale (which the plea set out); that within the seven days the defendant delivered an abstract of his title as agreed; that Leete “made certain objections to, and requisitions on the said title, and the defendant, being unwilling to answer or comply with such objections and requisitions, did, in accordance with the said conditions, elect to rescind, and rescinded the contract,” and tendered the deposit which the plaintiff refused to accept. Third, to the second count, Not Guilty. Fourth, to the third count, except as to 55*l.*, Never Indebted. Fifth, to the 55*l.* tender and payment into Court.

Replication to the second plea, on equitable grounds, that after Leete had made the objections, &c., the defendant commenced the suit in Chancery, and that at the time of the alleged rescission the defendant had not dismissed the suit, nor had he dismissed it with costs. Replication to the fifth plea—That at the time of the tender more than 55*l.* was due as one entire sum, and in respect of a single entire contract.

Rejoinder to the equitable replication—

That after the suit was commenced, and before the defendant elected to rescind, Leete died, and thereupon the suit abated, and afterwards the order of Stuart, V.C., of the 11th of March, 1869, was made: That the month elapsed without the order to revive being obtained or served, and thereupon the bill stood dismissed without costs, and the defendant then elected to rescind, and tendered the deposit.

Joinder of issue on the pleas and replications and rejoinder. Demurrers to the first replication and to the rejoinder, and joinder therein.

The arbitrator found on the second issue (subject to the opinion of the Court), that the defendant did not, according to the third condition, rescind the contract. On the third, that the defendant was not guilty of fraud. On the fourth, that the defendant was not indebted to the plaintiff beyond the sum of 55*l*. On the fifth, that the defendant duly tendered to the plaintiff the sum of 55*l*. before action. On the sixth, that at the time of the alleged rescission the defendant had not dismissed the suit. On the seventh, that at the time of the tender more than 55*l*. was not due as one entire sum, and in respect of a single entire contract. On the eighth (subject to the opinion of the Court), that the defendant was not entitled to rescind the contract under the conditions. In pursuance of the power to assess the damages contingently, the arbitrator found the following amounts—

	£	s.	d.
Costs incurred in investigating the title	22	15	0
Interest upon such costs and upon the deposit	9	15	0
Damages for loss of bargain	250	0	0
Costs of defending the Chancery suit	67	0	0

The Court is to be at liberty to draw any inferences of fact which a jury might draw.

12. The questions for the Court are—First, whether under the circumstances of the case, the defendant had power to, and did, rescind the contract of sale within the meaning of the 3rd condition. Second, whether the plaintiff is entitled to damages for loss of bargain. Third, whether the plaintiff is entitled to recover in this action the costs of defending the

Chancery suit, or any and what part thereof.

Judgment to be entered according to the decision of the Court.

The case was argued in the Court of Exchequer on May 30, 1871, by—

Quain (*Speke* and *O. E. Hawkins* with him), for the plaintiff.—First, the question is concluded by the finding of the arbitrator, in paragraph 10 of the case, that the rescission was not from unwillingness, &c.; that is in other words, that the rescission was invalid because not made within the third condition. Even without that finding the facts shew that the vendor had no right to rescind. A breach of contract having already been committed by the failure to deliver a true abstract, the subsequent rescission is no answer to the action. Having once elected not to rescind on the original objections he can never rescind on them—*Tanner v. Smith* (1) and *Morley v. Cook* (2). At all events he could not rescind without first dismissing his bill with costs (per *Kindersley, V.C.*, in *Wards v. Dixon* (3)), and the bill has not been dismissed by him, nor with costs. If the attempted rescission was in consequence of the objection (first raised in the answer to the bill), that the abstract was defective, it is not a rescission within the meaning of the third condition, for the only objections which give the vendor an option to rescind under that condition are original or supplemental objections to the title as disclosed in the abstract. If the vendor had intended the option to apply to objections, “whether arising out of the abstract furnished or otherwise,” he would have framed the condition as in *Steer v. Crowley* (4). If the purchaser had told the vendor of the defect, and the vendor had afterwards filed his bill for specific performance, that would have been an election which would prevent him from afterwards rescinding—

(1) 10 Sim. 410.

(2) 2 Hare 106; s. c. 12 Law J. Rep. (n.s.) Chanc. 136.

(3) 28 Law J. Rep. (n.s.) Chanc. 315, 322.

(4) 14 Com. B. Rep. N.S. 337; s. c. 32 Law J. Rep. (n.s.) C.P. 191.

Gardom v. Lee (5). How can he put himself in a better position by concealing the defect, knowing from his failure with Lord Lyveden that his title was not marketable? Even if this were an objection within the third condition, which entitled him to rescind, he could not take advantage of his own intentional misrepresentation. But if entitled to rescind, he must do so within a reasonable time—*The Shoreditch Vestry v. Hughes* (6), and a space of nearly five months between the filing of the answer and the first mention of rescission is not reasonable time. If the defendant is right, a vendor can always enlarge the time for rescission by filing a bill. Secondly, the plaintiff can recover for loss of bargain, for the case falls within *Hopkins v. Grazebrook* (7), and not within *Flureau v. Thornhill* (8) and *Bain v. Fothergill* (9), and the cases there cited. Thirdly, the plaintiff can recover the costs of the Chancery suit.

Kemplay, for the defendant, contended that he had a right to rescind on each or all of the objections, and that if unwillingness or inability existed it was immaterial what reasons were given, or what motives actuated the rescission. That the purchaser could not complain of the omission of the deeds, because Hawkins, his attorney, knew it all through, and notice to the agent is notice to the principal—*Dresser v. Norwood* (10).

Quain in reply.—Even in equity "it is settled that notice to an agent or counsel who was employed in the thing by another person, or in another business and at another time, is no notice to his client who employs him afterwards, and it would be very mischievous if it was so, for the man of most practice and greatest eminence would then be the most dangerous to employ"—per Lord Hardwicke in *Worsley v. Lord Scarborough* (11).

Cur. adv. vult.

The next day the following judgments were delivered—

CLEASBY, B.—I think the defendant is entitled to judgment. On the second question I think that even if the plaintiff is entitled to recover, it is not for the loss of bargain. This is a contract for sale of real property, and as I think comes within the rule of *Flureau v. Thornhill* (8), and not within the exception of *Hopkins v. Grazebrook* (7). It is not made out—indeed it is negatived—that the defendant knew that there was not a good title. As to the third head, it is impossible to say that the costs of the Chancery suit were in any way caused by the breach of this contract.

The real question is, had the defendant a right to rescind? That depends upon the third condition. [The learned Judge read it.] Now the plaintiff bought lots 3 and 4 separately at separate prices, but when the matter was carried into effect by an endorsement on the conditions there was only one contract entered into to purchase the two lots for 550*l*. When the abstract of title to Lot 4 was delivered, the objection was made that it shewed a title not to one-third but only to one-fourth. That was answered by a reference to the tenth condition which provided for compensation in such a case; and both parties seem to have agreed to that, notwithstanding that there might be misrepresentation as to Lot 3. Upon the requisitions as to Lot 3, the vendor insisted that he was in the right, and he filed a bill for specific performance. That bill was founded upon that state of facts—that there was no question whatever as to Lot 4. It says in paragraph 30 that the purchaser now raised no objection as to Lot 4, but was ready to take it at the price of 100*l*. That was strictly speaking correct—that the one-third part should stand at the price of 100*l*., but if there was to be only one-fourth conveyed, the purchaser was content to take that, and then there would be a deduction. The bill prayed that if the purchase of Lot 4 should not have been previously completed (assuming apparently that there would be no difficulty about it) the purchaser might be compelled to pay the 550*l*. In

(5) 3 Hurl. & C. 651; s. c. 34 Law J. Rep. (N.S.) Exch. 113.

(6) 17 Com. B. Rep. N.S. 137; s. c. 33 Law J. Rep. (N.S.) C.P. 349.

(7) 6 B. & C. 31; s. c. 5 Law J. Rep. K.B. 65.

(8) 2 W. Black. 1078.

(9) 40 Law J. Rep. (N.S.) Exch. 34.

(10) 17 Com. B. Rep. N.S. 466; s. c. 34 Law J. Rep. (N.S.) C.P. 48.

(11) 3 Atk. 392.

the answer the objection which had been made to Lot 4 is insisted upon in the most positive way, and besides that another objection is made, which would be an answer to the suit, viz., that the vendor had not furnished a proper abstract of title. The 31st and 32nd paragraphs of the answer are very distinct in insisting upon the original objection to Lot 4 as a ground for refusing to perform any part of the contract, either as regards Lot 3 or Lot 4, treating it as one contract. Then the question arises whether under this condition the vendor is in a position to rescind. We must consider the dates, and I have had some doubt whether what was done was done within a reasonable time. In September the answer was put in. The death of the person whom the plaintiff represents took place on the 2nd of December, and in January the vendor sets about taking proceedings for getting rid of the suit then pending, and in February he does rescind, but informally, when the bill had not properly been dismissed. Afterwards in April the bill having been got out of the way altogether, he exercises his power to rescind. Now I cannot say that, under all the circumstances, such a time had elapsed as to make it unreasonable. It is more difficult, perhaps, to account for the time between September and December, but I do not think that he had precluded himself by not acting with more dispatch.

There was another objection made that the bill having been filed by the vendor had not been dismissed with costs, and *Warde v. Dixon* (3) was referred to where *Kindersley, V.C.*, said that the bill must be dismissed with costs before the right to rescind could be exercised. That does not shew that after a bill has been filed for specific performance by the vendor he may not rescind; it rather assumes that he may if the bill is got rid of. Here the bill was got rid of, and the case stood therefore on the original contract, unaffected by any subsequent proceedings. Then we have to consider whether on the terms of the old contract there was a right to rescind upon the objection to Lot 4, which at first appeared to be waived, but when the answer was filed was set up again. That old contract the

defendant in the suit says he is not bound to perform because of this objection which was an objection made under the old contract, and which was a valid and subsisting objection. The vendor was therefore entitled to rescind. I do not think the circumstance of being compelled by other objections makes any difference. I cannot see under all the circumstances how it is possible to say that the vendor has been guilty of anything improper in not putting forward in the abstract these deeds which he considered by the advice of counsel were unimportant. Therefore that does not disentitle him in any way to his right to rescind. If he had done anything improper it might be a different matter, but it really is not so. I think, therefore, the defendant is entitled to judgment.

BRAMWELL, B.—On the third question, I think it is not necessary to add anything to what was said during the argument, viz., that the costs of the Chancery suit were not in consequence of the failure to deduce a good title. The plaintiff, therefore, cannot recover them.

As to the second question whether the plaintiff is entitled to damages for loss of bargain, I will not dissent from the opinion of my brother Cleasby, and from that which I understand to be the opinion of my Lord and my brother Martin, but I should have liked more time—if it had been necessary to consider the question—because there are some very remarkable circumstances in this case which make me doubt whether *Flureau v. Thornhill* (8) and the other cases govern it. The arbitrator finds distinctly that no fraud was intended, and that it was under the advice of counsel that the conveyance to Smith and the conveyance and the deeds were omitted from the abstract, in which no doubt they ought to have been put. I do not wish to insinuate that there was fraud. I do not think that there was any intention to do anything wrong. The vendor and his advisers probably thought that if a conveyance had been taken from the vendor the purchaser would have got a good title and would have nothing to fear from anybody else, and that no harm would come of it. But I am strongly inclined to

think no man has a right to represent to another a state of things which is not the true state with the intention that that other person shall act upon it. The latter ought to exercise a judgment upon it himself, when the truth is known to him, as to the way he shall act; and though I do not think there was anything wrong intended, I think the vendor has done what the purchaser has a right to complain of, inasmuch as knowing the truth the vendor did not think proper to tell it to him, and the state of things on which the purchaser acted was different from the real state of things. I am not at all sure that it does not take the case out of the authorities cited, and I refer to my brother Cleasby's opinion in *Bain v. Fothergill* (12) where he says, "We are therefore thrown back on the rule of *Flureau v. Thornhill* (8) which establishes that where there is no fraud and no express contract to sell property with a knowledge on the vendor's part that he has not the title to sell, as was the case in *Hopkins v. Grazebrook* (7), no damages for loss of bargain can be recovered."

Now did the vendor know that he had not the title? The particulars of sale say that he sold under his power of sale, but he knew that he had proposed to sell to Lord Lyveden, and that the objection had been made to his title, and he knew that the title was not marketable. It is confessed upon the pleadings, and the arbitrator finds, that the defendant did not deduce or make a good title. It seems to me, speaking with diffidence on a point of law I am not familiar with, that he could not have deduced a good title because he could not have deduced a title free from the mortgagor's assignees. I speak therefore with reserve as to whether the plaintiff might not be entitled to recover damages for his loss of bargain.

But the principal question is as to whether the vendor had a right to rescind. Now the arbitrator has found that which I think concludes the case—"That the said rescission or attempted rescission of the contract by the vendor was not from unwillingness or inability on his

part to answer or comply with objections to or requisitions on the title to the said lots or either of them." The second plea to the first count expressly states that he being unwilling to answer or comply with the objections and requisitions rescinded. Mr. Kemplay says it is not necessary that the rescission should proceed from his being unwilling or unable, it is enough that his unwillingness or his inability existed. That argument, I think, is ingenious but unsound. Suppose he had refused to go on with the purchase for no other reason than that he thought he could get a better price, and an action having been brought against him it turned out that he could not make a good title, would anybody say that he could exercise his power of rescission in that case? Clearly not. I think, therefore, the arbitrator has concluded the case against the vendor by the finding of fact.

But if that finding were not there, I should come to the same conclusion, that the vendor had not power to rescind at the time he did. It is said he had a right to rescind on two different grounds; first, in consequence of the objection that the vendor could not make out a title to more than one-fourth, whereas he had sold one undivided third; and, secondly, on account of the objection arising out of the conveyance to Smith and the re-conveyance and those dealings with the title. First, had he any right to rescind in consequence of the objection taken in the answer that the defendant could only convey one-fourth and not one-third? It is clear to my mind that he had not, and for this reason—the purchaser had no power to make such an objection. It was a perfectly invalid, useless, and idle objection. He had taken it before and taken it improperly, and it had been answered by a reference to the tenth condition, and it is found as a fact that the answer had been acquiesced in. It was just as idle as if he had said that a dot had not been put to an i, and therefore it was an objection which the purchaser could not make except that he might properly have said, "the bill demands payment of the full price, but there must not be a decree for the full price as the vendor can only convey one-fourth."

(12) 40 Law J. Rep. (N.S.) Exch. 34, 40; s. c. Law Rep. 6 Exch. 59, 69.

There is another answer to it: it is not an objection which the vendor was unable or unwilling to answer. He certainly was not unable, because he clearly might have referred to the tenth condition. He was not unwilling; not only is that found by the arbitrator, but it is certain. I do not know whether any meaning has been put on the word "unwilling" (18) but it does not mean, "I would rather not answer because I am glad to avail myself of the objection that you make." No such ridiculous construction has been put on it, but it must mean an unwillingness of this character—"I cannot absolutely say I cannot answer your objection; but I can only answer it at very considerable trouble and expense." In such a case he may be reasonably unwilling to answer it. The vendor in that sense was not unwilling to answer.

Secondly, it is said there was a right to rescind on the objection taken in the answer that the abstract was an improper one, because when the true state of the title was disclosed, the vendor could not make a good title without getting the concurrence of the trustees for the benefit of the mortgagor's creditors. Did that objection give the vendor a right to rescind? I think not. I take it as established, that the abstract was one that ought not to have been delivered; it ought to have contained the conveyance to Smith and the reconveyance. Now the 5th condition says, "Lot 4 is sold by the said trustees under a power of sale in a mortgage made to Mr. Parker, and the abstract to such lot will commence with a will dated in 1802." That is the title that he is professing to convey. The 3rd condition says (leaving out immaterial words), "within seven days from the day of sale, the vendors shall at their own expense make and deliver to every purchaser an abstract of the title according to these conditions." That is to say, according to the conditions under which they sell under the power of sale. "And the purchaser shall make his objections and requisitions (if any) in respect of the title." That is to say, the title that is to be made

out. [The learned Judge read the rest of the 3rd condition.] It appears to me that the vendor under such a condition has only a right to rescind in respect of objections that are made to the title that is disclosed in the abstract, or the objections or requisition that arise therefrom; that is, if an objection or requisition is made, and that is answered and that gives rise to a fresh objection that the right to rescind should apply to such fresh objection also. Now suppose that the abstract was delivered, the title accepted, and the parties met to complete, and then for the first time the purchaser said, "your name is not A. B., but C. D., and you are an uncertificated bankrupt, and I cannot deal with you." Does anyone contend that there would be a power to rescind under such an objection as that? The reason of the thing and the language equally shew to me that the condition does not apply to an objection not arising out of the title disclosed on the abstract. That was the case here. An objection was taken which did not arise out of the disclosed title because the abstract was an improper one. Otherwise, it would be unjust, because if the title had been truthfully stated in the first instance, the objection would have been taken then, and the vendor would have been bound to say (as he does now) that he could not answer it. See what the consequences would be of holding otherwise. If it means that he may rescind in consequence of any objections and requisitions whether made upon the abstract or not, it follows that this clause would equally apply—"And all objections and requisitions which shall not be made and so sent in within the time specified, shall be taken to be waived." Does any human being suppose that an objection which does not arise out of the abstract delivered is to be waived by its not being taken, and if the defect is subsequently disclosed that the objection may not be taken? That goes to shew that the objections and requisitions of the 3rd condition are those that arise out of the abstract, and not those which are found out *alunde*. That consideration seems to me to shew that the power to rescind could not be exercised in respect of the objection first raised in the answer to the bill, that the vendor had so dealt with the title as

(18) See per Turner, L.J., in *Duddell v. Simpson*, 36 Law J. Rep. (N.S.) Chanc. 70, 72.

that he could not convey. If the vendor thinks fit to send an untrue or improper abstract, he loses the benefit he might otherwise expect if he had properly stated the title.

There is another ground which seems to me conclusive, and I cannot understand how any other view can be taken of it. The answer to the bill was filed in September. Supposing that upon the objection being then disclosed for the first time, there was a right to rescind. Surely that was a right to rescind *then*: I know the words in the 3rd condition are "at any time," but that means that whenever the time may be when the occasion arises for electing to rescind, then he may rescind. It does not mean that when the occasion arises for electing, he shall be at liberty to say, "I will not rescind," and then at any distance of time afterwards, "I will." That seems a preposterous construction. What does the vendor do? The purchaser having died, the vendor writes to know the names of the executors in order that he may revive the bill. That was nearly four months after the filing of the answer; a fortnight afterwards he says, "Now I have changed my mind and I will not. I will rescind. An objection is taken that ought not to be taken." Observe the consequences. It was contended that the executors had been put to additional expense in consequence of his not rescinding in September when he had legal notice of the objection. On what possible ground of reason or of justice is the vendor to rescind? Why did he not rescind at the end of a fortnight or within a reasonable time after he had notice of this objection, if he had a right to rescind? But months after he knew of the objection he intimates an intention of going on and actually goes on, and by retaining the deposit keeps the plaintiff out of his money for some months longer than he ought. As to the bill, the rule in equity as I understand *V.O. Kindersley's* decision seems very reasonable. While you have yet the bill upon the file insisting upon the existence of the contract, you cannot also be rescinding. You must first get rid of the bill.

One more observation: the plaintiff has no breach for not delivering a proper ab-

stract of title. It seems to me that if he had, there would have been no possible answer to his claim. It may be that his attorney ought to have kept this secret (though I am far from saying he ought), but certainly the plaintiff has a right to complain of the defendant—"By your proceedings you have put me to an expense which I should not have been put to if you had dealt with me truthfully." If it came before me as arbitrator or judge with power to amend the declaration by putting in a count for not delivering a proper abstract, I should do so. But this was not necessary, as I think, to entitle the plaintiff to our judgment. He has shewn that the title was not deduced, and to my mind, for the various reasons I have given, the defendant had not a right to rescind.

MARTIN, B.—As I entirely concur in the judgment of my brother Cleasby, and as I understand the Lord Chief Baron will agree with it, I shall say but little. On the third question, as to the costs of the Chancery suit, it is sufficient to say that it is for the Court of Chancery. If the Vice-Chancellor thought fit to refuse costs, we cannot at common law give them.

As to the second question, whether the plaintiff is entitled to recover damages for his loss of bargain, *Flureau v. Thornhill* (8) was decided 100 years ago, and it is there stated as a rule that if there was no fraud on the part of the seller, if he *bona fide* thought he had that which he proposed to sell, he was not to be held liable for any damage by reason of loss of bargain. *Flureau v. Thornhill* (8) has been the subject of comment for the last 100 years: it is discussed in Mr. Sedgwick's book on Damages (4th edition), p. 234 [209]; he considers it wrong, and it may be wrong; it may be an anomaly, but it has been acted upon so long that it must be taken as law, and as I said in *Bain v. Fothergill* (9) it is in my opinion as much law as if it had been an Act of Parliament. In this case, when the contract was entered into the vendor thought he had a *bona fide* right to sell, and I cannot understand why, because some deeds were omitted in the abstract, as explained, it should make any difference.

On the first question the defendant is, in my opinion, entitled to judgment on the ground that he had a right to rescind. [The learned Judge here read the first clause of the 3d condition.] It seems to me that those words are to be read according to their plain and ordinary meaning. The abstract being delivered in this case these two objections were made: the first was to Lot 3, that market tolls were in the nature of incorporeal hereditaments and could not be said to be situate anywhere. Can there be a more frivolous objection than that? The other objection was to Lot 4, that a title could not be made to a third part, but only to a fourth, and the answer was that there should be a proportionate reduction of the purchase money, and it seems to have been understood by both parties (certainly by the vendor) that there was to be a reduction of the price. Then the bill was filed for a specific performance, and what was the answer? [The learned Judge read par. 32 of the answer.] As far as I can see, the objection was raised for the first time and was never disposed of. Then the decision of Kindersley, V.C., in *Ward v. Dixon* (3), is directly in point. He says that it is a condition precedent that the costs of the Chancery suit should be paid by the vendor, and I have no doubt that is a perfectly correct rule and a proper thing for the Court of Chancery to do. But that is no part of the contract, it is merely a rule which the Court of Chancery imposes. On the authority of Kindersley, V.C., I think it is competent on the objection being made, for the vendor—although he might be as willing as any one could be to answer it—to say, “I am unable to answer that objection, and I therefore rescind the contract.” It seems to me to be within the express words of the condition, and I own, therefore, that I cannot understand the argument on the part of the plaintiff.

[BRAMWELL, B.—I wish to refer to *Fisher v. Rawlins* (14) on the second question.]

(14) 40 Law J. Rep. (N.S.) Chanc. 107; since reversed on appeal, 41 Law J. Rep. (N.S.) Chanc. 485.

KELLY, C.B.—I also think the defendant is entitled to judgment. The great question is whether the defendant was entitled to rescind at the time he professed to rescind. That depends entirely upon the third condition. [His Lordship read it.] An abstract was delivered, and two objections were made upon that abstract: the first, that the defendant was not entitled to one-third of Lot 4, but only to one-fourth; the other, that in the abstract to Lot 3, no sufficient title was made out to certain market tolls. Upon these two objections communications took place between the parties, the result of which was that the objection to Lot 4 was withdrawn, by reason of a provision in the tenth condition, the purchaser consenting to purchase and the vendor consenting to sell Lot 4 at the price of 100*l.*, afterwards reduced to 75*l.*

The objection to Lot 3 remained unanswered, and in this state of things no doubt the defendant would have been at liberty, by reason of the objection to Lot 3, to say he was unable or unwilling to answer it, and he ought at once to have elected to rescind if he intended to do so on that objection; but since the objection to Lot 4 had been waived, and he thought he had a sufficient answer to the objection to Lot 3, he does not rescind, but calls on the purchaser to perform the contract by accepting the title as set forth in the abstract, and the purchaser not choosing to do so, a bill for specific performance was filed. By way of answer to the bill, the purchaser, in express terms, says—[Here his Lordship read paragraph 32 of the answer.] In other words, the purchaser in his answer withdraws altogether his acquiescence and revives his objection as to Lot 4, and the question is whether there is anything in the terms of the 3d condition which precludes the seller from saying as to Lot 4—“True, I did not think fit to rescind when you first made this objection. On the contrary, I proposed a mode of arrangement in lieu of rescinding, and you acquiesced. But now you have revived the objection to the title, and it is an objection which I am unable, or unwilling, or both, to answer, and this is therefore a case within the literal terms of the third condition. I have

a right under that condition to rescind the contract, and I do rescind accordingly." I am unable to conceive what is to be said against the vendor's right at that time and under those circumstances to rescind. It is said he has lost the right because he did not exercise it when the objection was first made, but the answer to that is, that at that time the objection was agreed to be waived and was put an end to.

Then we are met with another difficulty, arising out of the rule of the Court of Chancery, that when a vendor has filed a bill for specific performance he cannot rescind the contract until the bill is dismissed with costs. That is a very good rule; the essence of it being that you cannot enforce the contract, assuming that it exists, and at the same time exercise a right to put an end to it. Now the vendor obtained an order in the Rolls Court to dismiss the bill with costs, but owing to the death of one of the parties to the suit it was inoperative. Then, in order to meet this difficulty, and to comply with the rule of Equity, the vendor offers to pay the costs to the order of the purchaser's executor—he does all that man can do to give effect to the rule, but the other side will not accept the offer and insist on the literal terms of the rule being conformed to, that is on the bill being dismissed with costs, for which purpose it would be necessary to revive the bill. The final result was that the bill was dismissed without costs, and the suit being at an end the parties are remitted to their original rights. Then the objection to the title conferred on the vendor a right to rescind, and he accordingly rescinded.

But it is said a difficulty is raised by the finding of the arbitrator that "the said rescission, or attempted rescission, of the contract by the vendor was not from unwillingness or inability on his part to answer or comply with objections to or requisitions on the title to the said lots or either of them." I think it is wholly immaterial whether he rescinded from unwillingness or inability: it is enough that the contract says in plain terms—if inability exists, if unwillingness exists, the vendor shall be at liberty

to rescind. Whatever may be the case as to inability (which may be a question of law and may depend on whether the objection was valid or invalid) the vendor says he has a right to rescind, and I think he had.

But another difficulty is suggested. In his answer to the bill the purchaser, besides renewing his old objections, raised a new one, viz., that the abstract was not a true one because it omitted certain deeds which affected the title. This objection, it is said, put an end to the vendor's right to rescind on the old objections, because it shewed that the vendor had already committed a breach of contract in failing to deliver a full and true abstract. It is also said that the objections referred to in the third condition are only objections to the title set forth in the abstract, and I am not sure that this was not the intention of the parties, but I shall not consider that question, for how can a right which the vendor had acquired to rescind upon the old objections be taken away by this new objection, whether it be within the third condition or not? It may possibly (but I do not say it does) constitute a ground of action, but I cannot see how it can take away an acquired right to rescind.

The last argument I shall notice is that the vendor did not rescind within a reasonable time. Though the words of the 8d condition are very large—"the option at any time to rescind," I am not prepared to say that the option must not be exercised within a reasonable time. The answer to the bill was filed in September, in the long vacation, and the objections were of such a nature that the vendor could not safely act without counsel's advice, which he could not obtain before November. That would leave him little more than a month before the purchaser's death. Looking at the difficulties of the case, and all the circumstances, I cannot say that when the vendor elected to rescind in February, that was not within a reasonable time.

I have already, during the argument, expressed my opinion that the plaintiff is not entitled to recover either damages for the loss of bargain, or the costs of defending the Chancery suit. For these

reasons I think the defendant is entitled to judgment.

Judgment for the defendant.

Thereupon the Court having answered each question in favour of the defendant, and judgment having been entered for him with 700*l.* costs of defence, the plaintiff brought error.

Manisty (Speke and O. E. Hawkins with him) (on May 10, 12, 1873, in the Exchequer Chamber), for the plaintiff.

Sir J. Karslake (Kemplay with him), for the defendant.

The arguments and authorities adduced were the same as those used in the Court below, except that the plaintiff abandoned the claim for the costs of the Chancery suit. *Duddell v. Simpson* (13) and *Mauson v. Fletcher* (15) were also referred to.

Cur. adv. vult.

BLACKBURN, J. (on June 26) read his own judgment, in which Keating, J., Brett, J., Archibald, J., and Honyman, J., concurred.—

In this case the plaintiff's testator purchased from the defendant (who was sole surviving trustee under the will of W. Parker) at an auction two lots, 3 and 4, of real property. Lot 3 was knocked down to him at 450*l.*, and Lot 4 at 100*l.*, but he signed one contract for the purchase of the two lots for 550*l.*, subject to the conditions of the sale. Those parts of the conditions material to the question before us were as follows:—[The Learned Judge read the 3rd and 10th, and that part of the 5th which relates to Lot 4].

The plaintiff's testator paid a deposit of 10*l.* per cent. on the purchase-money of both lots. This has been returned to his executor, but without interest or any other compensation. The questions in the case are, whether the plaintiff is entitled to any, and if any, to what, further compensation. The majority of the Court below were of opinion that he is not entitled to any further compensation, and if that opinion is right, it becomes unnecessary to consider any other point.

This depends on whether on the true construction of the conditions the defendant had an option, under the circumstances that have occurred, to rescind the contract, and if he has in due time exercised that option. My brother Bramwell in the Court below thought that the defendant failed in making out either position, but on considering the case, I have come to the contrary conclusion, and consequently think that the judgment below should be affirmed.

In Dart's *Vendors and Purchasers* (4th edition), p. 115, it is said, "If any other condition refer to 'the delivery of the abstract,' this in any question as to time will be held to mean the delivery of a *perfect* abstract, i.e. an abstract as perfect as the vendor could furnish at the time of delivery, although it may be an abstract of a defective title, and if it contains with sufficient fullness the effect of every instrument which constitutes the title it will be deemed to satisfy the condition; and time will begin to run against the purchaser as from the date of its delivery; and an abstract as delivered is presumed to be *perfect* unless the contrary is shewn." For this various decisions are cited which seem to me to bear out his positions which I think correct.

The defendant here delivered an abstract of the title to Lot 4, which was perfect in the above sense down to the time of the mortgage to Parker. But it now appears that Collier, the mortgagor to Parker, had after the mortgage conveyed all his estate (including, therefore, the equity of redemption in this property) to Parker and Castle as trustees for the benefit of his creditors; that Parker in professed exercise of his power of sale appointed the premises to one Smith, and Parker and Castle as trustees conveyed the equity of redemption to Smith; that Smith was a mere trustee for Parker, had signed a declaration of trust in his favour, and subsequently conveyed the estate to Parker. These facts and the deeds which evidenced them were all in the knowledge of the defendant, but he "intentionally but *bonâ fide*" omitted these instruments from the abstract, as it was supposed they did not affect the title. This omission was enough to prevent the abstract from

being a perfect one within Mr. Dart's definition, and consequently the purchaser had a right to raise any objection arising on the matters omitted, though after twenty-one days from the delivery of the imperfect abstract.

On the delivery of the abstract the solicitor of the plaintiff's testator made a perfectly frivolous objection to the title to Lot 3. He also made a well-founded objection to the title to Lot 4, as disclosed on the abstract, being only a title to one-fourth of the cottages, instead of to one-third. The vendor offered, under Condition 10, to make an abatement of one-fourth of the price, and convey one-fourth of the cottages for 75*l.*, instead of one-third for 100*l.* The purchaser, so far as this lot was concerned, seems to have acceded to this, but persisted in his unfounded objection to Lot 3, and declined to take and pay for Lot 4 unless he could get both. Thereupon the vendor filed his bill in equity for a specific performance of the contract by the plaintiff's testator, and I certainly think that this was a distinct declaration of his option *not* to rescind on account of any objection hitherto made.

The Equity draftsman who prepared the bill framed it as if there was a title made out to the original Lot 4, viz.—one-third of the six cottages sold at the price of 100*l.*, and prayed that the purchaser might be required to take Lot 4 at 100*l.* (unless that was already considered as done), and Lot 3 at 450*l.*, and pay 550*l.* or 450*l.* as the case might be.

On the 23rd September, 1868, the plaintiff's testator filed his answer to this bill. The 10th par. of it, so far as relates to Lot 4, and the 31st and 32nd, are all that it is necessary to notice; they were as follows—[The learned Judge read them].

On December 2nd, 1868, the plaintiff's testator died. On January 26th, 1869, the defendant's solicitors wrote requesting particulars of the probate of the will—"in order to revive the suit which we will do at once," which I think shews conclusively that they had not then resolved to exercise their option to rescind, if they still had it. On February 12th, 1869, they wrote, "We shall rescind the

contract and present petition to dismiss bill on grounds which we will explain in a future letter," which I think shews conclusively that they then exercised their option to rescind, if at the date of that letter they still had such an option. Nothing has occurred subsequently to undo this rescission if then effectual.

The question therefore seems to me to be whether the vendor on that day had an option to rescind under the third condition. It appears to have been, to some extent at least, the reason of the judgments of the majority of the Court below that the vendor had a right to rescind because the purchaser objected that the vendor's title extended only to one undivided fourth part of the cottages instead of to one undivided third part. That objection had been made long before, it had been met by a reference to the 10th condition, and supposing that the vendor could ever have rescinded on that ground, he had determined his option to do so by demanding a specific performance. It is true the bill was not properly framed to enforce a performance of the contract to take Lot 4—as it really was—for 75*l.*, but that could easily have been rectified by an amendment of the bill. And I agree with my brother Bramwell that the finding of the arbitrator is that the vendor did not in fact rescind on this ground. And I do not see how on these facts the arbitrator could have come to any other conclusion.

But the objection (raised for the first time in the answer) that the abstract was defective in not shewing the deeds, was (at the least) a plausible one, and the purchaser was not too late in raising it. If the raising of that objection gave the vendor an option to rescind he was entitled to a reasonable time to take advice and consider what he would do. I cannot think that the delay till February 12th was so great as to lead us to the conclusion that he had then already determined his option (if he had one) by resolving to go on. At that date the letter shews that he determined to rescind (if he could) on the ground that he was either unable or unwilling (or both) to answer this objection.

My brother Bramwell (as I under-

stand his judgment), thinks he had no such option, because he construes the third condition as meaning that after the delivery of an abstract *de facto*, though not a perfect abstract, objections to the title as appearing on the abstract and only such objections are waived, if not made within the twenty-one days, and that the option to rescind in the latter part of the condition only applies to such objections made or at least commenced within the twenty-one days which would otherwise be waived. If I agreed with him in this construction of the condition, I should think the judgment below wrong. But I do not agree in this. The intricacies of title according to the law of real property are such that a vendor who *bona fide* thinks he has a good title, and who honestly discloses a perfect abstract, may unexpectedly find that owing to something not appearing in his abstract, and of which he had no knowledge, he has no title at all, or one which can only be made marketable at a great expense. And it is to meet such a case that the provision in the condition is inserted, which I think must be construed to mean that in case any objection to the title, whether as appearing on the abstract or *otherwise*, is made, the vendor may have the option to rescind.

It is objected that this construction leaves it open to a dishonest vendor to deliver an abstract concealing the defect and take the chance of the blot not being hit; that he may with impunity put the purchaser to a great deal of expense before he discovers the blot, and then the vendor can rescind. I do not think he can do so with impunity. The purchaser on a count framed in tort alleging that the vendor represented to him that the abstract was a perfect abstract, which was false to his knowledge, might recover any damages resulting from his being induced to act on that representation. And on a count for the breach of the vendor's contract to deliver a true abstract, he might recover such damages as resulted from the breach—see *Steer v. Crowley* (4). But it would be a good answer to the action of deceit, and reduce the damages to nominal damages in that on contract, if it were to appear that the purchaser

was well aware of the blot all the while, and went on intending to get costs from the vendor, for then the damages would result not from the false representation or breach of contract on the part of the vendor, but from the cupidity of the purchaser or his attorney.

It is enough in the present case that no attempt has been made to sue in either of the ways suggested. The facts found in the eighth paragraph of the case afford good grounds for doubting whether he could have recovered damages if such an attempt had been made, or at all events suggest a reason why it was prudent in his advisers not to try. I therefore think the judgment should be affirmed.

GROVE, J.—In this case I agree with my brother Bramwell, who in the Court below considered the plaintiff entitled to judgment. The only questions upon which I think it necessary to enter, are those arising upon the construction and application of the 3rd condition of sale. The Lord Chief Baron was at least doubtful whether any objection which the vendor shall be unable or unwilling to answer, does not mean an objection to the title of which the abstract is furnished. He says, "I am not sure that this is not the intention of the parties." My brother Cleasby also relies much on the objection to Lot 4 being continued as a valid objection in the answer to the bill in Chancery, and after discussing the question of reasonable time, he says, "That old contract the defendant in the suit says he is not bound to perform, because of this objection, which was an objection made under the old contract, and which was a valid and subsisting objection. The vendor was therefore entitled to rescind." The judgment of my brother Blackburn proceeds, as will be seen, upon a different ground.

Now the 3rd condition of sale is as follows. [The Learned Judge read it.] By this an abstract of the title of the vendors to the lot or lots purchased respectively is to be delivered within seven days from the sale, and the purchaser shall make his objections and requisitions (if any) in respect of the title, and send the same within twenty-one days of the dating of the abstract. Now the title and the

abstract, so far, obviously mean those previously mentioned, i.e. the abstract delivered within seven days, and the title therein disclosed, the objections and requisitions contemplated refer (the contrary is not contended) to the title so disclosed, and all objections and requisitions not made within the time specified shall be taken to be waived. These cannot of course apply to a title unseen and unknown.

Then comes the sentence on which the question arises—"And in case any purchaser shall make any objection to or requisition on the title of the respective lots which the vendors shall be unwilling or unable to answer," &c. Is "any objection to or requisition on *the title*" in this sentence to have an entirely changed meaning, and are the words, "*the title*," to be applied not to the title hitherto referred to, viz., that of which the abstract has been delivered within seven days, but to another, and, taken as a whole, a different title, which the vendor knows but the purchaser does not—a title which was not found out by the objections or requisitions, nor did its disclosure in any way flow from them, but disclosed after the whole period of the seven days, the twenty-one days and any further time occupied in discussing the objections and requisitions and any matters arising out of them has elapsed? Would any purchaser so read the requisition, not knowing and having no reason even to guess that there exists such another title? The condition goes on to give power "at any time to rescind the contract for sale of the lot or lots in respect of which *such objections or requisitions* shall be made." Are "*such objections or requisitions*" in this sentence not the objections referred to in the early part of the condition, but a new objection necessitated by a new and objectionable title of which the purchaser when he made his objections and requisitions was, from the vendor's default, ignorant? After the expense and delay of investigating the first title, by which he may have lost the opportunity of a better investment, and by the stringent terms imposed by the vendor, he is to recover nothing but his deposit, the interest of which he has lost, he is to begin a new investiga-

tion at his own cost or give up the whole.

Are the new objections or requisitions to be limited to twenty-one days, though the vendor has not as to this second abstract been limited to the seven days? Or how much, if any, of these previous conditions are to be applied to these new investigations? It seems to me that the matter is plunged into a sea of difficulties by such a construction, whereas the simple ordinary construction—reading the words "*the title*" to have the same application in the early and later part of the condition, and the words "objections" and "requisitions," the same application—is perfectly intelligible, free from difficulty and certainly sufficiently favourable to the vendor who has used his own words in imposing the condition, and against whom—if in any conceivable case—the maxim *fortius contra proferentem* should apply.

Then, secondly, is the vendor entitled to rescind because the purchaser has repeated his objection to Lot 4 in his answer to the bill in Chancery? So far from electing to rescind upon the objection taken in the first instance to Lot 4, the vendor by filing a bill for specific performance shows that he pays no regard to that objection, and is not either unwilling or unable to answer it; he has answered it and insists on the completion of the purchase. He therefore manifestly does not rescind in consequence of that objection, but in consequence of the new difficulty which has arisen from defects in a title not disclosed in pursuance of the conditions of sale. The vendor, moreover, in his bill insists on the full price for Lot 4, although it is admitted the extent of the property was really less than that contracted for.

It is true that the purchaser having discovered the mistake in the abstract, and being asked for the full price of Lot 4, seems to repeat, in addition to his new objection, his previous objections in general terms; at least the latter part of paragraph 32 would probably be so construed, though this is not quite clear when the paragraph is read in conjunction with paragraph 31, which points out the new objection to Lot

4; and this (with the objection to the demand of the full price for Lot 4, and the remaining parts of the answer) may be what is referred to, and the purchaser may mean by "all the objections" all those *here* urged; and when he uses the words "or at all," he may mean or at all now that the more serious objection is discovered. Assuming, however, these paragraphs to be construed as a repetition of his old objections together with the new ones, I cannot see that this throws the whole matter back upon the old conditions, which as I read them do not apply to the new state of things, and upon the old objections the vendor has, in the strongest mode open to him, elected not to rescind. I cannot help thinking that the learned arbitrator took this view when he found as a fact that "the said rescission or attempted rescission of the contract by the defendant was not from unwillingness or inability on his part to answer or comply with objections or requisitions on the title to the said lots or either of them." If the finding be so interpreted, it shuts out from consideration the renewal of the old objections, and if it be read more generally, I agree with what my brother Bramwell has said as to its force, and think that practically it decides the question.

Judgment affirmed.

Attorneys—Milne & Co., agents for Archbould & Hawkins, Thrapston, for plaintiff; Palmer, Eland & Co., for defendant.

[IN THE EXCHEQUER CHAMBER.]

(Appeal from the Court of Exchequer.)

1873. }
Feb. 13. } DUNCAN AND ANOTHER v. HILL.
June 21. } SAME v. BEESON.

Principal and Agent—Rules of London Stock Exchange—Defaulting Broker—Liability of Principal.

The plaintiffs, brokers on the Stock Exchange, who had at the request of the defendant contracted for the purchase of

shares for him, were on the 13th of July, the "carrying over day" for the 15th, instructed by him to carry over or continue the contract from the 15th till the 29th of July, the next account day. On the 15th they paid for him (as was necessary in order to have the contract carried over), the difference on the shares at the price of the 13th, amounting to 1,688l. On the 18th of July the plaintiffs, by reason of many persons for whom they had entered into contracts failing to meet their engagements, became defaulters on the Stock Exchange, whereupon, in accordance with the rules thereof, all their bargains were closed and made up by the official assignees at the prices of that day. The price of the shares purchased for the defendant having fallen, the amount due in respect thereof (including the 1,688l. differences) was 6,013l., which the plaintiffs then became liable to pay to the official assignees, and now sought to recover from the defendant:—Held, that the plaintiffs' insolvency having been brought about by want of means to meet their other primary obligations, and not by reason of their having entered into any contract on behalf of the defendant, no promise could be implied on the part of the defendant, as their principal, to indemnify them against the consequences of the enforcement of the Stock Exchange rules with regard to defaulters, and that, therefore, the plaintiffs could only recover from the defendant the sum of 1,688l., the amount of the differences they had actually paid for him.

These were actions brought in the names of brokers on the Stock Exchange against their principals (not members of the Exchange), on implied promises to indemnify the brokers for losses incurred by them on contracts entered into for the defendants respectively, by reason of the brokers having been declared defaulters on the Stock Exchange while the contracts were still pending. The pleadings will be found set out in the report in the Court below (1).

The cases were tried before Kelly, C.B., at Guildhall, after Michaelmas Term, 1870, when the following facts appeared in evidence.

(1) 40 Law J. Rep. (N.S.) Exch. 137.

On the 13th of July the defendants instructed the plaintiffs, who were brokers on the Stock Exchange, to continue or "carry over," from the 15th to the 27th of July, the next account day, certain contracts for the purchase of shares which the plaintiffs had previously entered into for them. This could only be done by paying the differences between the price originally agreed upon for the shares and the official market price of the shares of the 13th.

The defendant Hill being unprepared to pay the amount of his differences, 1,688*l.* 19*s.*, the plaintiffs paid that sum for him. The defendant Beeson paid the amount of his difference. (This constituted the only distinction between the two cases.)

On the 18th of July, the plaintiffs, by reason of many persons for whom they had effected contracts failing to make good their payments, became unable to meet their engagements, and were therefore declared defaulters under rule 142 of the Stock Exchange, which directs that "A member unable to fulfil his engagements shall be publicly declared a defaulter, by direction of the chairman, deputy-chairman, or any two members of the committee."

The official assignees appointed under rule 167 immediately proceeded to close the plaintiffs' accounts, in pursuance of the 169th rule, which directs that "The official assignees shall publicly fix the prices at which a defaulter's transactions shall be closed, such prices to be those current in the market immediately before the declaration." The sums thereupon payable, in order to close the transactions entered into for the defendants, according to the prices of the 18th, were, in the case of the defendant Hill, 6,013*l.* 13*s.* 5*d.*, including the 1,688*l.* 19*s.*, and, in the case of the defendant Beeson 425*l.*; and to recover these sums respectively (which the plaintiffs were liable to pay to the official assignees, according to the rules of the Stock Exchange), these actions were brought. Verdicts were directed to be entered for the full amounts claimed; and rules which were afterwards obtained—to reduce the verdict to 1,688*l.* 19*s.* in Hill's

case, and to enter it for the defendant in Beeson's case—were subsequently discharged (1); whereupon both defendants appealed to this Court.

Joseph Brown (with him *Sir J. Karlake* and *J. O. Griffiths*, in Hill's case—and with him *Philbrick*, in Beeson's case), argued for both appellants. Although a broker may have an indemnity from his principal as long as he follows his instructions, the indemnity does not extend to losses occurring from the broker's own default, or from his departing from his instructions; and such rules only of the Stock Exchange can be imported into the contract between the broker and his principal outside as are reasonable. A rule which throws on the outside principal the consequences of a default on the broker's part, arising from no default of the principal, but from the broker's having entered into other contracts which he cannot perform, is not reasonable. *Grisell v. Bristow* (2) and *Maxsted v. Paine* (3), were both actions between principal and jobber, i.e., between the principals to the contract, where it might well be reasonable that the rules of the Exchange should apply; but such an implied contract as is contended for here would involve a principal outside the Exchange in all the other contracts his broker might have entered into, of which the principal would be entirely ignorant. He cited *Story on Agency*, § 339, *Paley on Agency*, p. 116, and *Polhier's Traité de Mandat*.

The Attorney-General (with him, *J. J. Powell and Day*), for the respondents in Hill's case.—If a principal puts forward his broker to deal for him in a market like the Stock Exchange according to the rules of that market, he cannot take the advantages of those rules without being liable to the disadvantages they may impose upon him; and therefore the whole of the rules must be taken to be incorporated into the contract, provided they are not unreasonable, and if the rules make the broker liable, then (after all the decisions that have taken place) a contract on the part of the principal to indemnify him may fairly be implied.

(2) 38 Law J. Rep. (N.S.) C.P. 10; s. c. Law Rep. 4 C.P. 36.

(3) 40 Law J. Rep. (N.S.) Exch. 57.

All parties must be taken to have had notice of the rule that in case of the broker being declared a defaulter, all accounts should be closed at once. If the contention of the other side is correct, then any number of persons might combine and deal with the same broker, and when the market was against them, might cause his default and then refuse to pay up. He cited *Bourring v. Shepherd* (4) and *Lacy v. Hill* (5).

J. J. Powell (with him *Murphy*), for the respondents in *Beeson's* case, pointed out that the only distinction between the cases was that above mentioned, viz., that *Beeson* had himself paid the amount of his differences at the time of carrying over, whereas the brokers had paid *Hill's* differences for him.

Brown, in reply.—The rules may be divided into several classes—for instance, one class directs how contracts are to be carried out, another directs the procedure to be adopted upon any member becoming a defaulter. Now here the appellants employed their brokers to carry out their contracts for them—not to do anything leading to a default: so that the rules as to defaulters can have no application, and must be altogether excluded from consideration; if not, the absurd result might follow that the appellants are bound to indemnify the brokers for the consequences of their having ceased to be members of the Stock Exchange.

Our. adv. vult.

BLACKBURN, J. (on June 21) delivered the judgment of the Court (6). After recapitulating the facts as above stated, the judgment proceeds as follows—

It is admitted in the first action that the plaintiffs are entitled to retain the verdict for 1,688*l.* 19*s.*, and the only question on appeal is, whether the rule should have been made absolute to reduce the damages to that amount.

In the other action the defendant had before action paid everything that was due before the account was closed, and

the question on appeal there is, whether the rule should have been made absolute to enter a verdict for the defendant.

In both cases, the only question is, whether the creditors of the brokers can maintain an action in the name of the brokers against their customers to recover the differences on the compulsory closing of the accounts through the brokers being declared defaulters.

It appears by the case that the effect of the carrying over of contracts from one account day to the next is, that the brokers enter into contracts with jobbers for that account day, and that the jobber with whom the contract is made is in precisely the same position towards the broker and his customer as if there had been no previous contract, and an original contract had been made with the jobber for the ensuing account.

Both actions (whatever be the precise form of them) are actions in contemplation of law brought by the plaintiffs as brokers and agents against the defendants as their principals for an indemnity. They are founded upon allegations that the agents have incurred a loss by reason of having acted as agents for their principals. They are actions founded on the ordinary and general principles of the Common Law, with regard to implied indemnities.

It must be admitted that the plaintiffs were authorized by the defendants to enter into contracts on their behalf according to the rules of the Stock Exchange. It must be admitted that for any loss incurred by the agents, by reason of their having entered into such contracts according to such rules, unless they be wholly unreasonable, and where the loss is without any personal default of their own, the agents are entitled to be indemnified by their principals upon all implied contracts to that effect.

But it is argued that where the agents, as in this case, are subjected to loss, not by reason of their having entered into the contracts into which they were authorized to enter by the defendants, but by reason of a default of their own, that is to say, as in this case, by reason of their insolvency brought on by want of means to meet other primary obligations, it cannot be said that they have

(4) 40 Law J. Rep. (N.S.) Q.B. 129.

(5) 28 Law Times, N.S. 9.

(6) *Blackburn, J.*; *Koating, J.*; *Brett, J.*; *Grove, J.*; *Quain, J.*; *Archibald, J.*; and *Honyman, J.*

suffered loss by reason of having entered into the contracts made by them on behalf of the defendants, and consequently there is no promise which can be implied on behalf of the defendants as principals to indemnify their brokers, and in the present cases there certainly was no express promise to this effect.

These allegations both as to fact and law seem to us to be correct. There was no failure by the defendants in any part of their undertakings; there was no evidence that the insolvency of the plaintiffs was occasioned by reason of having entered into the contracts for the defendants; it is consistent with the evidence that the plaintiffs would have become insolvent precisely at the same time as they did, if they had not entered into any contract for either of the defendants. The plaintiffs' insolvency was therefore, so far as regards the defendants, entirely the result of the plaintiffs' own default; and we think there is no implication of law to force upon the defendants an obligation to indemnify the plaintiffs in such a case.

We think therefore that the judgment below should be reversed, and that the rule in *Duncan v. Hill* should be made absolute to reduce the damages to 1,688*l.* 19*s.* 0*d.*, and that the rule in *Duncan v. Beeson* should be made absolute to enter a verdict for the defendant.

Judgment reversed.

Attorneys—John Tucker, for the respondents in both cases; Oehme, for the appellants in Hill's case; Whites, Renard & Co., for the appellants in Beeson's case.

[IN THE EXCHEQUER CHAMBER.]

(*Appeal from the Court of Exchequer.*)

1873. { *BLAIRMIRE v. THE LANCASHIRE*
June 27. { *AND YORKSHIRE RAILWAY*
 COMPANY.

Railway—Negligence—Railways Regulation Act, 1868 (31 & 32 Vict. c. 119), section 22—Communication between Passengers and Guard.

A railway train is or is not within the meaning of the 22nd section of the Railways Regulation Act, 1868 (which requires communication to be maintained between passengers and the company's servants when a train runs twenty miles without stopping), according to the actual instructions as to stopping given to the company's servants in charge of the train. And therefore where the primary cause of an accident to a train not provided with such communication was the breaking of a wheel-tire (without any negligence on the part of the company or their servants), and several minutes elapsed between the first shock felt by the passengers and the actual disaster resulting in the mischief complained of, it was properly left to the jury to say—First, what was the effect of the company's time tables taken together with the special instructions given to their servants with regard to the train in question; and second, whether the absence of the statutory precaution was conducive to the accident which occurred.

The plaintiff in his declaration in this case claimed damages for injuries sustained by him while being conveyed as a passenger on the defendants' railway. Plea—not guilty. Issue thereon.

On the 7th of June, 1870, the plaintiff was received by the defendants as a passenger to be carried from Cleckheaton to Blackpool in an excursion train, consisting of twenty-eight carriages. During the journey the last eight carriages became detached from the others, and one of them—the carriage in which the plaintiff was—fell over an embankment four yards high, and the plaintiff sustained the injuries complained of. After the accident the tire of a wheel of the plaintiff's carriage was found loose and off the wheel, being fractured near one of the rivet-holes. The ultimate result of this fracture was the breaking of the couplings and the fall of the carriage over the embankment. There was no apparatus on the train for effecting communication between the passengers and the driver or guard, and it was contended on the part of the plaintiff that if there had been such communication the accident would not have happened. It appeared from the evidence of several of the passengers, that

about half a mile after passing Blackburn, a very serious jerk was felt, and after an interval of three or four minutes, another and more severe shock, throwing the passengers together. The train then proceeded quietly for about three quarters of a mile, when a still more severe shock was felt, followed by continuous jerks, till the plaintiff's carriage fell over the embankment, and the hinder part of the train came to a stop. The engine and the other carriages were stopped about 470 yards further on. Marks were observed on the sleepers and chairs for nearly 300 yards back from the place of the accident.

According to the company's time-tables, which were produced, the train would have run more than twenty miles without stopping; but it appeared in evidence that peremptory instructions were given by the defendants to their servants in charge of excursion trains to stop at least once in every twenty miles.

The Railways Regulation Act, 1868 (31 & 32 Vict. c. 119), s. 22, enacts that after the 1st of April, 1869, every company shall provide and maintain in good working order, in every train worked by it which carries passengers, and travels more than twenty miles without stopping, such efficient means of communication between the passengers and the servants of the company in charge of the train as the Board of Trade may approve; and that if any company makes default in complying with this section it shall be liable to a penalty not exceeding ten pounds for each case of default; also that any passenger who makes use of the said means of communication, without reasonable and sufficient cause, shall be liable for each offence five pounds.

Evidence was given to the effect that various approved means of communication have been since the passing of the Act adopted by different railway companies, none of which were, however, altogether efficacious. The evidence as to whether the existence of any such communication would have prevented this accident was conflicting.

After telling the jury, first, that the train in question came within the Act or not, according to the instructions given

to the defendants' servants in charge of it with regard to stopping, and secondly, that non-compliance with the requirements of the Act could not make the defendants liable in this action, unless such non-compliance conduced to the mischief which occurred, Kelly, C.B., left the following among other questions to them—1. Were the instructions given to the defendants' servants and the time tables *taken together* to the effect that all excursion trains were to be stopped once within every twenty miles? 2. Was the want of communication negligence or a breach of duty on the part of the defendants? 3. Did the want of such communication cause, or materially conduce, to the accident? 4. Was the accident caused by the negligence of the defendants? The jury answered the first question in the negative, and the others in the affirmative. They also found that the material of which the tier was composed was sufficient for the purpose, and they negatived the existence of any negligence on the part of the company on that ground. They gave the plaintiff 350*l.* damages.

In Michaelmas Term, 1871, the Court of Exchequer refused the defendants a rule for a new trial on the ground of misdirection, giving the defendants leave to appeal to this Court, which they now did accordingly.

Holker (with him *J. Edwards* and *O. Crompton*), now contended on behalf of the appellants that there had been a misdirection; that there was no evidence of any negligence in the management of the train; that the train was not within the 22nd section of the Railways Regulation Act; that if it was, the absence of the communication between the passengers and the guard, which was not pointed to the safety of the train but to the convenience of the passengers, was not a breach of duty, and could not be said to have been conducive to the accident, which was caused by the breaking of the tire, an occurrence beyond the defendants' control, and in respect of which the jury had acquitted them of all negligence.

Herschell (with him *T. H. Baylis*), for the plaintiff, the respondent, was not called upon to argue.

BLACKBURN, J.—The question here is whether under the particular circumstances of the case—the jury having negatived the existence of negligence on the part of the defendants so far as the breaking of the tire is concerned—there was evidence of negligence on their part on the ground of the want of the ordinary communication between the passengers and the defendants' servants in charge of the train.

I am of opinion that the Lord Chief Baron was right in leaving the case to the jury as he did. He told them, first, that the question whether the train came within the Act of Parliament depended on the intention of stopping or not within twenty miles, for any other construction would make the question depend on what the guard or driver might choose to do in the course of the particular journey. He then told them that the breach of duty committed must have been conducive to the mischief, in order to make the defendants liable. The jury found it was not intended to stop the train once at least in every twenty miles, and they also found that the absence of the statutory precaution was conducive to the accident. And if there was evidence to support these findings, the verdict must stand; so that the only question for us is whether there was evidence for the jury.

It is not necessary for us to determine whether any common law duty was cast on the defendants to take this particular precaution for the safety of the passengers, because the Act here positively puts the duty upon them in such cases. I wish to leave altogether open what may be the duty of railway companies with regard to trains running for shorter distances than twenty miles; but where the statutory duty and the finding of the jury coincide, as in this case, it is clear that the verdict of the latter must stand.

There was then in my opinion reasonable evidence to go to the jury, and it was for them to say whether—if the ordinary means of communication had existed—the mischief could have been prevented by the train stopping in time. I am far from saying that, if I had been on the jury, I should have found that it could; but that is not the point: it is whether

the case could have properly been withdrawn from the jury. I am of opinion that it could not have properly been so withdrawn; and that the train being one to which the Act applied, and the mischief happening in consequence of the absence of the statutory precaution, there should be no rule.

KEATING, J., concurred.

BRETT, J.—I will only add—wishing my view of this case to be clearly understood—that this is not an action for a penalty under the Act, but an action for negligence; and it is for the plaintiff to prove the company guilty of doing or omitting to do something which a company using ordinary care would have done. Now there was evidence that the train was intended to go more than twenty miles without stopping, and also that the precautions directed by the Act are practised by railway companies using ordinary care. It is only right to use the Act as evidence of what is due and ordinary care under such circumstances as those of the present case, and that is the way in which I consider the Lord Chief Baron left, and correctly left, the matter to the jury, for, taking into account the evidence of the witnesses and the Act itself, I think there was evidence of negligence to go to them.

GROVE, J.—The question whether there was or was not negligence in not adopting the precautionary measures specified in the Act must depend on the state of knowledge at the time. Now this Act was passed some years since, and its provisions must have been known to the defendants. And looking at the Act merely as an authoritative notice to the company of what the legislature considers as reasonable precautions, I think there was evidence of negligence for the jury.

ARCHIBALD, J.—For the reasons given by my brother Blackburn, I am also of opinion there should be no rule.

Judgment affirmed.

Attorneys—Torr, Janeway & Co., agents for Lancaster, Bradford, for plaintiff, respondent; Clarke, Woodcock & Ryland, agents for Grady & Co., Manchester, for defendants, appellants.

1873. } TYERS and others v. THE
Jan. 29. \ ROSEDALE AND FERRYHILL
May 6. } IRON COMPANY (LIMITED).

Contract—Breach of Contract for Sale of Goods to be delivered by Instalments—Postponement of Delivery by Consent—Memorandum within 29 Car. 2. c. 3. s. 17.

In October, 1870, the defendants sold to the plaintiffs 2,000 tons of iron by two contracts in writing duly signed, each of which was in these terms—"Sold to (the plaintiffs) 1,000 tons of Ferryhill pig iron in equal quantities of grey forge, mottled and white, price 50s. per ton, delivered at their (the plaintiffs') siding. Delivery in monthly quantities over 1871, or sooner if required. Payment by their four months' acceptance from the 10th of the month following delivery." No iron was required by the plaintiffs or delivered by the defendants in 1870. In 1871 the defendants delivered some of the iron by instalments, but never so much as one-twelfth of 2,000 tons in any one month except December, being continually requested by the plaintiffs to withhold deliveries, sometimes for a specified time, and sometimes until further orders. These requests were made by letter, and the defendants replied by letter signifying their assent. In December the plaintiffs gave the defendants notice that they should require the rest of the 2,000 tons to be delivered before the end of the year. The defendants delivered more than one-twelfth of 2,000 tons, and refused to deliver the remainder. The plaintiffs having sued for breach of contract,—Held, per KELLY, C.B., and PIGOTT, B., that the contract was for the delivery of 2,000 tons in equal quantities in each of the twelve months, and that there was in fact no new contract to deliver the monthly deficiencies at some subsequent time; that no such new contract could be implied in law; and that the action was therefore not maintainable.

Per MARTIN, B., that the plaintiffs when they requested the deliveries to be withheld, intended that the entire quantity of 2,000 tons should eventually be delivered, and that the defendants understood this to be the plaintiffs' intention, and that (on the principle of *Ogle v. Vane*, 36 Law J. Rep. (N.S.) Q.B. 175; and in error 37 *ibid.* 77), the plaintiffs were entitled to recover the

difference between the contract price of the undelivered remainder, and the market price at the time when the defendants refused to deliver.

Semble per KELLY, C.B., and PIGOTT, B., that assuming that there was a contract to postpone the deliveries, it would not be binding within s. 17 of the Statute of Frauds, if not in writing; and per MARTIN, B., that it did not fall within that section, because it was a contract, not for the sale of goods, but for the delivery of goods already sold.

Action for breach of contract. At the trial before Blackburn, J., without a jury, which took place at the Leeds Summer Assizes, 1872, the following facts were proved: The plaintiffs are iron manufacturers at Leeds, and the defendants are makers of pig iron at Ferryhill and Newcastle. On October 26, 1870, the defendants, after an interview, sent the plaintiffs a bought note, and the following sale note duly signed—

"Sheffield, October 26, 1870. Sold Messrs. Tyers, Middleton & Co., 1,000 tons Ferryhill pig iron in equal quantities of grey forge, mottled and white, price 50s. per ton, delivered at their siding. Any rate in excess of the usual 6s. per ton railway dues to be charged extra. Delivery in monthly quantities over 1871 or sooner if required. Payment by their four months' acceptance from the 10th of the month following delivery." The bought note, which was in similar terms, was signed by the plaintiffs and returned by them to the defendants on October 27. On October 31, the plaintiffs and defendants by notes duly signed made a second contract in the same terms for the sale of 1,000 tons. The plaintiffs did not require any of the iron to be delivered, nor was any delivered during 1870. Between the 12th and 17th of January, 1871, the defendants delivered to the plaintiffs thirty tons of grey forge, and seventy-one tons of mottled iron. On February 16, the plaintiffs wrote to the defendants, "You will oblige by sending no more iron this month." The defendants sent no reply.

On February 20, the defendants delivered twenty-five tons of grey forge and twenty-five of mottled. On the same day the plaintiffs wrote to the defendants,

"You will greatly oblige us by not sending in any more iron until we write. We are now so full of metal we do not know where to put it. In another month we hope to be better off for room, but we really cannot do with more at present." On the 21st the defendants wrote in reply, "We have yours of yesterday and have instructed our people at Ferryhill to stop delivery until further orders."

On March 2, the defendants delivered eleven and-a-half tons of grey forge and fourteen and-a-half of mottled. On the same day the plaintiffs wrote, "Your advice note of a further delivery of iron is to hand. We must remind you again that we are not yet in a position to take more iron in, and beg you will not send more until you hear from us. We are just completing four more puddling furnaces with boilers attached, and we want to have them in work as soon as possible, but we are at a stand now, as the metal already sent in takes up part of the room where those furnaces must stand. We are arranging to lay a new metal yard down, and to run our lines into it; for this purpose the present siding has to be altered; so that we are completely at a stand, until we can get you gentlemen to stay delivery for a fortnight or so. We will write you on the very earliest date when we can take iron in with anything like convenience." On March 3, the defendants wrote in reply, "We have yours of yesterday and have stopped deliveries of pigs for a fortnight." Between March 14 and 18 the defendants delivered fifty-five tons of grey forge and thirty-five of mottled. On March 18, the plaintiffs wrote, "We are again compelled to request you not to send us any more iron in until further orders, as we are completely fast where to put it. You have now sent us in no less than sixty tons since we first requested you to withhold deliveries. Out of all our friends whom we have bought from, you are the only ones who have not acceded to our request. You are putting us to serious inconvenience and expense as we have not room to stack such a quantity. Please oblige us in this matter." On March 20 the defendants wrote, "We have stopped deliveries of pigs until further orders." On the 21st

the defendants delivered fifteen tons of grey forge.

On April 1st, the plaintiffs wrote, "You really must stay any further delivery of iron until you hear from us. You and other friends have sent in such quantities that we are blocked out and have not room for a single pig; as it is, our alterations are seriously impeded. We should not ask you to stay delivery if we could consume all as it came in, but this we cannot do until we have more furnaces on, which are in course of erection. Your attention will oblige." On April 3 the defendants wrote, "We have stopped deliveries of pig iron." On April 5, the defendants delivered twenty-five tons of grey forge, and on the 25th the same quantity. On the 25th the plaintiffs wrote, "We are much surprised to receive this morning advice for twenty-five tons of pig iron after we most particularly requested you to send us no more until we wrote. We must beg of you to attend to our instructions more particularly, and rest assured you will receive instructions when we are in a position to take your iron. You are the only friends who do not do as we desire." On April 26, the defendants wrote in reply, "We have yours of yesterday and have advised our people at Ferryhill not to send you any more iron without our instructions from this office."

On May 26th the defendants delivered twenty-four tons of grey forge. On the 27th the plaintiffs wrote—"You wrote us promising not to forward any more iron until you heard from us, and now you are forcing more upon us at the very last day of the month as it were. The works will be closed from to-day until Wednesday, and you must send no more until we write."

On June 9th the plaintiffs wrote—"Your favour to hand. . . . We have advice of twenty tons of iron from you. This we do not want. You must on no account send more than twenty tons more, in all forty tons, this month. Please advise your people at the mines." On the same day the defendants delivered twenty tons of mottled. On the 10th the plaintiffs wrote—"You must oblige us by not sending any more iron this month. We really cannot do with it or we would

gladly take more in. Please let this have your best attention and oblige." On the 13th the defendants delivered twenty tons of grey forge. On the 26th the plaintiffs wrote, "You are most particularly requested not to send more iron in this month, we are now put to great inconvenience by you not doing as we wish. Where to put this lot advised this morning we do not know. You must not do this way with us. We should not ask you to stay delivery without having good reason for so doing. You must not send more in until we write." On the 27th the defendants delivered twenty tons of grey forge and twenty-one of mottled. On the 28th the defendants wrote in reply, "We have stopped deliveries of pigs until further orders." On the 30th the plaintiffs wrote, "Send at once twenty or thirty tons of white pig iron. Let it be good. If up to the mark we shall want more. We cannot do with anything else but white."

On July 1st the defendants wrote in reply, "Yours to hand, and have ordered thirty tons good white iron to be sent at once." On the same day the plaintiffs wrote, "As we have arranged to take stock this month, we have to request that you send no iron in unless written for." On the 4th they wrote, "Please push the delivery of the thirty tons white iron as we are completely without it, and shall have to stand if you do not send us some soon. This is urgent." On the 5th the defendants wrote, "We have yours of yesterday, and have instructed our agent at the works to forward thirty tons white to-morrow if part has not been sent to-day." Between July 7th and August 4th the defendants delivered 111 tons of white.

On August 5th the plaintiffs wrote, "You will oblige by not sending any more white iron; we have more than we can do with. It would suit us much better if you would not press deliveries upon us, but wait until we write." On the 7th the defendants wrote, "Yours to hand. Kindly take in that sent, we will not send any more white till we hear from you."

On September 4th the defendants delivered twenty-four and on the 14th twenty-nine tons of white. On the

same day the plaintiffs wrote, "Don't send any more white at present; the last lot sent in is not fit to use, we don't know what to do with it." On the 15th the defendants wrote, "We have yours of yesterday, and have stopped deliveries of pigs until further orders." On the 16th the defendants delivered twelve tons of white. On the 29th the plaintiffs wrote, "Please send us on Monday next fifty tons grey iron from our contract; also send another fifty tons the week following." On the 30th the defendants wrote, "Your order of yesterday shall have our best attention."

Between October 3rd and 18th the defendants delivered 100 tons of grey forge.

On November 25th the plaintiffs wrote, "We must beg of you to let us have a delivery at once of grey forge as per contract, say fifty tons. We are nearly cleared out, and must have iron to keep us going." On the 27th the defendants wrote, "We have yours of the 25th, and have instructed our Ferryhill people to forward you a supply at once." On the 30th the plaintiffs wrote, "We are compelled to press you again for a delivery of grey iron. We are now without, and must beg of you to let us have some *at once*."

On December 1st the defendants wrote, "Yours to hand; part we sent yesterday and have written our agent to see you relative to your contract, which expires at the end of this month." On the same day the defendants delivered twenty-seven tons of grey forge. On the 5th the plaintiffs wrote, "Yours of the 1st December to hand, and contents noted. We are surprised that we receive no iron from you, though we have asked for deliveries several times. We are fully aware that the contract expires at the end of the year. We shall hold you to the completion of same, and all must be delivered by the end of this year." On the 6th the defendants wrote, "Yours to hand, and note contents, and glad you agree with us as to the contract expiring. The contract quantity will of course be delivered this month, 167 tons, and as we are sadly bothered as to the supply of trucks, and in consequence had to stack iron in November, we are prepared to

deliver 140 tons next month, or extend part to February. This we understand to be in excess of what you ask." On the 7th the plaintiffs telegraphed, "You have misconstrued our letter. We shall decidedly hold you to deliver the remainder of 2,000 tons; we want 1,280 tons; send all at once."

This the defendants refused to do, and delivered only 186½ tons before the end of the year, making 906½ tons in all, of which not so much as 1/3rd of 2,000 tons was delivered in any month except December.

The price of iron was 46s. per ton in April, 1871, and rose gradually till November 1st, when it was 51s., and it continued to rise till July, 1872. The plaintiffs, in May, 1872, brought this action in respect of the remaining 1,093½ tons undelivered.

The first two counts of the declaration were framed respectively on the two contracts of October 26th and 31st; breaches, non-delivery of the 1,000 tons in monthly quantities over 1871. The third count alleged the making of the two contracts, and averred that after the making thereof and before breach it was agreed between the plaintiffs and defendants that the time for the delivery should be altered, and that the defendants should deliver within a reasonable time; breach, non-delivery within a reasonable time.

The pleas and replication as amended were—

Pleas, 1. To so much of the breach assigned in the first and second counts as relates to the non-delivery of iron during the months prior to November, 1871, that the defendants were always ready and willing to deliver the iron according to the terms of the contract, but the plaintiffs were not ready and willing to accept.

2. To the same part of the breach, exoneration and discharge before breach.

3. To the residue of the breach payment into Court of 170*l*.

4. To the third count, denial of the agreement.

5. To the same, that a reasonable time did not elapse before suit.

6. To the same, denial of the breaches.

Replication to the third plea, that the sum was not enough to satisfy, &c.; and joinder of issue on the other pleas.

At the trial (without a jury) the plaintiffs contended that the effect of the correspondence was to extend the time for the delivery of the iron, and that the defendants having repudiated the contract, the plaintiffs were entitled to the difference between the contract price and the market price on the 31st of December, 1871, upon 1,093½ tons undelivered.

The defendants contended that the effect of the letters was to exonerate them from delivering the contract quantity during all the months except November and December, and that the sum paid into Court was enough to cover the damages sustained by the plaintiffs by reason of the short delivery during the month of November.

Blackburn, J., was of opinion that the effect of the different postponements at the request of the plaintiffs, and by the consent of the defendants, was not to put an end to the contract, but only to postpone the time for the delivery, and consequently that there was a breach of contract; but reserved leave to the defendants to move to enter a verdict on the construction of the documents and correspondence. He thought also that the breach was on the 1st of December, and that the damages were to be estimated at that date, which, it was agreed, exceeded the money paid into Court; but reserved leave to the defendants to move that the damages be estimated at such period or on such principle as the Court should decide, the verdict to be reduced or entered for the defendants accordingly. The learned Judge found a verdict for the plaintiffs for 649*l*., the agreed amount of the difference between the contract price and the market price on the 1st of December.

A rule *nisi* to enter the verdict for the defendants was afterwards obtained, on the grounds—

1. That the quantities undelivered were so undelivered at the request of the plaintiffs, and that the plaintiffs were not ready and willing to take them when they ought to have been, and that the plaintiffs are not entitled to sue in respect of them.

2. That the original contract was abandoned.

3. That it was varied.

4. That no new contract to the effect alleged by the plaintiffs results from the evidence.

5. That the damages ought to be calculated at the monthly prices of each month's deficiencies, and that the money paid into Court is enough.

6. That the postponement (if any) was not to the month of December, and that the breaches should be taken each month instead of on the 1st of December.

D. Seymour and Cave, for the plaintiffs, shewed cause.—The plaintiffs are entitled to the difference between the contract price and the market price in December, for the whole quantity then undelivered, in whichever way the contract be read. This is manifest if the term “in monthly quantities” means (as we say) not in equal monthly quantities, but in any reasonable quantities, so as to have the whole delivered before the end of the year. And if it means “in equal monthly quantities,” then the correspondence shews that the parties entered into a new contract either for increased deliveries in the closing months of the year, or for delivery within a reasonable time, and since there was no breach till November and December, the damages must be calculated at the end of the year, and not at the end of each month. *Ogle v. Vane* (1) is an authority that the damages should be calculated by the market price at the end of the year.

Field and Waddy, for the defendants, in support of the rule.—“Monthly quantities” must mean “equal monthly quantities,” because it is essential for the maker to know beforehand how much iron will be required. The contracts are to be read as if they were twelve separate contracts for equal quantities, and with regard to each contract, except those for the months of November and December, the plaintiffs exonerated the defendants from performance. There was therefore no breach except in November, and for that the money paid into Court is sufficient. The amount delivered in December exceeded the monthly quantity. A new contract cannot be implied in law,

(1) 7 B. & S. 855; s. c. 36 Law J. Rep. (n.s.) Q.B. 157; in error, 37 Ibid. 77.

and is not, in fact, established by the correspondence, of which the only result was to disable the defendants from suing for breach of contract to accept. The defendants are therefore, in this view, entitled to the verdict. But even if there was a breach at the end of each month, the plaintiffs were not entitled to wait till the end of the year to buy when the price was highest, but ought to have bought at the end of each month—*Brown v. Muller* (2), and the verdict should be reduced to the amount of damages calculated on that principle.

Curr. adv. vult.

On May 6 the following judgments were read—

KELLY, C.B.—The two contracts in question taken together are for the delivery by the defendants and acceptance by the plaintiffs of 2,000 tons of iron, in monthly deliveries during the year 1871, of equal quantities in each of the twelve months, or 166 $\frac{2}{3}$ tons per month, payment by acceptances at four months from the 10th of the month following delivery. In January, 101 tons only were delivered, and no demand was made for the delivery of the 65 $\frac{1}{3}$ at any time in January, or at any other time until December. On the 16th of February, and at several periods between that time and the month of December, 1871, the plaintiffs requested the defendants by letter to deliver no more iron during the then current month, and sometimes to deliver no more until further orders; and these requests were acquiesced in by the defendants, and partial deliveries only were consequently made during the several months following, until and including the month of November. In December, the price of iron having considerably risen, the plaintiffs required the delivery of the remainder of 2,000 tons undelivered, or 1,280 tons. The defendants delivered 187 $\frac{1}{2}$ tons, leaving 1,093 $\frac{1}{2}$ tons undelivered, and for the non-delivery of which the plaintiffs have brought this action, and claim the difference between the market price in December and the contract price of this quantity as damages. The plaintiffs insist that although the non-delivery of the several

(2) 41 Law J. Rep. (n.s.) Exch. 214.

quantities of iron undelivered in each of the first eleven months of the year was at their request and for their accommodation, and although there was no express contract on the part of the defendants to deliver the quantities undelivered at the end of each month, in the following month or at any subsequent period, the contract remained in force, not only as regarded the remainder of the 166 $\frac{2}{3}$ tons within the current month, and the 166 $\frac{2}{3}$ tons if called for in each of the months throughout the year, but as regarded the aggregate of all the quantities undelivered in compliance with their own request throughout the year; and, consequently, that the plaintiffs were at liberty to require the delivery in the month of December of the whole quantity undelivered, or 1,280 tons, and so to maintain this action. It is unnecessary to determine whether the plaintiffs' failure to accept, if required, and pay for the entire quantity of 166 $\frac{2}{3}$ tons in any one month, or the delivery of a part only of 166 $\frac{2}{3}$ tons at the plaintiffs' request, assented to by the defendants, would have the effect of putting an end to the contract altogether. But assuming that the contract may be read as twelve several contracts for the sale and delivery of 166 $\frac{2}{3}$ tons within twelve successive months, and consequently that the plaintiffs had a right in each successive month to call for the delivery of 166 $\frac{2}{3}$ tons, I am of opinion that, in the absence of an express contract to sell and deliver the quantity undelivered at the plaintiffs' request in the following month, or at some subsequent time, no such contract can be implied, and that the right to enforce delivery on the one hand, or acceptance on the other, was at an end when by mutual consent the time had expired, within which, by the express terms of the contract, both delivery and acceptance were to take place. It is impossible to read a contract to deliver and accept a quantity of iron in the month of February to be paid for by a bill at four months from the 10th of March, as a contract to deliver and accept it in the month of March and pay for it by a bill in April, and still less in the month of December, or in the next year, or at any later period within six years. It is therefore necessary to imply

a new contract, and whether this pretended implication raises a question in this case (as I think it does) for a jury, or a question to be decided by a judge, it seems to me that no such implication can arise where it so materially alters the condition of both parties. The market price of the commodity may rise or fall. The buyer may have entered into sub-contracts which the change in the time of delivery may disable him to perform. The seller may have the commodity on hand and be obliged to sell it at a loss to put himself in funds, or to keep it at the expense of warehouse rent and lose the use or the interest of the money with which it was to have been paid for. All these considerations may be provided for by an express contract, but surely they preclude an implication which may never have occurred to the mind of the party against whom it is to operate, and which may seriously prejudice his interests, and expose him to an indefinite amount of inconvenience and loss.

Besides, it is now established that a new contract cannot be substituted for the original contract where, by the Statute of Frauds, such new contract must be in writing. In *Chitty on Contracts* (7th ed. p. 104), the rule is thus laid down—"But it is clear that where the contract is one that the Statute of Frauds requires to be in writing, and, after it has been reduced into writing, new terms are agreed upon, such new terms must likewise be reduced into writing, otherwise they are not receivable in evidence." And this is well supported by the cases cited in the note—*Moore v. Campbell* (3), *Goss v. Lord Nugent* (4), *Stead v. Dawber* (5), *Marshall v. Lynn* (6), overruling *Cuff v. Penn* (7). Here the written contract sued upon is for the delivery of 166 $\frac{2}{3}$ tons of iron in each of twelve months specified, to be paid for by bill at four months on the 10th of each follow-

(3) 10 Exch. Rep. 323, 332; s. c. 23 Law J. Rep. (N.S.) Exch. 310, 313.

(4) 5 B. & Ad. 58, 65; s. c. 2 Law J. Rep. (N.S.) K.B. 127.

(5) 10 Ad. & E. 57; s. c. 9 Law J. Rep. (N.S.) Q.B. 101.

(6) 6 Mee. & W. 109; s. c. 9 Law J. Rep. (N.S.) Exch. 126.

(7) 1 M. & S. 21.

ing month. And the contract contended for by the plaintiffs is for the delivery of 1,280 tons in the month of December, to be paid for, it must be presumed, at some indefinite time afterwards. This is a totally different contract, and so a new contract, and to be binding in law must have been made in writing.

The substantial defence, however, is that no such contract has in fact been entered into. It has not been expressly made, and for the reasons above assigned cannot be implied.

Ogle v. Vane (1), which has been cited for the plaintiffs, has no application to the present case. There there was no new contract; the question was merely as to the amount of damages, and the plaintiff being entitled to the difference between the contract price and the market price when he had to purchase the iron which the defendant had failed to deliver according to his contract, and having delayed the purchase in the market at the request of the defendant, and the price having risen in the meantime, the defendant was held liable according to the market price at the time when he had himself requested the plaintiff to make the purchase.

In this judgment, my brother Pigott agrees.

MARTIN, B.—This is an action for the alleged breach of two contracts, one made on the 26th of October, 1870, the other on the 31st, for the sale respectively of 1,000 tons of pig iron, in equal quantities, delivered in monthly quantities over 1871, or sooner if required, payment by four months' acceptance from the 10th of the month following delivery. The cause was tried before my brother Blackburn at Leeds without a jury, when he found for the plaintiffs for 649*l.* damages, but he reserved two questions; the first, on the construction of the documents and correspondence; the second, as to the periods or principle upon which the damages are to be estimated. The first point, and the only matter on the contract argued before us, was as to how the iron was to be delivered, and I think it was to be delivered by equal monthly deliveries, that is to say, 83 tons and a little more upon each contract, or 166 tons and a

little more upon both, unless the plaintiffs, the vendees, required it sooner. On the 12th of January, 1871, the defendants delivered 40 tons of iron; on the 15th, 49 tons 10 cwt.; and on the 17th, 11 tons 10 cwt.; in all 101 tons, being 65 tons short. On the 16th of February, the plaintiffs wrote to defendants, "You will oblige by sending no more iron this month." On the 20th the defendants sent 25 tons; on the same day the plaintiffs wrote, "You will greatly oblige us by not sending in any more iron until we write. We are now so full of metal we do not know where to put it. In another month we hope to be better off, but we really cannot do with more at present," &c. On the 21st of February, the defendants wrote, "We have yours of yesterday, and have instructed our people at Ferryhill to stop delivering until further orders." A number of other letters, and a number of deliveries of iron took place during the year, and in the end the defendants delivered only 906½ tons of iron, and contend they were under no obligation to deliver more.

Upon the first question reserved by my brother Blackburn, two questions arise; the first, a question of fact; the second one of law. The question of fact is, what is the meaning of the correspondence? The defendants contend that its meaning is that the plaintiffs propose that the defendants should not deliver iron during the several months in which the letters were written, and that they should be thereby relieved from the obligation of delivering any iron, or any more than what was actually delivered during each month, or in other words, that assuming the contract to be for the delivery of about 166 tons of iron per month, the plaintiffs, before breach, exonerated the defendants from the performance of it. The plaintiffs, on the other hand, contend that this is not the meaning of the correspondence, but that what it means is, and what the defendants could only by possibility understand it to mean is, that the plaintiffs requested the defendants, as a favour and convenience to them, not to press upon them the acceptance of the iron, inasmuch as it was inconvenient to them to receive it, and that there is no-

thing in the correspondence to shew that the plaintiffs ever intended that the entire quantity of 2,000 tons should not be delivered, or that the defendants understood that such was their intention. It would be tedious, and almost unintelligible, to a hearer or reader to state the reasons why I am clearly of opinion that the plaintiffs' contention is right, and that there is nothing in the correspondence to indicate that the plaintiffs ever proposed, or intended, or suggested, that the entire quantity of 2,000 tons should not be delivered, or that the defendants ever put it forward as their understanding of it, until the price of iron had risen in November, when it was their interest not to deliver.

The second question is one of law, and is a most important one; it arises over and over again every day in the ordinary transactions of mankind. It is this: there is a contract for the sale of goods to be delivered, say in January, or upon a day of January; on a day before the delivery is to take place, the vendor meets the vendee and says, "It is not convenient for me to deliver the goods in January, or upon the day named, and I will be obliged if you will agree that the goods shall be delivered at a later period;" and the vendee assents. Or the vendee goes to the vendor and says, "It is not convenient for me to receive the goods in January or upon the day named, and will you agree that the delivery shall be postponed?" and the vendor assents. The latter is the present case, and the contention on the part of the defendants is that this puts an end to the contract, and that the defendants are not bound to deliver upon the latter day. In my opinion this contention is not well founded. In the first place, I think it is decided by authority. It is impossible to distinguish the case of the application for postponement coming from the vendors and one coming from the vendee, and the case of *Ogle v. Vane* (1), has decided that where the postponement took place at the request of the vendor he still continues liable

upon the contract. This case, in my opinion, concludes the contention.

It was suggested rather than argued that the right of the plaintiffs to recover was barred by the 17th sect. of the Statute of Frauds. I think it is not. Assuming the legal construction of what took place between the plaintiffs and defendants to be a contract, it was not a contract for the sale of goods—which is the contract provided for by this section—but a contract respecting the delivery of goods already sold, which is not within the section at all. I am therefore of opinion that the plaintiffs are entitled to recover.

The second question reserved by the learned Judge relates to the period as to, and the principle upon which, the damages are to be calculated. I think the same case of *Ogle v. Vane* (1) is conclusive as to this also, and shews that the damages were calculated at the trial upon the right principle, viz., upon the market price at the time when the defendants refused to deliver the iron. It was said that this operated with injustice and hardship upon the defendant. I do not agree to this. If the defendants had, as they say they had in one of their letters, stacked the iron for the plaintiffs, the damages would only be the increased price which they got for the iron so stacked, and no hardship would be imposed upon them. If they had not stacked the iron, and had it not to deliver at the time when they were bound to deliver it, they are only called upon to pay what the plaintiffs would have been obliged to pay if they had gone into the market to buy the quantity short delivered. In my opinion, the argument as to injustice and hardship entirely fails.

Rule absolute to enter the verdict for the defendants.

Attorneys—Torr & Co., agents for Middleton & Sons, Leeds, for plaintiffs; John Scott, agent for Hodge & Harle, Newcastle, for defendants.

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TO THE SUBJECTS OF THE

CASES AT COMMON LAW

IN THE

LAW JOURNAL REPORTS,

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stances, a signature not of an agent merely, but of the banking company, and therefore "of the party to be charged therewith," within the 8th section of 9 Geo. 4. c. 14. *Held, also*, that the communication contained in the letter was not that of the defendant Goddard personally, but of the banking company; that plaintiff being a customer of the S. and H. bank was entitled to maintain an action in respect of the misrepresentation made in the letter written by Goddard; that the banking company was liable for the fraudulent representations of its manager made in the course of conducting the business of the company; and that Goddard the manager and the banking company were both liable to be sued jointly. *Swift v. Winterbotham, Q.B.*, 111

—**accounts at separate branches of bank: set-off**—In the absence of any special contract or arrangement, there is no obligation on a banking company to honour the cheque of a customer presented at one of their branch offices where he has a balance standing to his credit, when he has overdrawn his account at another branch office to an amount greater than such balance, so that the company are in fact not indebted to him. *Garnet v. M'Kewan, p.o.*, *Ex.*, 1

BANKRUPTCY—bill given for debt discharged by bankruptcy—No action can be maintained on a bill accepted in consideration only of a debt discharged by a bankruptcy or arrangement under the Bankruptcy Act, 1861, although such bill was given after the repeal of that Act by the Bankruptcy Repeal Act, 1869 (32 & 33 Vict. c. 83). *Rimini v. B. Van Praagh, Q.B.*, 1

—**jurisdiction of county court**—Where a petition in bankruptcy is preferred under 32 & 33 Vict. c. 71 in a County Court against a person as residing within its district, and he is adjudicated bankrupt thereon, such adjudication not being rescinded or appealed against is final and conclusive, though it turns out that he traded within the London district; and the trustee in bankruptcy is entitled to the proceeds of an execution on such trader's goods which are retained in the sheriff's hands under section 87, due notice of the petition having been given under that section, as it is not necessary that the adjudication should be against such person as a trader, and it is sufficient if there be an adjudication against him and he be in fact a trader. *Revell v. Blake (Ex. Ch.)*, C.P., 165

—**extraordinary resolution of creditors: composition payable by instalments: security to be given**—In accordance with the provisions of s. 126 of the Bankruptcy Act, 1869, an extraordinary resolution was passed by the proper majority in number and value of the creditors of the defendant, a debtor, that a composition

should be accepted, payable by three instalments, and that the second and third instalments should be secured by the promissory notes of the defendant and a third person:—*Held*, in an action by a creditor who did not attend or vote on the resolution, that such resolution, although duly passed and registered, did not constitute any defence, there being no proof that the defendant had paid or tendered the two instalments which had become due before action, or that he had delivered the promissory notes. *Goldney v. Lording*, Q.B., 103

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—*leave to appear: defence in abatement*—Where a writ is issued under "The Summary Procedure on Bills of Exchange Act, 1855," a defence in abatement that the defendant was joint acceptor of the bill of exchange with another, is a legal defence entitling him to leave to appear under section 2. *Casella v. Darton*, C.P., 58

— consideration. See Bankruptcy.

BILL OF LADING—"value, weight, and contents unknown"—Where, on a closed package being shipped for carriage, a bill of lading, containing an innocent misdescription of its contents is presented to the master of the ship, and he, without asking questions or examination, stamps thereon "weight, value and contents unknown," there is a contract to carry the package whatever its contents may be. What is the measure of damages for loss of the contents seems doubtful. *Lebars v. The General Steam Navigation Co.*, C.P., 1

—*goods carried under bill of lading: lien for freight although goods landed: when costs of defending an action recoverable*—Defendant shipped goods on board a vessel, chartered by plaintiffs on a voyage to a foreign port, under a bill of lading, which stated that the goods were to be landed at the expense and risk of the consignee. On the arrival at the port of destination there was no consignee ready to receive the goods, and the vessel was thereby detained there for a considerable time. An action for unliquidated damages for such detention was brought against plaintiffs by the owners of the vessel, and plaintiffs defended the action, after giving notice thereof to defendants, who refused to have anything to do with it. Plaintiffs afterwards sought to recover from defendants not only the sum awarded in that action for such detention, but also the cost incurred in defending it. At the trial the judge left it to the jury to say whether it was reasonable in the present plaintiffs to have defended that action, and whether they defended it in a reasonable way. The judge also told the jury that the captain would lose his lien for freight by landing the goods, as it did not appear that there was any warehouse at such foreign port similar to those under the English warehousing statutes. The jury having found for plaintiffs for the amount claimed,—*Held*, that the question was rightly left to the jury as to the liability of the defendants to the costs of the action brought against the plaintiffs. Also, that the direction of the judge that the captain could not land the goods without losing his lien for freight was

wrong, as being too general in its terms, since he might land them and yet preserve his lien for freight if he kept them entirely within his own exclusive control. *Mors le Blanch v. Wilson, C.P.*, 70

Quare—whether the captain would not lose such lien if the goods when landed were placed in the hands of an independent person, who would have a lien on his own behalf, even though he should undertake to the captain not to deliver the goods to the consignee without being paid the claim for freight. *Ibid.*

— **freight: delivery of damaged cargo: invoice quantity as per bill of lading: "quantity and quality unknown"**—A charter-party, under which a ship was chartered for a grain cargo from the Danube to the United Kingdom for certain freight "per imperial quarter delivered," contained a provision that in the event of the cargo, or any part thereof, being delivered in a damaged or heated condition, the freight should be payable on the invoice quantity taken on board, as per bill of lading, or half-freight upon the damaged or heated portion, at the captain's option. The bill of lading stated that 1,021 kilos. were shipped on board; but the master added at the end of the bill of lading, before signing it, the words, "quantity and quality unknown." The cargo having become heated on the voyage, the master claimed to exercise his option, and to be paid freight upon the invoice quantity, as per bill of lading:—*Held*, that the addition of the words "quantity and quality unknown" to the bill of lading by the master did not take away his right to be paid freight upon the invoiced quantity in the bill of lading, and that the object and effect of that memorandum was merely to protect the captain against any mistake that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery or deterioration not caused by his default. *Tully v. Terry, C.P.*, 240

BILL OF SALE—*successive bills of which the last is alone registered*—Where a bill of sale is given for good consideration, but not registered, and before the expiration of the time for registration it is annulled, and a similar bill of sale given which also is not registered, and, after this process has been repeated several times, at last a bill of sale is duly registered, such last bill of sale is valid against execution creditors if made *bona fide* with the intention of passing the property comprised in it. *Smale v. Burr, C.P.*, 20

— **description of grantor's occupation**—A clerk in the accountant's office of a railway company does not, in styling himself an "accountant," give a sufficient description of his occupation to satisfy the first section of the Bills of Sale Act. *Larchin v. The North Western Deposit Bank, Ex.*, 134

— See Interpleader.

BOND. See Payment into Court.

BREAD—sale of otherwise than by weight. *Aerated Bread Co. v. Grigg, M.C.*, 117; *Q.B.*, 192

BURIAL FEES—*right of incumbent: "new parish"*—In 1851, the church of St. T. was built and consecrated. In 1852, an order in council under 59 Geo. 3. c. 134. s. 16, authorised services to be performed in the new church, assigned a district to it out of the ancient parish of W., in which it was situated, and granted the incumbent the fees. There was then no burial ground in the district, and the persons dying in it continued to be buried as before in the churchyard of the parish. The plaintiff was appointed incumbent of this church in 1854, and in 1856, a burial ground for the whole parish was consecrated, the district of the new church contributing to the rates for providing it. A new rector of the parish was appointed in 1864:—*Held*, by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the district of St. T. was a "new parish" within 20 & 21 Vict. c. 81, and that the plaintiff, on the first avoidance of the rectory, was entitled to the burial fees in respect of inhabitants of St. T. buried within the parish. *Cronshaw v. The Wigan Burial Board (Ex. Ch.)*, *Q.B.*, 137

CANAL AND CANAL COMPANY—*rights of owner of coal mines under canal: liability of canal company*—In this case the Court of Queen's Bench (*HANNEN, J.*, dissenting), having held that the defendants were not responsible for damage to the mines by water escaping from the canal, as there was no proof of any negligence on their part, or of anything done in excess of their statutory powers,—*Held*, by the Exchequer Chamber, affirming the decision below (41 Law J. Rep. *Q.B.* 121), that the action, for the reasons above given, was not maintainable. And *semble*, per *KELLY, C.B.*, and *PROCTOR, B.*, that plaintiffs were entitled to relief under the compensation clauses of the Canal Acts. *Dunn v. The Birmingham Canal Company (Ex. Ch.)*, *Q.B.*, 34

CARRIERS BY RAILWAY—*negligence: cattle: injury caused by restlessness*—The G. N. R. Co. and the defendants agreed that a complete and full system of interchange of traffic should be established from all parts of one company and beyond its limits, to all parts of the other company and beyond its limits, with through tickets, through rates and invoices, and interchange of stock at junctions, the stock of the two companies being treated as one stock. The agreement provided for the division of the traffic. The plaintiff, wishing to send a cow from D. to S., went to the station of the G. N. R. Co. at D. and booked her for S. by the defendants' line. He signed a contract, by which it was agreed that the cow was to be conveyed upon certain conditions, one of which was as follows—"The G. N. R.

Co. give notice that they convey horses, cattle, sheep, pigs and other live stock in waggons, subject to the following condition: That they will not be responsible for any loss or injury to any horse, cattle, sheep or other animal, in the receiving, forwarding or delivering, if such damage be occasioned by the kicking, plunging or restiveness of the animal." The cow was put into a truck belonging to the defendants, and was conveyed to S., where a servant of the defendants, who was in charge of the yard or loading place, let her out of the truck, although he was cautioned by the plaintiff not to do so at that time. The cow rushed out of the truck, and after running about the yard, got upon the line and was killed:—*Held*, per totam Curiam, having power to draw inferences of fact, that the G. N. R. Co. were the agents of the defendants to make the contract for the carriage of the cow, and that if the defendants were not protected by the condition above set out, an action was maintainable against them. *Held also*, per BLACKBURN, J., and LUSH, J. (MELLOB, J., *dissentiente*), that the accident to the cow was attributable to the fact that the porter let her out of the truck without waiting a reasonable time, as he might have done, and that the defendants were therefore liable to the plaintiff for the value of the cow. *Gill v. The Manchester, &c., Rail. Co.*, Q.B., 89

CARRIERS BY RAILWAY (continued)—*late delivery of goods: non-acceptance of goods by consignee: special notice to carrier: damages*—Plaintiffs in the beginning of the year 1871, contracted to supply, at 4s. a pair, a large quantity of shoes to H. & Co., who required them to fulfil a contract for the supply of the French army during the late war. The last day for delivery by plaintiffs was the 3rd of February, 1872, and all shoes not so delivered would be thrown back on plaintiffs' hands. Plaintiffs delivered a certain quantity of shoes to defendants (the Midland Railway Company) at Kettering, consigned to H. & Co., in London, in time to be delivered on that day. Notice was given to the station master that plaintiffs were under contract to deliver on that day, and if not so delivered the shoes would be thrown on plaintiffs' hands, but no further information. The shoes were not delivered by defendants till the morning of the next day, and were rejected. Plaintiffs, using their utmost endeavours, could only sell the rejected shoes at 2s. 9d. a pair, and in consequence of the cessation of the war the consignees, but for their French contract, could not have sold them at a higher price even if duly received. Defendants paid into Court 20l., which was sufficient to cover the incidental expenses and the ordinary damages to which plaintiffs would be entitled, but the latter claimed to be entitled to recover the difference between 4s. and 2s. 9d. a pair:—*Held*, by the majority of the Court of Exchequer Chamber, affirming the judgment of the Court of Common

Pleas (41 Law J. Rep. (N.S.) C.P. 264), that plaintiffs were not entitled to recover the said difference. *Horn v. The Midland Rail. Co.* (Ex. Ch.), C.P., 59

Whether the rule in *Hadley v. Bazendale* is law seems questionable. *Ibid*.

— *of passengers: agreement by passenger to travel at his own risk*—Declaration, that plaintiff was received by defendants, a railway company, as a passenger to be safely carried on their railway on a journey from Piel Pier to Carlisle, and that defendants so negligently managed the railway and the traffic upon it that a collision took place, by which plaintiff was injured. Plea, that plaintiff was received as a passenger under an agreement that he should travel at his own risk. Replication, that it was by reason of gross and wilful negligence and mismanagement of defendants that the collision took place:—*Held*, that the replication was bad, for the agreement stated in the plea must be taken to include the negligence mentioned in the replication. *Macaulay v. The Furness Railway Co.*, Q.B., 4

— *of passengers: liability for negligence of another company in exercise of running powers*—Under an agreement embodied in an Act of Parliament, the M. Railway Company granted running powers, on the payment of a mileage charge, over a portion of their own line to the L. Railway Company, and regulated by their own servants the passage of all the trains of both companies over such portion. Through the negligence of the servants of the L. Company in the exercise of the running powers, a train of that company ran into a train of the M. Company, by which the M. Company were carrying a passenger in fulfilment of a contract over such portion of their line. The servants of the M. Company were not guilty of any negligence:—*Held*, that the M. Company were not liable to the passenger for the injuries caused by the collision, since the servants of the L. Company, whose negligence caused the collision, were not concerned in the carriage of the passenger, and were not employed by, or under the control of, the M. Company. *Wright v. The Midland Rail. Co.*, Ex., 89

— *of passengers: carriage door left unfastened: contributory negligence*—The plaintiff, in company with his brother, was travelling by an underground railway. While the train was in motion he got up for the purpose of looking out of the window, in order to point out some object to his brother, and placed his hand against a bar which went across the carriage window, when the door flew open, and he fell out and was injured:—*Held*, by the Exchequer Chamber, upon the argument of a rule, to enter the verdict for the defendants, on the ground that there was no evidence of negligence to go to the jury, that the rule must be discharged, as the question whether the omission to fasten the door was the cause of the accident was rightly left to the jury.

Per KELLY, C.B.—That assuming that the question of contributory negligence could be taken into account in considering whether the plaintiff had established a *prima facie* case, that there was no evidence of contributory negligence on the part of the plaintiff. *Gee v. The Metropolitan Rail. Co.* (Ex. Ch.), Q.B., 105

— of passengers: injury by removing a passenger from a railway carriage under mistake]—By the rules and bye-laws of a railway company the porters were directed to prevent passengers from leaving trains whilst in motion, and to do all in their power to promote the comfort of the passengers and interests of the company, and specially given powers of removal under certain specified circumstances not applicable to the particular case. And it was found by a case stated in an action for injury to a passenger in his removal from a carriage by a porter under the mistaken idea that he was in a wrong train, that he was violently removed just as the train was moving; that it was the duty of the porters to prevent passengers going by wrong trains as far as possible; but if they were, to request them to alight, and on refusal, report them with a view to charging an excess of fare, but not remove them:—*Held*, by the Court of Exchequer Chamber, affirming the decision of the Court of Common Pleas (41 Law J. Rep. (N.S.) C.P. 278), that there was evidence of the porter having acted within the scope of his authority and abused it, and that the company were responsible. *Bayley v. The Manchester, Sheffield and Lincolnshire Rail. Co.* (Ex. Ch.); C.P., 78

— communication between passengers and guard]—A railway train is or is not within the operation of section 22 of the Railways Regulation Act, 1868 (which requires railway companies to provide communication between passengers and guard when a train runs twenty miles without stopping), according to the actual instructions as to stopping given to the company's servants in charge of the train. And therefore where the primary cause of an accident to a train not provided with such means of communication was the breaking of a wheel-tire (without any negligence on the part of the company or their servants), and several minutes elapsed between the first shock felt by the passengers and the actual disaster resulting in the mischief complained of, it was properly left to the jury to say—First, What was the effect of the company's time tables taken together with the special instructions given to their servants with regard to the train in question? and second, Whether the absence of the statutory precaution was conducive to the accident which occurred? *Blamires v. The Lancashire and Yorkshire Rail. Co.* (Ex. Ch.), Ex., 182

CERTIORARI—Time for application for to remove order of quarter sessions. *R. v. The Justices of Brecknockshire* (M.C., 135), Q.B., 233

CHAMPERTY—common interest in subject-matter of dispute: relationship]—Declaration that H., a brother of defendant and a cousin of plaintiff, had died leaving landed estates and personal property, and defendant was heir-at-law of deceased and one of his next of kin, and deceased died leaving a will whereby his property, real and personal, was left to persons other than plaintiff and defendant, and plaintiff believed that such will revoked a former will by which testator had bequeathed certain property to plaintiff, and in consideration that plaintiff would take the necessary steps to contest the validity of the said will and would advance certain moneys and obtain evidence for such purpose, and instruct an attorney in that behalf, defendant promised that he would pay to plaintiff one half of any personal property and convey to him a moiety of any landed estates he might recover or which might come to him, defendant, by reason of the taking of such proceedings for the setting aside of such will; and plaintiff took such steps as aforesaid and advanced certain moneys and instructed an attorney, and a large sum of money was thereby recovered by defendant, and the said will was declared invalid, and defendant became entitled to and obtained possession of large landed estates of the deceased. Breach, that defendant had not paid to plaintiff half the personal property, or conveyed to him one-half of the real estates:—*Held*, on demurrer, that the declaration was bad, for the agreement being to advance money and procure evidence for the purpose of a suit in consideration of a share in what was recovered by it, was *prima facie* invalid on the ground of champerty, and that the relationship of the parties, and the other circumstances stated in the declaration, did not give plaintiff such an interest in the suit as to alter the nature of the transaction. *Hutley v. Hutley*, Q.B., 52

CHARTER-PARTY—voyage: illegality: Contagious Diseases (Animals) Act, 1869: order in council]—A charter-party was made in France, by which it was stipulated that the ship should proceed to Trouville, a port in France, and should there load a cargo of hay, and proceed therewith direct to London; all cargo to be brought and taken from the ship alongside. The agent of defendant, the charterer, told the master that the consignors would require the hay to be delivered at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, which he promised to do. On arriving in the Thames, he was informed that by an order in council made under the Contagious Diseases (Animals) Act, 1869, it was illegal to land in Great Britain hay brought from France. The order in council was in existence when the charter-party was entered into, but neither of the parties knew of it, nor did the shipowner contemplate any violation of the law. Defendant after a time exported the hay, and the shipowner brought an action against him to recover damages in respect of the detention

of the ship:—*Held*, that under these circumstances defendant could not set up as a defence that the voyage was illegal. *Waugh v. Morris*, Q.B., 57

CHARTER-PARTY (continued) — *warranty: expected to be at A. about the 15th of December* — In a charter-party, dated 14th November, 1871, defendant's ship was chartered to plaintiff as follows:—"It is this day mutually agreed between Messrs. M. & S., of the good British steamship *Ceres*, of the measurement, &c., whereof, &c., is master, expected to be at Alexandria about the 15th of December, and the plaintiff," &c., &c. The declaration setting out the charter-party alleged as a breach that the ship was not then expected to be at Alexandria about that day, but was then in such part of the world and under such engagements that the ship could not perform her said engagements and arrive at Alexandria about the said day:—*Held*, on demurrer, that the statement in the charter-party was a warranty or condition that the ship was then in such a place and under such engagement as that she might reasonably be expected to be at Alexandria about the day mentioned, and that the breach was well assigned. *Corkling v. Massey*, C.P., 153

A plea to the above declaration set out the position in which and certain engagements under which the ship then was, and alleged notice thereof to plaintiff, and that the charter-party was made subject to the condition that the said vessel should with all convenient speed fulfil her said engagements, and then sail and proceed to Alexandria, and averred performance of the said condition:—*Held*, that the plea was a good plea upon the authority of *Young v. Austen* (38 Law J. Rep. (N.S.) C.P. 233). *Ibid*.

— *prima facie evidence of damage: onus of proof* — A charterer who has, through the shipowners' default in not being ready to load at the time agreed upon, been compelled not only to pay increased freight, but also to pay a higher price for the article to be shipped, is—in the absence of evidence that he will be able to sell at a corresponding increased price at the port of delivery, or of other evidence that he will not be a loser—entitled to recover as damages the additional price paid as well as the difference in freight. *Featherston v. Wilkinson*, Ex., 78

— See Demurrage.

CHURCH—*right of presentation to incumbency: election of trustee under 5 Geo. 4. c. 103* — Under 5 Geo. 4. c. 103, a church building Act, where only one subscriber of 50*l.* is left surviving, and only one trustee by election, the incumbent of the parish becomes trustee *ex officio* jointly with the surviving trustee by election, and, on the death of the latter within forty years, entitled to nominate on the vacancy in the incumbency of the church. *Allen v. The Bishop of Gloucester and Bristol*, (H.L.), C.P., 299.

CHURCHWARDENS—*election of by perpetual curate under canon 89* — A perpetual curate is a "minister" within the Act, the general custom founded on canon 89 by which churchwardens in every parish are to be chosen by the joint consent of the minister and the parishioners, and if they cannot agree, one by the minister and another by the parishioners. *R. v. Allen*, Q.B., 37

COMMITMENT—second committal for same default. See County Court.

COMMON—*exclusive right of pasture: evidence* — Where an exclusive right of pasturage had been enjoyed for a long series of years, but was described in various documents as a right of common, the Court held as a conclusion of fact that such description did not cut down the exclusive right so established by user. *Johnson v. Barnes* (Ex. Ch.), C.P., 259

COMPANY—*liability of transferee upon an implied contract to indemnify transferor against loss on shares* — On the 4th of September, 1865, plaintiff sold to defendant twenty shares in a joint-stock company. On the 8th he executed a transfer to defendant, who paid the purchase money, and caused the transfer to be registered by the company on the 4th of December. On the 20th of March, 1866, defendant transferred the shares to M. On the 18th of April, 1866, the company stopped payment, and on the 8th of May, 1866, was ordered to be wound up. On the 24th of July, 1866, M. was placed on the A. list of contributories, being the list of existing members. On the 30th of October, 1866, M. executed a deed of inspectorship. An order was made upon M. to pay a call of 40*l.* a share, but he did not pay, and the liquidators failed to get any payment out of his estate. On the 6th of December, 1867, plaintiff and defendant were placed on a B. list of contributories as past members in respect of the shares. On the 27th of December, 1866, defendant executed a deed of inspectorship, under sect. 192 of the Bankruptcy Act, 1861, which was registered on the 29th of December, 1867. On the 20th of March, 1869, the Court ordered defendant to pay a call of 40*l.* a share, but he did not do so, and on the 10th of May plaintiff, in pursuance of an agreement of compromise made between himself and the official liquidator, paid the sum of 15*l.* per share in respect of the twenty shares sold by him to defendant:—*Held*, that he had a right to recover from defendant the sums paid upon an implied contract by defendant to indemnify him against loss and liability upon the shares transferred. *Kellock v. Enthoven*, Q.B., 174

— *debentures are not negotiable instruments* — A company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), issued a debenture under the seal of the company and countersigned by two of the directors and the secretary.

By it the company promised, subject to conditions endorsed, to pay to the bearer the sum of 100*l.* upon the 1st of May, 1872, or upon any earlier day upon which it should be entitled to be paid off or redeemed according to the conditions. By the conditions the company contracted not only to pay the money, but also to cause a portion of the debentures to be drawn in a stipulated manner. Of late years a custom of trade had prevailed to treat such bonds as negotiable instruments:—*Held*, that the debenture was not a negotiable instrument, and that therefore where it had been stolen from the owner, no action could be maintained upon it against the company by a person who claimed through the thief. *Crouch v. The Credit Foncier Company*, Q.B., 183

— *issue of debentures: ultra vires: personal liability of directors for money borrowed to pay off debentures*—The directors of a railway company which had exhausted its statutory powers of borrowing money on debentures, published an advertisement in which they stated they were prepared to receive proposals for loans on debentures of the company "to replace loans falling due," the intention of the directors being to apply the money so raised in discharge of an equal amount of the then existing debentures. In consequence of such advertisement W. offered to lend 500*l.* on the debentures of the company. The directors accepted such offer and promised to issue a debenture to him when he was prepared with the money. On the faith of this W. paid the 500*l.*, and the directors gave the money to H. who had held debentures of the company, and directed him to transfer a debenture for 500*l.* to W., but H. kept the money without transferring any debenture, upon which the directors issued a new debenture of the company in favour of W., but which was not binding on the company as it was in excess of its borrowing powers:—*Held*, that on these facts the directors were to be deemed to have given W. a warranty that they had power to issue a debenture to him which was binding on the company, and they were therefore personally liable for the breach of such warranty. *Weeks v. Propert*, C.P., 129

— *trustee and cestui que trust: obligation to register share certificates*—H. & P., who were directors of the defendants' railway company, were the registered holders of shares. They held the shares as trustees for the company. After the death of P., H. became the registered holder of stock in which the shares had been converted, and which he held as trustee. The coupons or certificates for the stock were obtained by H., and he deposited them in a bank as a security for an advance of money. The money was advanced by R. at the request of H., who asserted that he was the real proprietor. R. received the certificates from the bank. No deed of transfer was executed in the life-time of R., but after his death his widow

required H. to execute a transfer, which he did. Neither the bank nor R. had given any notice to the defendants that they had any claim on the stock, and the defendants had regularly received the dividends. As soon as the defendants discovered the fraud committed by H., they gave notice to the widow of R. that H. had no right to mortgage the stock, as it stood in his name merely as trustee, and they refused to enter her name upon the register as proprietor of the stock:—*Held*, that H., as a trustee, had no right to hold the certificates; that the defendants by allowing him to hold them had enabled him to hold himself out as the proprietor of the stock; and that the prosecutrix was entitled to a mandamus commanding the defendants to enter her name as proprietor of the stock. *Robson v. Shropshire Union Railways and Canal Co.* (Ex. Ch.), Q.B., 193

— *prospectus omitting statement of a contract to qualify directors: bondholder: pleading embarrassing*—The 38th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), enacts that "every prospectus of a company" "shall specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof before the issue of such prospectus;" "and any prospectus" "not specifying the same shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." A declaration, after alleging the defendant to have been director of a certain corporation, and that before the issue of the prospectus the promoters of the said corporation had entered into a contract with the defendant, by which, in consideration of the defendant's name appearing in the prospectus as such director, the promoters were to pay him a certain sum, averred that such contract was not specified upon the prospectus, and that the defendant knew of the said contract, and knowingly issued the prospectus with fraudulent intent to induce the plaintiff to take bonds of the said corporation; and that the plaintiff took such bonds on the faith of the said prospectus, without having had notice of the said contract; and by reason of the aforesaid fraud of the defendant the plaintiff lost the value of the said bonds:—*Held*, that the declaration was bad as a declaration on the 38th section, since that section does not apply to the case of a bondholder, and that the declaration if treated as a declaration at common law for a fraudulent representation, was embarrassing, and likely to delay the fair trial of the action, within the meaning of section 52 of the Common Law Procedure Act, 1852. *Cornell v. Torrens*; *Same v. Hay*; *Same v. Massey*, C.P., 136
Quere, if section 38 of 30 & 31 Vict. c. 131, gives a cause of action where a prospectus is issued contrary to that section. *Ibid.*

B

COMPANY (continued)—Registration of stock in name of married woman. See Married Woman.

COMPENSATION—*Lands Clauses Consolidation Act, 1845: lands injuriously affected*—Plaintiff carried on business in premises consisting of a house, warehouse, stables, &c., near a draw-dock leading into the River Thames. The dock was free and public, but was principally used by the plaintiff and certain other persons whose premises were in proximity to it. A roadway existed between the edge of the dock and the plaintiff's premises, which had an enhanced market value by reason of their proximity to the dock. The defendants in making an embankment under their private Acts filled up and destroyed the dock; and thereby the plaintiff's premises became diminished in value in the market:—*Held*, by the Court of Exchequer Chamber (CLERKE, B., *dissentiente*), affirming the judgment below, that the plaintiff was entitled to compensation under 8 & 9 Vict. c. 18. s. 68, as his land had been injuriously affected by the defendants' works. *M'Carthy v. The Metropolitan Board of Works*, C.P., 81

— for injury to cattle by not fencing. See Railway Company.

— in case of accidental death. See Damages. And see Canal and Canal Company.

CONTAGIOUS DISEASES (ANIMALS) ACT. See Amendment.

CONTEMPT OF COURT—Commitment for. See County Court.

CONTRACT—*sale of goods to be delivered by instalments: breach as to one instalment: continuation contract*—Plaintiffs agreed to take from defendants, "say about 6,000 to 8,000 tons of coal . . . put into our waggons at the colliery; delivery to commence from 1st of July next, and to be taken in about equal monthly quantities over the next twelve months," &c. Defendants agreed to supply the coal, "to be delivered into your waggons at our collieries, in equal monthly quantities during period of twelve months from the 1st of July next," &c. Up to the 1st of August plaintiffs only supplied waggons sufficient to take away 158 tons of coal, whereupon defendants gave them notice that they cancelled the agreement:—*Held*, in an action by plaintiffs to recover damages in respect of the refusal by defendants to deliver any more coal, that defendants were not justified in cancelling the agreement in consequence of plaintiffs' failure to send waggons in the first month sufficient to take away the quantity of coal agreed to be delivered in that month. *Hoare v. Rennie* (29 Law J. Rep. Ex. 73) questioned. *Simpson v. Crippin*, Q.B., 28

— *breach of contract for sale of goods to be delivered by instalments: postponement of deli-*

very by consent: memorandum within s. 17 of Statute of Frauds—In October, 1870, defendants sold to plaintiffs 2,000 tons of iron by two contracts in writing duly signed, each of which was in these terms—"Sold to (plaintiffs) 1,000 tons of Ferryhill pig iron in equal quantities of grey forge, mottled, and white, price 50s. per ton, delivered at their (plaintiffs') siding. Delivery in monthly quantities over 1871, or sooner if required. Payment by their four months' acceptance from the 10th of the month following delivery." No iron was required by plaintiffs or delivered by defendants in 1870. In 1871 defendants delivered some of the iron by instalments, but never so much as one-twelfth of 2,000 tons in any one month except December, being continually requested by plaintiffs to withhold deliveries, sometimes until the end of the current month, and sometimes until further orders. These requests were made by letter, and defendants replied by letter signifying their assent. In December plaintiffs gave defendants notice that they should require the rest of the 2,000 tons to be delivered before the end of the year. Defendants delivered more than one-twelfth of 2,000 tons, and refused to deliver the remainder. Plaintiffs having sued for breach of contract,—*Held*, per KELLY, C.B., and PIGOTT, B., that the contract was for the delivery of 2,000 tons in equal quantities in each of the twelve months, and that there was in fact no new contract to deliver the monthly deficiencies at some subsequent time; that no such new contract could be implied in law; and that the action was therefore not maintainable. Per MARTIN, B., that plaintiffs when they requested the deliveries to be withheld, intended that the entire quantity of 2,000 tons should eventually be delivered, and that defendants understood this to be plaintiffs' intention, and that (on the principle of *Ogle v. Vane*) the plaintiffs were entitled to recover the difference between the contract price of the undelivered remainder, and the market price at the time when the defendants refused to deliver. *Tyers v. The Rosedale and Ferryhill Iron Co., Ex.*, 185

Semle per KELLY, C.B., and PIGOTT, B., that assuming there was a contract to postpone the deliveries, it would not be binding within s. 17 of the Statute of Frauds, if not in writing. Per MARTIN, B., that it did not fall within that section, because it was a contract not for the sale of goods but for the delivery of goods already sold. *Ibid*.

— *alternative promise: construction of contract alleged in declaration*—A declaration alleged that defendant received certain bills of lading and drafts on the terms that on the acceptance of the latter by one B., the former should be delivered to him, that defendant should present such accepted drafts to B. for payment, and remit to plaintiff the proceeds if the same should be paid, and if the said drafts should not be paid, either return the same to plaintiff, or pay him the amount, for reward to defendant; that

everything happened to entitle plaintiff to have the drafts returned or the amount thereof paid by defendant, yet defendant did not return the said drafts, nor did he pay plaintiff their amount. Judgment went by default, and it appeared that the drafts were of no value:—*Held*, by the majority of the Court (KEATINGE, J., BARTT, J., and GROVE, J.), that the true construction of the declaration was that defendant promised if he did not return the drafts to pay their amount, which was therefore recoverable; but per BOVILL, C.J., the contract alleged was only alternative, to return the drafts or pay their amount, and that only the nominal damages arising from the least burthensome alternative were recoverable. *Deverill v. Burnell*, C.P., 214

— *voidable not void: drunkenness: ratification*]

—A contract made when one of the parties to it is so drunk as to be incapable of transacting business or knowing what he is about is not void but voidable only, and may be enforced against him, if ratified after he becomes sober; and this, though his condition was known to the other party to the contract at the time of making it. *Matthews v. Baxter*, Ex., 73

— Contract or tort. See Taxation of Costs. And see Auction. Carriers by Railway. Damages. Charter-party. Marine Insurance. Master and Servant. Principal and Agent. Vendor and Purchaser.

CONTRIBUTORY. See Company.

CONVERSION OF GOODS. See Trover.

COPYHOLD—*admittance of remainderman: right to compel admittance of termor for years*—Defendant's uncle, who was tenant in fee of lands in the manor of R., according to the custom of the manor devised his estate for a term of 500 years upon certain trusts, and, subject to the term, to defendant in fee. Upon the death of the uncle, the lord admitted defendant, who was an infant, and received a full fine in respect of the admittance. The lord further insisted that the trustees, the termors for 500 years, should also be admitted, and should pay a fine in respect of that term. They refused to do so, whereupon, after proclamation, he seized *quousque* and brought ejectment to try his right to the additional fine:—*Held*, affirming the judgment of the Court of Queen's Bench (41 Law J. Rep. (N.S.) Q.B. 263), that he was not entitled to the fine, and could not maintain the action. *Everingham v. Ivatt* (Ex. Ch.), Q.B., 203

COPYRIGHT—*infringement: engravings: fair use by one author of another's publications*—Between 1849 and 1867 there appeared in the weekly numbers of "Punch" many woodcuts caricaturing Napoleon III. In 1871 defendant published a book, of which Part I. consisted of a letter-press history of Napoleon's life. Part II. was called,

"The same story as told by popular caricatures of the last thirty years," and consisted of woodcuts copied from many English and foreign publications. Nine of these were exact copies in reduced size of the whole or part of the nine woodcuts which had appeared in nine separate numbers of "Punch" during the above period, and were inserted without any acknowledgement that they had appeared in "Punch." The registered proprietors of "Punch" brought an action for this infringement of their copyright in the above nine numbers of "Punch," each of which was described in the declaration as a "book or sheet of letter-press." The Court having found as a fact that defendant's book was published with the same object as "Punch," namely, to amuse the public and to make a profit by the sale,—*Held*, therefore, that there had been an infringement. *Bradbury v. Hotten*, Ex., 28

CORPORATION—*grant of annuity by resolution not under seal*—Certain trustees were created by Statute a body corporate, for the management of the navigation of a river, with a common seal and perpetual succession. The Statute empowered them to levy tolls, and enacted, "That it shall be lawful for the trustees, from time to time, to pay and allow to any officer or servant of the trustees whose services may, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case, may, in the judgment of the trustees, be reasonable and proper, and the trustees may, from time to time, pay and allow such annuity or allowance out of the moneys which may come to their hands by virtue of the powers and provisions of" certain Acts. The plaintiff, who had been their clerk for forty years, having in 1865 resigned owing to ill health, the trustees duly passed a resolution (which was not sealed), that his resignation "be accepted, and that a retiring pension of 300*l.* per annum, free of income tax, be granted to him during the remainder of his life." The pension was duly paid quarterly till the end of 1871. Early in 1872 the defendants, who had meanwhile been substituted for the trustees by Statute, duly passed a resolution to reduce the pension to 150*l.* per annum, to be paid during their pleasure, and paid the pension for the first quarter of 1872 on the reduced scale:—*Held*, that the resolution of 1865 was irrevocable, and that the plaintiff could recover the difference for that quarter from the defendants by action. *Marchant v. The Lee Conservancy Board*, Ex., 141

COSTS—of defending action, when recoverable. See Bill of Lading. And see Attachment of Debt. Taxation of Costs.

COUNTY COURT—*contempt not committed in face of court: right to punish offender*—A County Court

Judge has no power to commit any one for contempt which has not occurred in the face of the Court. *Ex parte Jolliffe*, Q.B., 121

The fact that the County Courts Act, 9 & 10 Vict. c. 95 (ss. 113, 114), gives a limited power of summarily dealing with contempt committed in face of the Court, but is silent as to contempt committed out of Court, is a strong, if not conclusive, argument against the summary power of a County Court Judge to punish for such contempt. *Ibid.*

COUNTY COURT (continued)—*committal order: several committals for same default*—A judgment debtor having made default in payment of the judgment debt which had been recovered against him in the County Court, and which he had been ordered to pay forthwith, the County Court Judge made an order for his commitment to prison for forty days. The debtor was arrested thereon, but was subsequently discharged on the ground of his being privileged at the time of such arrest, as a witness returning from the sessions. The debtor was again, and whilst the order for committal was still in force, summoned upon a judgment summons, and a second order for his committal for the same default in not paying the judgment debt was made by the County Court Judge:—*Held*, that the Judge had no power to make such second order as the first had not been executed. *Horsnail v. Bruce*, C.P., 140

Held also, by BOVILL, C.J., and BRER, J., that where a judgment debt is not payable by instalments there is no power under section 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), to commit the debtor more than once for default in not paying such debt. *Ibid.*

—*jurisdiction: cause of action arising wholly or in part within district*—A verbal offer to buy goods for more than 10*l.* having been made to the vendor's agent within the district of a County Court, was communicated to the vendor at his residence outside the district, where he accepted it and signed a memorandum within sect. 17 of the Statute of Frauds. This memorandum with a counterpart he sent by post to the purchaser, who signed the counterpart within the district. The vendor having delivered the goods to plaintiff's agent outside the district, the purchaser issued a plaint in the County Court against the vendor to recover damages for deficiency in weight:—*Held*, that the cause of action arose in part in the district so as to give the County Court jurisdiction under 30 & 31 Vict. c. 142, s. 1. *In re Green v. Beach*, Ex., 151

—Signing case by the Judge. See Appeal. And see Taxation of Costs.

COVENANT—*limitation of covenant in its terms general: what is a branch of a railway*—The Taff Vale Railway obtained a lease from the trustees of the Bute Docks at Cardiff of land which they

required for the purposes of their railway. The lease was for 250 years. With a view to securing that the proposed railway should not be used so as to take custom from the docks in which they were interested, the trustees inserted a covenant in the lease, on the part of the railway, that the company, so far as they were able, should cause all minerals which should be conveyed upon their line, or any part or branch of it, for shipment, to be shipped into vessels in the Bute Ship Canal (West Bute Dock), or in some basin or cut thereto belonging. Also, that when any minerals, &c., which should have been conveyed along the Taff Vale Railway, or any part or branch thereof, should be shipped into any vessel in any dock or basin whatsoever other than the said Bute Ship Canal (West Bute Dock), or in some dock, basin or cut belonging thereto, the Taff Vale Railway Company should pay to the owners of the said Bute Ship Canal for the time being the same wharfage dues in respect of such minerals as would have been payable for the same if such minerals had been shipped at the said Bute Ship Canal. After the line of railway had been constructed on the land so leased to the Taff Vale Railway Company, the company took a lease of another line (the Penarth Railway) which terminated at Penarth Docks on the south-west side of the river Ely, the Bute Docks being on the north-east side of that river. The Penarth Docks and the Penarth Railway were one concern; the whole was leased by the Taff Vale Railway Company. The two were connected at a station on the Taff Vale Railway:—*Held*, that the Penarth Railway was not a part or branch of the Taff Vale Railway; that the words in the covenant, "any dock or basin whatsoever," must be controlled by some limitation, and so controlled, the covenant must be confined to any dock or basin in connection with the Taff Vale Railway, or some part or branch of it, terminating in or at a dock or basin, and that as the Penarth Railway was not a part or branch of the Taff Vale Railway, the covenant did not apply to minerals shipped or unshipped at Penarth Harbour, though they were carried for a certain distance along the Taff Vale Railway. *The Taff Vale Rail. Co. v. Macnabb* (H.L.); Q.B., 153

—*in restraint of trade: mode of measuring distance*—In determining whether there has been a breach of a covenant entered into by the assignor of a lease of premises, used for a particular business, "that he would not be concerned in that business within a certain distance of the assigned premises," the distance is not to be measured along the nearest practicable route between the two places of business, but along the shortest straight line that can be drawn from one to the other as on a map, without regard to the curvature or the inequalities of the surface of the earth,—affirming the judgment below, 41 Law J. Rep. (N.S.) Exch. 28. *Moufflet v. Cole* (Ex. Ch.); Ex., 8

— to repair. See Landlord and Tenant. And see Mines and Mining Leases.

DAMAGES—*measure of, in action for breach of contract to deliver goods by instalments: action before last instalment?*—Where in the case of a contract for the sale of goods to be delivered during certain specified times, the vendee treats a repudiation of such contract by the vendor as a breach of the whole contract and brings his action for such breach before the expiration of the time for its performance, the true measure of damages is the difference between the market and contract price on each of the times when the goods ought to have been delivered, and if the amount of such damages can be diminished, because at the time such repudiation was so treated as a breach, it was possible to have made another forward contract with some other person for the supply of the goods during the remainder of the times contracted for, it is for the vendor to shew that such other contract could have been made. *Roper v. Johnson*, C.P., 65

— *principle of assessing under Lord Campbell's Act: compensation for loss of annuity: evidence on matters of opinion: skilled witness*—In actions under Lord Campbell's Act, 9 & 10 Vict. c. 93, to recover damages for the benefit of a relative to whom the deceased had covenanted to pay an annuity during their joint lives, it is unobjectionable to direct the jury that they may estimate the damages to the annuitant by calculating what sum would buy him an equally good annuity. That sum must depend, in addition to other contingencies, on the probable duration of the lives, and to ascertain that it is material to know the average duration of the lives of persons of the same age as the lives in question. Such average and probable duration cannot be better shewn than by proving the practice of life assurance companies who learn it by experience; evidence may therefore be given of such practice, and tables—which purport to shew the average duration of the lives of persons of all ages and the value of annuities on government or other very good security for such lives, and to which those companies refer for information—may be consulted to shew what is the average and probable duration of the lives in question, and what is the present value of the annuity, provided the attention of the jury be called to the difference in value between an annuity on government security, and one secured by a personal covenant.—So held per BLACKBURN, J., KEATING, J., GROVE, J., ARCHIBALD, J. (*dissentiente BRETT, J.*) *Rowley v. The London and North-Western Rail. Co.* (Ex. Ch.), Ex., 153

Per BRETT, J.—In such cases the only legal direction to the jury is that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances,

a fair compensation. A direction, therefore, which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost, for a period supposed to be equal to that which would have continued if there had been no accident, is a misdirection, and any evidence (such as that instanced above) given solely to enable a jury to calculate such present value is inadmissible, because necessarily misleading and legally irrelevant. *Ibid.*

A person who though not an actuary is acquainted with the business of life insurance is competent to give evidence as to the average and probable duration of lives and the present value of annuities as given by the tables and accepted by life insurance companies.—So held per BLACKBURN, J., KEATING, J., GROVE, J., and ARCHIBALD, J. (*dubitante BRETT, J.*) *Ibid.*
The jury may properly be directed to consider the lives in question as average lives, unless there is evidence to the contrary; and if there is such evidence, it is for the party excepting to the direction to place the evidence on the bill of exceptions.—So held per BLACKBURN, J., KEATING, J., GROVE, J., ARCHIBALD, J. (*dissentiente HONTMAN, J.*) *Ibid.*

— Measure of, on covenant to repair. See Landlord and Tenant. And see Bill of Lading. Carriers by Railway. Contract.

DEBENTURES—non-negotiability of. See Company.

DEBTOR AND CREDITOR—*order on feme covert to pay debt by instalments under the Debtors Act, 1869, s. 5*—Judgment having been obtained against a married woman in an action in which she did not plead coverture, a judge has jurisdiction under the Debtors Act, 1869, s. 5, to order her to pay the debt by instalments, without being satisfied that she has the means of paying. *Dillon v. Cunningham*, Ex., 11

— See Attachment of Debt. Bankruptcy. Foreign Attachment. Prisoner.

DEFAMATION—*libel and slander before military court of enquiry*—No action lies for libel or slander if the verbal and written statements complained of were made by a military officer, in the course of a military enquiry in relation to the conduct of another military officer, and with reference to the subject of enquiry, although the statements were made *mala fide*, and with actual malice, and without any reasonable and probable cause, and with a knowledge that the statements so made were false. *Dawkins v. Lord Rokeby* (Ex. Ch.); Q.B., 63

Held also, that evidence which is but a parcel of the minutes of the proceedings of the Court, and which when reported and delivered to the Commander-in-Chief are received and held by him on behalf of the Sovereign, is inadmissible. *Ibid.*

DEFAMATION (continued)—*general plea of justification*—The general practice of the Court now is, in actions of libel, to allow pleas of justification in a general form with a liberal allowance of particulars. *Gourley v. Plimsoil*, C.F., 121

— See Interrogatories.

DEMURRAGE—dock: loading in the usual manner: lay-days—By a charter-party it was agreed that the vessel should "proceed direct to any Liverpool or Birkenhead dock as ordered by charterers, and there load in the usual and customary manner a full and complete cargo of coals;" that the vessel should be "loaded at the rate of 100 tons per working day," and that loading should not commence before the 1st of July. On the 3rd of July the vessel was ready to go to the Wellington Dock, which was the Liverpool Dock ordered by the charterers, but she was not admitted into such dock until the 11th of July, because the coal agent employed by the charterers to supply the cargo had then three vessels in that dock and two others booked to come in, and the dock regulations did not allow a coal supplier to have more than three vessels in dock at the same time. Coal agents were usually employed to supply cargoes, and it did not appear that the charterers had made an unreasonable selection of the coal agent they so employed. The vessel entered the dock on the 11th of July, but her turn to go to the spout to receive the coals did not arrive sooner than the 23rd of July, and her loading was not begun until after that day. It was the usual practice to load coal at the spout, but it was also not unusual to load from lighters:—*Held*, that the lay-days did not begin until the vessel had entered the dock to which she had been so ordered by the charterers, but that they begun from that time, and were not postponed until the vessel's turn had arrived to go to the spout. *Tapscott v. Balfour*, C.P., 16

— *charterer's liability to cease: demurrage at port of loading*—It was agreed by charter-party that a ship should load a full cargo at Liverpool in fifteen working days and when loaded proceed to Genoa, there "to be discharged, weather permitting, at the rate of not less than thirty-five tons per working day from the time of her being ready to unload. And ten days on demurrage over and above her said laying days at 8*l.* per day. Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." The charterer having occupied more than twenty-five days in loading, the ship-owner, after a full cargo had been loaded, sued the charterer for the demurrage in respect of some of the ten days:—*Held*, that the charterer was protected by the last clause of the charter-party. *Francesco v. Massey*, Ex., 75

DEPOSITIONS.—See Extradition Act.

DISTANCE—How measured. See Covenant.

DISTRESS—for rent: furniture depository: privilege: estoppel—Goods warehoused in the ordinary course of business at a furniture depository are privileged from distress for rent. *Miles v. Furber*, Q.B., 41

Plaintiff warehoused furniture at a depository in London, and obtained a receipt signed on behalf of "The London Depository Company, Limited." The business of the depository had some years previously been carried on in the same premises by the company, but previously to the deposit they had, under the powers of their articles of association, assigned the good will of their business to B., with liberty to carry on the business in their names, and granted him a lease of the premises. At the time of the deposit the name of the company was painted over the premises; and plaintiff believed that the business was carried on by them, and did not know that B. was their tenant. The company having distrained plaintiff's furniture for rent due from B.,—*Held*, first, that the furniture was privileged from distress for rent; secondly, that even if it had not been so privileged, the company having induced plaintiff to believe that the business was carried on by them could not, in another character, distrain upon his goods. *Ibid*.

EASEMENT—eaves droppings: alteration of dominant tenement—Plaintiff, who had a right to project the eaves of his house over the land of defendant, raised the eaves about thirteen or fifteen inches without changing the extent of their projection over defendant's land:—*Held*, in an action for interfering with such right, that the easement was not destroyed by such raising of the eaves, in the absence of evidence that any additional burthen had been cast upon the defendant's land. *Harvey v. Walters*, C.P., 105

Semble, that the fresh projection over the land of defendant which was made when the eaves were raised, was not a new trespass, but only a mere user of the space taken possession of by the trespass occasioned by the original projection. *Ibid*.

EQUITABLE PLEA—argumentative general issue—To a declaration for money lent, money paid, commission on payment of bills of exchange, interest, and on accounts stated, it is not a good equitable defence, that defendant assigned goods to plaintiff under an agreement that he was to accept and pay bills of exchange against them, make advances, and pay charges, and sell the goods, and satisfy his claims in respect thereof out of the proceeds, and pay over the balance; that the goods would have been sufficient to satisfy such claims, but by defendant's negligence the proceeds became insufficient, and the claim in the declaration was for the insufficiency caused by that negligence. *Best v. Hill*, C.P., 10

ESTOPPEL. See Distress. Executor.

EVIDENCE—payment to third party: receipt: res inter alios acta]—The defendants being bound to repay the plaintiffs what the plaintiffs paid F. for certain work, the plaintiffs in order to prove what they had so paid, &c., proved that having received F.'s bill for doing such work amounting to a certain sum, they sent a cheque by post to F., and F. proved that he received the cheque, and sent in return a receipt, which the plaintiffs produced, and the Judge at the trial allowed it to be put in evidence:—*Held* (BOVILL, C.J., *dissentiente*), that the receipt was admissible as one of the facts connected with the payment, though it would not have been admissible by itself to have proved the payment. *Carmarthen and Cardigan Rail. Co. v. Manchester and Milford Rail. Co.*, C.P., 262

— of alteration of bill of exchange under denial of acceptance. See Bills of Exchange.

— of custom. See Principal and Agent.

— of exclusive right of pasture. See Common.

— of malice from pleadings. See Malicious Prosecution.

— on matters of opinion by skilled witness. See Damages.

— of record by certified copy of record. See Jurisdiction.

EXECUTION. See Attorney and Solicitor.

EXECUTOR—action: plene administravit: devastavit: estoppel from denying assets]—Plaintiff (creditor of testator) having recovered judgment for his debt in an action against the executor after issue found for plaintiff on a plea of *plene administravit*, sued the executor in an action on such judgment, suggesting a *devastavit*:—*Held*, that defendant could not shew that the acts of waste complained of were committed by him before such judgment with the concurrence of plaintiff, as that would amount to no assets as between plaintiff and defendant and would therefore negative the judgment, which defendant was estopped from doing. *Jewesbury v. Mummery* (Ex. Ch.), C.P., 22

— *payment by: before administration granted]*
—An annuity was payable under a will to a woman during her life, and a proportionate part computed from the last day of payment to the date of her death was payable to her executors and administrators:—*Held*, following *Mitchell v. Moorman*, that a payment of this proportionate part to the husband of the annuitant, who never took out letters of administration, was not a good payment in law, and that the amount could therefore be recovered by the son of the annuitant, in administering her estate after the death of the husband, whose executor he also was. *Mitchell v. Holmes*, Ex., 98

EXTRADITION ACT—fugitive criminal: treaty with France]—B. was arrested in the island of Jersey, under a warrant issued pursuant to the Extradition Act, 1870, and was sent to prison, there to remain for fifteen days, after which he was to be surrendered to the French authorities. He had been condemned by a French Court, upon a judgment for three separate offences, one of which, *abus de confiance*, was not within the existing extradition treaty between this country and France, nor within the Extradition Act, 1870, which repeals the 6 & 7 Vict. c. 75, passed for giving effect to the said treaty. By section 3, sub-section 2 of the Extradition Act, 1870, "a fugitive criminal shall not be surrendered to a foreign state, unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning, to her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded."—*Held*, that under the existing law of France such a provision is made, and therefore that B. was not entitled to be discharged. *In re Bouvier*, Q.B., 17

Semble, that the 27th section of the Extradition Act, 1870, has the effect of keeping in full force the said treaty, though it repeals the Act passed to give it effect. *Ibid*.

— *foreign depositions: fraudulent bankruptcy: offence by wife of bankrupt: jurisdiction of magistrate: retrospective operation of Act]*—Under the Extradition Act, 1870, 33 & 34 Vict. c. 52, foreign depositions (if duly authenticated) may be received in evidence in proceedings under the Act, although taken in the absence of the person accused, and without his having had an opportunity of cross-examining the witnesses. *Ex parte Counhaye*, Q.B., 217

In the list of "extradition crimes" in the schedule to the Act are included "crimes by bankrupts against the bankruptcy law":—*Held*, that a married woman charged with complicity in the fraudulent bankruptcy of her husband is not a person charged with a crime within the meaning of the above description, as it is limited to crimes committed by bankrupts only. *Ibid*.

By treaty between this country and Belgium, a requisition for the surrender to Belgium of a fugitive criminal shall be made to the Foreign Secretary, accompanied by a warrant of arrest or other equivalent judicial document issued by a Judge or magistrate, duly authorised, &c., together with duly authenticated depositions taken on oath before such Judge or magistrate, which documents are to be transmitted to the Home Secretary, who, if there be due cause, shall require a magistrate to apprehend the fugitive:—*Held*, that the Secretary may waive the fulfilment of these conditions, and that such documents may be received in evidence before the police magistrate before whom the fugitive is brought, although the warrant is not issued and

the depositions taken before the same Judge. *Ibid.*

Quere, whether the Extradition Act, 1870, applies to criminals who have taken refuge in this country before the date of the Act. (But see 36 & 37 Vict., c. 60, s. 2.) *Ibid.*

FALSE IMPRISONMENT—railway company: power to apprehend: implied authority to station inspector—Plaintiff travelled by defendants' railway with a ticket which entitled him to leave the train at N. Before the train arrived at N. it stopped at E., whereupon plaintiff got out of the carriage, and, upon being asked for his ticket, handed it to the collector. He was told by the collector that it was not available, and that he must pay the sum of 2d. excess fare. He refused to do so, unless a receipt was given to him, and was given into custody by the inspector of the station at E., and charged with having, on arriving at the station at E., refused to deliver up his ticket or pay his legal fare, and thereby defrauding the company of 2d. The charge was preferred before a magistrate, and dismissed. Plaintiff brought an action against defendants for false imprisonment, but was nonsuited, upon the ground that there was no evidence that the inspector had any authority either express or implied from defendants to give plaintiff in charge:—*Held*, in accordance with *Goff v. The Great Northern Railway Company* (30 Law J. Rep. (N.S.) Q.B. 148), that the question was one for the jury, and that the nonsuit was wrong. *Moore v. The Metropolitan Rail. Co.*, Q.B., 23

FALSE REPRESENTATION. See Banking Company.

FEME COVERT. See Debtor and Creditor. Married Woman.

FENCES—obligation to repair. See Negligence.

FOREIGN ATTACHMENT—render: imprisonment: the Debtors Act, 1869—Where in a proceeding by foreign attachment, the defendant renders himself in dissolution of the attachment, and the plaintiff goes on in the action and recovers judgment, the defendant is entitled to be discharged from custody by virtue of section 4 of the Debtors Act, 1869. The 29th section of that Act which preserves the custom of foreign attachment does not operate so as to make the defendant, under such circumstances, liable to be detained in custody. *Waine v. Wilkins*, Q.B., 95

FRAUD. See Banking Company.

FRAUDS, STATUTE OF. See Contract.

FREIGHT. See Bill of Lading. Charter-party. Marine Insurance. Shipping.

FRIENDLY SOCIETY—Insanity is sickness entitling member to relief. *Burton v. Eyden* (M.C. 115), Q.B., 168

GARNISHEE ORDER. See Attachment of Debt.

GOVERNESS—Action by. See Master and Servant.

GUARANTEE—continuing guarantee—Plaintiffs (of whom D. had been in the habit of buying goods) having heard of a bill of sale given by D. to defendants declined to let D. have certain goods he had then bought of them without a telegram from defendants that defendants would be answerable for them. Defendants sent such telegram, and D. had the goods, and in due time paid for them. By the post of the same day on which the telegram was despatched, defendants sent to plaintiffs a letter, in which, after referring to the telegram, and stating that they had done business with D. for five years, and had never known anything dishonest in his transactions, they wrote, "what you have heard was done to protect him from a dishonest tradesman, and will in no way we hope be to the injury of his creditors. Having every confidence in him he has but to call upon us for a cheque, and have it with pleasure, for any account he may have with you. When to the contrary we will write you."—*Held*, that this letter was a continuing guarantee for the amount of goods D. should buy of plaintiffs until they should hear from defendants to the contrary. *Nottingham Hide, &c. Market Co. v. Bottrill*, C.P., 256

HABEAS CORPUS. See Infant.

HARBOUR, DOCKS, AND PIER CLAUSES ACT—Damage to pier by inevitable accident. Liability of owner of vessel. *Dennis v. Tovell*, (M.C., 33), Q.B., 40

HIGHWAY—footpath: limited dedication: right to plough up: nuisance—The public had a right to use a footpath across the field of A., but subject to the right of A. to plough it up when he ploughed the rest of the field. He did so plough it up, and having done so, did not set out or mark the line of the path, but left the public to tread it out. The public continued to walk across the field in the direction in which the path had been, but soon finding the path in a muddy and bad condition, turned out of it, and walked on either side thereof. To prevent them from doing so, A. placed hurdles on the parts upon which the public so walked, leaving a space of about six feet in width where the path had been. The respondent having thrown down the hurdles, an action was brought against him by A. in a County Court. The Judge having given judgment in favour of the respondent, the Court reversed such judgment, holding that the respondent could not claim a right to go off the line of the footpath or a right to pull down the hurdles. *Arnold v. Holbrook*, Q.B., 80

— *non-user by public of highway created under an inclosure act*—A highway cannot be created

by statute unless the provisions of the statute creating it are strictly followed. *Cubitt v. Marse*, C.P., 278

By the General Inclosure Act, 41 Geo. 3. c. 109. ss. 8 & 9, the Commissioner, before making the allotments of the land to be enclosed, was to set out such roads as he should judge necessary, and to appoint a surveyor to form and complete the same, and until so formed and completed the parish was not to be bound to repair such roads, but after that time they were to be for ever after kept in repair by the parish. An Inclosure Commissioner appointed to act under a local Inclosure Act, subject to the provisions of 41 Geo. 3. c. 109, duly set out a road which he described in his award made in 1808, but although such road was staked out on the ground and fenced off from the adjoining allotments on either side, it was never formed and completed as required by the 41 Geo. 3. c. 109, nor was it ever used by the public:—*Held*, that as the requirements of the statute had not been complied with, the road so set out was not a highway created by statute, and as there had been no user, and therefore no acceptance of the road by the public, it was not otherwise a highway. *Ibid*.

— Proceedings for stopping up. Sufficiency of notice of vestry meeting. *R. v. Powell* (M.C., 129), Q.B., 220

HUSBAND AND WIFE—*chose in action: money borrowed and received for improvement of wife's separate estate: set-off of husband's debt: parties to action*—A married woman entitled to property for her separate use was desirous of raising money for the improvement of her estate, while her husband also wished to raise money to discharge a debt. They accordingly arranged through defendant, their solicitor, to borrow money upon mortgage of the separate estate, and upon policies upon the lives of each of them respectively. The money was to be advanced by instalments, and when the first instalment was due the husband and wife signed a joint authority for defendant to receive it for them. Defendant received the money, and claimed to retain part of it in respect of a separate debt due to him as solicitor of the husband:—*Held*, by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench (41 Law J. Rep. (n.s.) Q.B. 146), that in an action by husband and wife defendant could not retain the money, or set off against it a debt due to the husband, as it was received upon the express understanding that it was to be held for the husband and wife jointly, so that there never was any reduction into possession on the part of the husband. *Jones v. Cuthbertson* (Ex. Ch.), Q.B., 221

— See Debtor and Creditor.

INCLOSURE ACT—Construction of reservation clause. See Manor. And see Highway.

NEW SERIES, 42.—INDEX, *Com. Law.*

INDEMNITY. See Auction. Company.

INFANT—*custody of: religious education: testamentary guardian*—Upon an application for a habeas corpus to secure the custody of an infant affidavits were read, which stated that before marriage an arrangement was made between the parents of the infant (the father being a Roman Catholic and the mother a Protestant) that sons of the marriage should be brought up as Roman Catholics and the daughters as Protestants; that a daughter, the infant, who at the date of the application was about ten years old, was, with the sanction of the father, who died a few months after her birth, baptized as a Protestant, and that when she was about a year old she was left in the custody of her maternal grandmother, by whom she was brought up as a Protestant, and at whose expense she was maintained and clothed until the date of the application. It was alleged that two days before the father's death he had executed a document appointing the applicant, his brother, testamentary guardian of his children, but it did not appear that the applicant made any claim to the custody of the child until it was about eight years old:—*Held*, notwithstanding the lateness of the application, that the Court had no power to refuse the writ, so as to give effect to the arrangement made by the father as to the religious education of his child, but as there appeared to be some doubt upon the affidavits as to the validity of the document appointing the applicant guardian, an issue must be directed in order that the question might be submitted to a jury. *In re Edwards*, Q.B., 99

INFERIOR COURT—*Mayor's Court of London Procedure Act, 1857: points reserved for superior court: jurisdiction of mayor's court over cause*—The 10th section of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), enables either party to a suit in that Court, if leave be given to him by the Judge on the trial, to move in any of the Superior Courts to enter a verdict or nonsuit, as the case may be, and gives the Superior Court power to make such order therein as it may think proper, and directs judgment to be entered accordingly:—*Held*, that the disposal by the Superior Court of a rule to enter a nonsuit moved for under that section, does not take away the jurisdiction of the Judge of the Mayor's Court to entertain an application for a new trial. *Lebeau v. The General Steam Nav. Co.*, C.P., 76

— See County Court. Prohibition.

INNKEEPER—*liability of manager holding license for company*—The salaried manager of an hotel belonging to a company is not an innkeeper so as to be by law responsible for the goods and property of the guests, although the usual license under 1 Geo. 4. c. 61, has been granted to him personally. *Dixon v. Birch*, Ex., 135

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INSANITY—a sickness. See Friendly Society.

INSURANCE—*against fire: ship*—A steamship was insured against fire as “lying in the V. docks, with liberty to go into dry dock.” She was taken along the Thames to a proper dry dock, and on her return stopped in the Thames to put on part of her paddles, which had been taken off to admit her into the dry dock, a proceeding usual under the circumstances, and during such stoppage was burnt:—*Held* (affirming the decision below), that this was not a loss within the insurance. *Pearson v. The Commercial Union Assur. Co.* (Ex. Ch.) C.P., 164

— See Marine Insurance.

INTERPLEADER—*mortgage of trade fixtures: registration*—An indenture of lease for a term, of which about sixteen years were to run, was assigned in the year 1868 to H., and by the indenture of assignment the trade fixtures upon the premises were absolutely assigned to him. By an indenture of mortgage, dated 20th March, 1872, H. demised the premises to plaintiffs for the residue of the said term except the last two days, and he also assigned to plaintiffs the trade fixtures, subject to redemption on payment of the amount of mortgage debt and interest. The indenture of mortgage was not registered under the Bills of Sale Act. A judgment having been obtained against H., the sheriff, on 14th April, 1872, by virtue of a *f. fa.* seized the said trade fixtures, as well as the moveable and unfixd machinery and effects, all of which were at the time of the seizure in the apparent possession of H. Plaintiffs thereupon claimed the trade fixtures as being their property:—*Held*, upon an interpleader issue that the indenture of mortgage of 20th March, 1872, ought to have been registered under 17 & 18 Vict. c. 36, and that plaintiffs were not entitled to claim the trade fixtures which had been assigned to him. *Hawtre v. Bullin*, Q.B., 163

INTERROGATORIES—*before plea: libel: particulars under plea of justification*—Though there is no rule to preclude a defendant from being allowed to deliver interrogatories to the plaintiff before he has pleaded, yet if he seeks to be allowed to deliver them before plea, he must first disclose the nature of his defence, in order to shew that the interrogatories are for the purpose of supporting such defence. *Gourley v. Plimsoll*, C.P., 244

Where, therefore, in an action for libel the defendant pleaded a justification in a general form he was not allowed to deliver interrogatories to the plaintiff until, either by affidavit or by particulars, he had first disclosed the matters on which his justification was founded. *Ibid.*

— *cross interrogatories to discredit witness resident abroad*—An action having been brought

against defendant for the unskilful spinning of yarn, defendant obtained an order for the examination by interrogatories of a person whom he had employed as manager of his works, and who had gone to America. Plaintiff proposed to examine him upon cross-interrogatories, several of which were directed to the question whether or not he had left his wife and children in England, and whether or not he had taken another woman with him to America:—*Held*, that as these questions were not relevant to the issue, and had a tendency to deter the witness from coming to England to give evidence, they could not be allowed. *Stocks v. Ellis*, Q.B., 241

JURISDICTION—*trial of issue of nul tiel record: evidence: certified copy of record of acquittal*—The issue of *nul tiel* record is tried by the Court and not by a jury. *Richardson v. Willis*, Ex., 15

An action in a Superior Court is a “proceeding” in which a certified copy of a record is admissible as evidence of the record under 14 & 15 Vict. c. 99. s. 13. *Ibid.*

LANDLORD AND TENANT—*breach of covenant: house taken by railway: damages*—Where a railway company give the lessee for years of a house notice to treat, an award is made, and eventually a conveyance executed, and thereupon possession given to them, such lessee is liable to his landlord at all events up to that time, on a covenant to repair and keep in repair, and the measure of damages is the diminution of the market value of the reversion at that time. *Mills v. The Guardians of the East London Union*, C.P., 46

— See Distress. Trover.

LANDS CLAUSES CONSOLIDATION ACT—*superfluous land unsold: rights of adjoining owners*—Circumstances under which certain land was held, by the Exchequer Chamber, to be land acquired by promoters under a railway Act, and superfluous land which they were bound to sell and dispose of within ten years,—affirming the decision of the Queen’s Bench (41 Law J. Rep. (N.S.) Q.B. 104). *May v. The Great Western Railway Company* (Ex. Ch.), Q.B., 6

— See Compensation.

LEASE. See Covenant. Landlord and Tenant. Mines and Mining Leases.

LIBEL. See Defamation.

LICENSING ACT, 1872. See Alehouse.

LIEU—for freight. See Shipping. And see Bill of Lading.

LIMITATIONS, STATUTE OF—*mortgagor and mortgagee: adverse possession: payment of interest*

after twenty years: county court: time for appealing—Where a demise for a term of 1,000 years by way of mortgage is created in land, and no payment of principal or interest or acknowledgement is made for more than twenty years, and the mortgagee and those claiming under him remain in possession of the premises without interruption, the title of the mortgagee under the mortgage is thenceforth barred, therefore a payment of arrears of interest and the principal to the mortgagee under a decree in the foreclosure suit, after that time has elapsed, does not revive the title in the mortgagee, and an ejectment does not then lie to recover the possession. *Hemming v. Blanton*, C.P., 158

Semble, notice of appeal against the determination of the Judge in a plaint in the County Court is in time where a nonsuit was entered at the trial, and an application to set aside the nonsuit afterwards refused, if it be given within ten days after the refusal to set aside the nonsuit. *Ibid.*

LOCAL GOVERNMENT ACT—adoption of the Act: place having a known and defined boundary—By the Local Government Act, 1858 (21 & 22 Vict. c. 98), it is enacted that the Act may be adopted in corporate boroughs and places under the jurisdiction of a board of competent commissioners, and in all other places having a known or defined boundary, by a resolution of the owners and ratepayers, subject to appeal to the Local Government Board:—*Held*, that interpreting the words "place having a known or defined boundary" in the above statute, the word "place" is to be received with the widest possible signification, and is not restricted to the accustomed legal divisions of the country, such as manors, hamlets, townships or parishes, and may, therefore, consist of portions of different townships or parishes, and a place so composed has a "known or defined boundary," which has a physical, visible and notorious boundary, so that there can be no mistake as to its limits. *R. v. The Local Board of Gramere*, Q.B., 131

LORD MAYOR'S COURT—Time for leave to appeal. See Appeal. And see Inferior Court. Prohibition.

MALICIOUS PROSECUTION—evidence of malice from pleadings—Where in an action for maliciously giving plaintiff into custody and for slander, defendant pleaded to the latter cause of action a plea in justification, which would have been no answer to the former, and at the trial plaintiff failed to prove the slander,—*Held*, that the jury ought to disregard this plea in considering the former cause of action. *Brooke v. Avrillon*, C.P., 126

MANDAMUS—to register shares. See Company. Married Woman.

MANOR—manorial rights: reservation in inclosure act of right of sporting—The reservation clause

in an enclosure act enacted that nothing in the Act should prejudice the right of the lord of the manor "of, in or to the seignory or royalties incident or belonging to such manor or lordship, or either or any of them, but that the lord should and might, from time to time, and at all times, hold and enjoy all rents, quit rents and other rents, reliefs, duties, customs and services, and all courts, perquisites and profits of courts, rights of fishery and liberty of hawking, hunting, coursing, fishing and fowling within the said manor, and all tolls, fairs," &c., "royalties, jurisdictions, franchises, matters and things whatsoever to the said manor, or to the lord or lady thereof incident . . . other than and except such common right as could or might be claimed by the lord as owner of the soil and inheritance of the said commons or waste grounds."—*Held* (HONYMAN, J., *dissentiente*), that this reservation clause reserved to the lord only his seigniorial or manorial rights, and did not extend to his territorial right, as owner of the soil, of shooting over the allotted lands, and that the case was therefore within *Bruce v. Halliwell* (5 Hurl. & N. 609; s. c. *nom. Bruce v. Helliwell*, 29 Law J. Rep. (N.S.) Exch. 297), and was distinguishable from *Ewart v. Graham* (7 H.L. Cas. 331; s. c. 29 Law J. Rep. (N.S.) Exch. 88). *Sowerby v. Smith*, C.P., 233

MARINE INSURANCE—general average: damage to cargo by water to extinguish fire: practice of average staters: bill of lading: "average, if any, to be adjusted according to British custom"—A ship was lying at anchor in port with a general cargo on board, when a fire broke out in the forehold. Every effort was made, but without success, to extinguish the fire by throwing water down the hatchways and upon the cargo. Finally, a hole was cut in the side of the vessel, and her fore compartment filled with water. This extinguished the fire, and if it had not been done the cargo would have been destroyed, and the ship seriously damaged if not rendered a total wreck. Part of a quantity of bark, shipped on board by the plaintiffs, was damaged or destroyed by the water which was poured or let into the vessel to extinguish the fire. The bark was shipped under a bill of lading, which contained the words, "average, if any, to be adjusted according to British custom." It is the practice of British average adjusters in adjusting losses to treat a loss occasioned by water in the manner above described as not a general average loss:—*Held*, affirming the judgment of the Queen's Bench, p. 84, but without determining whether the loss was (as held in the Court below), according to the general law of England, the subject of a general average contribution, that the words "British custom" in the bill of lading must be taken to mean the practice of British average adjusters, so that the claim for general average was expressly excluded. *Stewart v. The West Indian and Pacific Steamship Co.* (Ex. Ch.), Q.B., 191

MARINE INSURANCE (continued)—*action where no stamped policy executed: slip*—Defendants, an Insurance Company at Liverpool, employed E. & Co. as their agents in London to accept risks and receive premiums in London for policies of marine insurance. Plaintiffs instructed P. & Co., insurance brokers in London, to effect an insurance upon a cargo of rails. P. & Co. on the 16th of November, 1871, prepared a slip which was initiated by E. & Co., and a copy was made out by P. & Co. who sent it to E. & Co. On the same night E. & Co. sent the copy to defendants at Liverpool. A policy ought to have been executed and sent soon after, but this was not done. An account, including 2s. 6d. policy duty, was sent by E. & Co. to P. & Co., who paid it on 13th March, 1872. No stamped policy was ever prepared or executed, and the ship on which the cargo of rails was having been lost, defendants refused to execute the policy or to pay the insurance money. The jury found that defendants authorised E. & Co. to issue slips, accept risks and receive premiums; that they had given plaintiffs reasonable ground to believe, and that plaintiffs did believe, that if they paid the premium and stamp on a slip initiated by E. & Co. they, defendants, would issue a policy in accordance with the slip. They also found that plaintiffs were prevented by the conduct of defendants from insuring elsewhere:—*Held*, by QUAIN, J., and ARCHIBALD, J. (BLACKBURN, J., *dissentiente*), that no action was maintainable by plaintiffs against defendants without contravening the provisions of ss. 7 and 9 of 30 Vict. c. 23, and, therefore, that plaintiffs could not recover in any form of action against defendants. *Fisher v. The Liverpool Marine Insur. Co.*, Q.B., 224

—*deck cargo: open policy: declaration of risks*—A shipowner—who was in the habit of receiving shipments of cotton to be carried on deck, sometimes at the request and risk of the shippers, sometimes for his own convenience, and under a clean bill of lading at his own risk—to protect himself as to jettison in the latter case, entered into open policies of insurance as to which the usage was that he was bound to declare all his risks in order of shipment, and rectify any mistake even after loss known. His agent, by negligence or mistake, gave a clean bill of lading for a certain shipment and gave no notice to him, but such shipowner on discovering the omission altered his declarations by inserting this shipment though after loss known:—*Held*, that the shipowner had an insurable interest, as at law a written contract cannot be varied on the ground of negligence or mistake, and was entitled to alter the declarations both according to the usage, which could not be said to be unreasonable, and according to the doctrine to be deduced from decided cases, that by the usages of merchants and underwriters, recognised by the Courts without formal proof, such declarations may be altered

even after loss known, if the alterations be made innocently and without fraud. *Stephens v. The Australasian Insur. Co.*, C.P., 12

—*slip and policy: additional terms: concealment of material fact: continuing policy*—Defendants, on March 11, agreed to insure freight by plaintiff's vessel on a certain voyage, and a slip containing the terms of the insurance was then drawn up by defendants, who on that day accepted the risk. No question was then asked as to the insurance on the hull of the vessel, but on March 17, when the stamped policy was issued, defendants required to know the insurance on the hull, and upon learning it issued the policy, with a warranty inserted therein that the hull was not insured beyond that amount:—*Held*, that the addition of such warranty did not prevent the policy from being drawn up in respect of the risk accepted on March 11, and therefore it was not necessary for plaintiffs to have communicated to defendants the loss of the vessel, which had occurred on March 16, as plaintiffs knew, before the stamped policy was issued. *Lishman v. The Northern Maritime Insur. Co. (Lim.)*, C.P., 108

A policy of insurance was made on a vessel for a year, by an insurance association, by the rules of which the insurance was to be from year to year, unless notice to the contrary be given, and the managers, unless they receive ten days' notice to the contrary, were to renew the policy on its expiration:—*Held*, that according to the terms of such rules, and 30 & 31 Vict. c. 23, s. 8 (which makes null a policy exceeding twelve months), the policy was not a continuing one, but expired at the end of the year. *Ibid*.

—Breach of warranty against contraband of war. Judgment of the Queen's Bench (41 Law J. Rep. (N.S.) Q.B. 193) affirmed. *Seymour v. The London and Provincial Maritime Insur. Co.*, C.P. 111 n.

—*prospective freight: total loss: notice of abandonment*—Notice of abandonment need not be given where there is nothing which on abandonment can pass or be of value to the abandonnee. *Rankin v. Potter* (H.L.), C.P., 169

Where there is a constructive total loss of the ship and it is impossible for its owners to earn the chartered freight, and there is therefore an actual and not a constructive total loss of such freight, no notice of abandonment is necessary. *Ibid*.

No such notice is necessary where the ship never having been ready to receive the chartered cargo there was nothing to abandon to the underwriter on freight. *Ibid*.

What amounts to constructive total loss of ship, and what is sufficient notice of abandonment of freight. *Ibid*.

—*prepayment of part of freight: insurance on freight: interest insured*—The term "freight" in a policy of insurance may be

limited by the assured to such freight only as he has an insurable interest in at the time of effecting the assurance. *Allison v. The Bristol Marine Insur. Co.*, C.P., 384

By a charter-party under which plaintiff's vessel was chartered to carry a cargo of coal from Greenock to Bombay, freight was to be paid on the right delivery of the cargo at a certain rate per ton on the quantity delivered, and such freight was to be paid half in cash on signing bills of lading and the remainder on the right delivery of the cargo. The vessel left Greenock with her chartered cargo and was wrecked on the voyage, and half its cargo was totally lost, but half was saved and delivered at Bombay the port of destination, but as the freight in respect of such cargo was less than the freight which had been paid in advance on signing the bills of lading, plaintiff received no freight on the delivery of such half but totally lost the same:—*Held*, that the freight which the plaintiff so lost was recoverable as a total loss under an insurance of "freight" by the said vessel, on the said voyage, which the plaintiff effected after the charter-party, although the underwriters were not informed, at the time, of such charter-party, and that part of the freight was payable in advance, as the plaintiff at the time of effecting such insurance had only an insurable interest in so much of the freight as was payable on the delivery of the cargo at the port of destination. *Ibid.*

— *insurable interest entitling parties to bring action*—Plaintiffs were cotton brokers and agents in London, who were accustomed to receive consignments of cotton from Bombay for sale on behalf of the shippers who drew bills of exchange on them against the consignments; the bills of exchange were usually negotiated in India, sent to this country with the bills of lading attached as security, presented to, and accepted by, plaintiffs against delivery of the shipping documents; and plaintiffs were in the habit of effecting open floating policies of insurance with the defendants "as well in their own names as for and in the name or names of all and every person or persons to whom the same doth, may or shall appertain in part or in all." Cotton having been shipped, bills of exchange drawn on plaintiffs against it, negotiated and sent with the bills of lading and accepted against delivery of the documents, plaintiffs declared the cotton against two open floating policies previously made and not yet exhausted; and the cotton being lost, the bills of exchange paid by them, and the bills of lading obtained, brought an action on the policies, averring that they, or some or one of them, were interested to the full amount named, and that the insurances were made for the use and benefit and on account of the persons so interested:—*Held*, per BOVILL, C.J., and DENMAN, J., on the facts of the case, that plaintiffs had an equitable interest in every part of the cotton, and that it was intended that not only their interests but those of the other par-

ties interested should be covered, and that plaintiffs having such an interest and a duty of selling and managing, were in law entitled so to insure and were the only persons to bring an action, and might aver, as they did in their declaration, and recover to the full extent, applying the proceeds to their own benefit to the extent of their own claims, and holding the residue for the other persons interested; but per BART, J., and KEATING, J., plaintiffs were consignees for sale of goods not arrived, who had made advances on goods, but had only a contract right as to them, and though interested in every part were not the legal owners, and therefore they were by law limited to the recovery of their own beneficial interest, which alone they could properly insure and recover, *Ebworth v. Alliance Marine Insur. Co.*, C.P., 305

— *risk during land transit: restraint of princes: goods in a besieged town*—By an ordinary Lloyd's policy goods were insured from Shanghai to London, via Marseilles, and whilst remaining there for transit, including all risks of craft to and from the steamers, and the risks insured included "arrests, restraints and detentions of princes." Goods sent from Shanghai to London, via Marseilles, are always sent overland through France, and this was well known to underwriters. The goods insured having arrived at Marseilles, were in the usual course forwarded by railway to Paris to go from thence to Boulogne; but soon after they reached Paris, that city was so completely surrounded and invested by the German armies, who were then besieging it, that it was impossible to remove the goods from it, and accordingly the assured gave notice of abandonment to the underwriters of the policy:—*Held*, that the policy covered the risk during the land transit of the goods through France, and also that there was a loss by "a restraint of princes" within the terms of the policy, which justified the notice of abandonment. *Rodocanachi v. Elliott*, C.P., 247

— *separate packages: damage to some packages by sea water, to others from suspicion and prejudice*—By a marine policy of insurance the insurance was described to be "on 1,711 packages teas," valued at one sum, on a voyage from New York to London, by a certain ship "warranted by the assured free from damage from dampness, change of flavour, or being spotted, or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils." In case of partial loss by sea damage to certain goods, not including tea, "the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, [as far as practicable]." The ship met with very bad weather during the voyage, and 449 of the 1,711 packages of the tea were seriously damaged by actual

contact of sea water. The rest of the packages arrived sound and in good condition, except by the injury to their reputation from having formed part of a shipment of which 449 packages had been damaged by sea water, and which was the cause, as was usual in such cases, of these packages, though sound and uninjured, not realising so high prices as they would have done if the 449 packages had not been damaged by sea water:—*Held*, that the packages insured by the above policy were divisible, and that the assured was entitled to recover only in respect of the 449 packages which were actually damaged. Also, that the loss in value of the goods depended on their value at the time of their arrival at the port of destination, and not at the time of sale, and the underwriters were therefore not liable for a fall in the market price between such arrival and the time of sale. *Cater v. The Great Western Insur. Co. of New York, C.P.*, 266

MARINE INSURANCE (continued)—*voyage or time policy: South-West African coast trade: deviation: meaning of "stay and trade"*—By the terms of a marine policy the insurance was expressed to be an insurance on a vessel and cargo "at and from Liverpool to the west and (or) south-west coast of Africa during her stay and trade therein and back to a port of call or (and) discharge in the United Kingdom." The premium was 8 guineas per cent. on the value insured. 20 per cent. of the premium was to be returned for the risk ending in ten months and 40 per cent. for the risk ending in eight months; and there was written in the margin "held covered at 13s. 4d. per cent. per month if longer than twelve months out." The vessel having stayed a month on the African coast for the purpose of earning salvage, and having been damaged there, and afterwards stranded on her voyage home, the owners sued for a total loss:—*Held*, that the words "stay and trade" meant "stay for the purpose of trade"; and that, no evidence being given that staying for salvage purposes was staying for an ordinary purpose of the South-West African coast trade—the risk had been substantially varied, that there was in the absence of such evidence no question for the jury, and that they were properly directed to find for the underwriters. *The Company of African Merchants (Lim.) v. The British and Foreign Marine Insur. Co. (Lim.)* (Ex. Ch.); Ex., 60

— *slip: policy: concealment of material facts: Lloyd's lists: election to avoid contract*—There is no presumption of law that underwriters are acquainted with the contents of Lloyd's Lists, so as to discharge an assurer from the duty of communicating material facts known to himself and published in those lists. *Morrison v. The Universal Marine Insurance Company, limited*, Ex. 17

— *slip: policy: concealment of material fact: election*—Underwriters having agreed upon the

terms for a marine insurance with the broker of the assured, initialed the slip and debited the broker with the premium, in ignorance of facts material to be communicated to them, and known to the broker. Shortly afterwards the underwriters discovered the concealment, and mentioned it to the broker, but raised no objection, and afterwards, at the usual time, executed and delivered to the broker in silence a stamped policy in accordance with the slip. News of a total loss having arrived, they repudiated their liability on the ground of the concealment and the assured sued them on the policy. By 30 & 31 Vict. c. 23, s. 9, no policy shall be pleaded or given in evidence in any Court, or admitted in any Court to be good or available in law or in Equity unless duly stamped. It was conceded that in effecting marine insurances, when the slip is initialed the contract is considered concluded; and it was proved to be the usage to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initialed:—*Held* (reversing the judgment of the Exchequer, page 17), that since the assured had not been induced to alter his position by a belief that the underwriters had elected to treat the contract as binding, the delivery of the stamped policy was not an act of estoppel; nor even *prima facie* evidence of an election, so as to make it incumbent on the underwriters to shew that the assured did not understand, or had no right to understand, the conduct of the underwriters as an election. *Morrison v. The Universal Marine Insur. Co. (Lim.)* (Ex. Ch.), Ex., 116

MARRIED WOMAN—*registration of stock in name of married woman*—Upon the application of a married woman under the Married Woman's Property Act, 1870, s. 4, that shares in a joint stock company may be registered in her name as a married woman entitled to her separate use, it is the duty of the company to investigate and recognise her title, and a mandamus to enforce the performance of this duty will be granted by the Court. *The Queen on the prosecution of Fraser v. The Carnatic Rail. Co. (Lim.)*, Q.B., 169

— Order on to pay debt under the Debtors Act, 1869. See Debtor and Creditor.

MASTER AND SERVANT—*action by governess: non-disclosure of material fact: absence of fraud*—In an action by a governess for breach of an agreement in writing, in which she was described as M. K., spinster, and by which defendant undertook to employ her for a term of three years, it was pleaded that plaintiff intending to induce defendant to enter into the contract, concealed from him a fact material to her qualifications as such governess, and material to be known by defendant in engaging her as such governess, namely, that she had previously been married, and that the marriage had been dissolved by decree of the Divorce Court:—*Held* on demurrer, that the plea was bad, as there was no allegation

of fraud, and the mere non-disclosure of a material fact was, except in the case of policies of insurance, no answer to an action upon a contract. *Fletcher v. Krell*, Q.B., 55

— *evidence of negligence of servant in his employment*]—The fact that a passenger in an omnibus is struck by the driver's whip is *prima facie* evidence of negligence by the driver in the course of his employment; and even if it appear that the blow was struck at the servant of another omnibus with whom there had been a dispute, and who had jumped on the omnibus step to get its number, it is a question for the jury whether the blow was struck by the driver in private spite or in supposed furtherance of his employer's interests. *Ward v. The General Omnibus Company* (Ex. Ch.), C.P., 265

— *negligence of servant: acting within scope of employment*]—One W. being employed to cart certain iron to a wharf, and defendant, a stevedore, to ship it on board a ship alongside, defendant's foreman, who was acting for him, being dissatisfied with the uncarting of the iron by W.'s carters, got into the cart, threw out some iron, and in so doing injured plaintiff. Two of plaintiff's witnesses said it was the duty of W.'s carters to put the iron on the ground, and of the stevedore then to take it, and this was the only evidence as to the duty of defendant and his servants:—*Held*, by GROVE, J., and DENMAN, J., that it was a question for the jury whether, in the particular case, the foreman was acting within the scope of his employment; but by BRETT, J., that the Judge was bound to say that what was done by him was done before his employment by defendant commenced. *Burns v. Poulson*, C.P., 302

— *Liability for acts of Servant*. See Carriers by Railway. And see Negligence. Principal and Surety.

MAYOR'S COURT OF LONDON. See Appeal. Inferior Court. Prohibition.

MEDICAL ACT—*right of surgeon to sue for medicines unconnected with surgical treatment*]—Under the Apothecaries Act (55 Geo. 3. c. 194), s. 21, which is not repealed by the Medical Act, 1858 (21 & 22 Vict. c. 90), ss. 31, 32, a member of the College of Surgeons, registered as a surgeon only under the later Act and having no further qualification, cannot recover for medicines administered by him in a case, not requiring surgical treatment. *Leman v. Fletcher*, Q.B., 214

METROPOLIS GAS ACT, 1860—The provisions of this Act are not repealed by the Gas Light and Coke Company's Act, 1868—affirming the decision of the Queen's Bench, 41 Law J. Rep. (N.S.) Q.B. 36. *The Gas Light and Coke Com-*

pany v. The Vestry of St. George, Hanover Square (Ex. Ch.), Q.B., 50

METROPOLIS LOCAL MANAGEMENT ACTS—Provisions for paving new streets. Lands used for purposes of a railway. *Higgins v. Harding*, (M.C., 31), Q.B., 27

— *paving expenses: apportioned amount of expenses payable by future owners*]—The effect of the 77th section of the Metropolis Local Management Act, 1862, is to make the apportioned amount of paving expenses incurred under the Act a charge on the premises in respect of which the amount has been apportioned; and the District Local Board may recover the amounts so apportioned from subsequent owners of the premises accordingly, although no arrangement be made for payment by instalments—affirming the decision below, Ex. page 50. *Ingoldby v. Plumstead Board of Works* (Ex. Ch.), Ex., 136

— *Building erected beyond general line*. Limitation of time for complaint. Penalty or forfeiture. *Vestry of Bermondsey v. Johnson* (M.C. 67), C.P., 161

— *Repairs of new street*. *R. v. The Hackney Board of Works* (M.C., 161), Q.B., 236

MINES AND MINING LEASES—*demise of mines and minerals: compensation clause: right of surface owner to support*]—Declaration for negligently excavating and working mines under and adjacent to land of the plaintiff, whereby the land gave way and sank, and a mill, cottage and other buildings became prostrate and ruinous, and a stream of water was diverted from the plaintiff's land. Plea, that by an indenture of lease made before plaintiff became possessed of the land as alleged, the owners in fee demised unto certain lessees, whose interest afterwards vested in the defendants, for thirty-eight years from the 25th of March, 1839, all and all manner of veins and seams of coal, and ironstone and other stone and minerals of any manner or sort whatsoever, that should or might be found or discovered in or under the land, with full power, liberty and authority to get the coal, ironstone and other stone and other minerals out of all pits already sunk or open, and the like liberty and authority to bore, dig, delve and sink as many other pits as the lessees might think necessary, the lessees making reasonable satisfaction to the owners in fee, their heirs and assigns, and their tenants, for the damage done to them respectively by the surface of their land being covered with rubbish or otherwise injured, or as they might sustain as well by the injury done to the lands of the owners in fee in sinking and getting the mines and minerals, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said owners by so doing. The lessees covenanted in case of damage or injury to such buildings to rebuild or repair the same; and

also over and besides the immediate damage to stock or crops so damaged, to pay a satisfaction for all damages sustained by the owners in fee after the rate of 40s. per annum for five years from the commencement of the damage, and after that time to pay such a price for the land so damaged as should be settled by arbitration:—*Held*, that upon the true construction of the lease, the owners in fee granted the absolute right to work the minerals, without regard to injury to the surface, subject only to the obligation to pay compensation according to the covenant. *Smith v. Darby*, Q.B., 140

MINES AND MINING LEASES (continued)—*reservation of: compensation for damage from workings*—Lessees of lands subject to clauses reserving to lessor the minerals with power to work them, making compensation, bought the reversion subject to similar clauses, which reserved the minerals with working powers of an extensive character, and provided for compensation for damage or spoil to the ground thereby:—*Held*, that the true construction of the particular deed was that the compensation was to be made, not merely as to future workings, &c., but also for subsequent damage accruing from the future use of existing workings, &c., and that such compensation was to be assessed with reference to the marketable value of the land, taken or damaged, for all purposes to which it was reasonably applicable, without regard to the powers of working, &c., to which it was subject, and that there was no restriction on increasing the weight in the mines. *Mordue v. The Dean and Chapter of Durham*, C.P., 114

—*mining lease: support of surface by subjacent land: liability for subsidence*—When the owner of surface and minerals beneath grants a mining lease of the minerals for a term, there is not, outside the contract, an implied reservation of any right to have the surface supported by the minerals. The contract itself must be looked at, and construed with regard to the subject matter, in order to arrive at the extent to which the owner authorises the minerals to be removed. *Eaton v. Jeffcock*, Ex., 36

Where a mining lease authorised the removal of all the coal beneath the surface except certain portions, subject to a covenant to work the mine in a good and workmanlike manner,—*Held*, that the lessees, doing only what the lease authorised them to do, were not responsible to the lessor for the subsidence of the surface caused by their mining operations.—*Dugdale v. Robertson* distinguished. *Ibid*.

—*Damage to mines*. See Canal and Canal Company.

MORTGAGE—*right of mortgagee to sue for debt after sale of mortgaged property: equitable plea: striking out plea*—To a declaration on the mortga-

gor's covenant to pay the debt, the action being brought to recover the balance due to the mortgagee, after giving credit for the money realised on the sale of the mortgaged property, the defendant pleaded, by way of equitable defence, a plea which shewed that the plaintiff had taken possession of the mortgaged property, and had sold the same under the power of sale contained in the mortgage, and had thereby, as the plea alleged, deprived the defendant of his right to have such property reconveyed to him upon payment of the money and interest due on the mortgage. This plea was pleaded under a master's order, which gave the plaintiff liberty to reply and demur thereto. Instead of demurring, the plaintiff applied for and obtained an order from a Judge to strike the plea out:—*Held*, that such Judge's order was rightly made, as the plea was clearly bad, since it did not shew that sufficient had been realised by the sale to satisfy the debt. *Rudge v. Richens*, C.P., 127

— See Interpleader.

MUNICIPAL ELECTION—*election of borough councillor: burgess on roll for two wards: selection of ward*—By the Municipal Corporation Act, 5 & 6 Will. 4. c. 76, s. 44, "if a burgess be rated in respect of distinct premises in two or more wards, he shall be entitled to be enrolled and to vote in such one of the wards as he shall select, but not in more than one." At an election of councillors for a borough which was divided into wards a burgess who was on the roll for two wards voted for the defendant in one ward, and immediately afterwards voted in the other ward:—*Held*, on the authority of *The Queen v. Tugwell* (37 Law J. Rep. (N.S.) Q.B. 275), that the vote was good, and that the voter having voted in one ward, had irrevocably made his selection, which was not affected by what took place afterwards. *Regina v. Harrauld*, Q.B., 211

—*Ballot Act: duties of presiding officer and clerks: action for breach of duty: pleading*—Under the Ballot Act, 1872, it is the duty of the presiding officer at a polling station, or a clerk deputed by him, whichever of them in fact undertakes it, to deliver to the voters ballot papers bearing the official mark, and to be present, so that each voter, before placing his ballot paper in the box, can shew to him the official mark on its back; but *prima facie*, and in the absence of it appearing that a clerk has been deputed by such presiding officer to fulfil it, the duty lies on such officer.—So *Held* by the whole Court. *Pickering v. James*, C.P., 217

But it is doubtful whether there is a similar duty as to ascertaining, before the voters put their ballot papers in the box, whether they are properly marked with the official mark.—*Kearns, J.*, and *Barrt, J.*, holding that there is, and

BOVILL, C.J., and GROVE, J., that there is not. *Ibid.*

Where the presiding officer or clerk commits a breach of duty, he is liable to an action for damages by the party aggrieved, though the breach be not wilful or malicious.—So *Held* by the whole Court. *Ibid.*

Where the declaration sufficiently states the duty, and breach thereof by the defendant, and after stating facts not sufficiently shewing the plaintiff is aggrieved, alleges that "by reason of such neglect of duty the plaintiff was prevented from being elected," such allegation is one of fact and sufficient to shew the plaintiff is aggrieved.—So *Held* by KEATING, J., BRETT, J., and GROVE, J. (*dissentiente* BOVILL, C.J.). *Ibid.*

NEGLIGENCE—obligation to repair fence: escape of cattle: want of notice of fence being out of repair—Plaintiff and defendant were occupiers of adjoining closes of land separated by a fence, situated on defendant's close, and the property of defendant. For more than forty years the fence had been repaired whenever repairs were necessary by the owner and occupiers of defendant's land, and on several occasions the fence had been repaired by defendant and his predecessors in title upon notice from the occupier for the time being of plaintiff's close. Defendant sold the fallage of the wood on his close to one H., who proceeded to fell the trees, and some of his servants felled a tree in so negligent a manner that it caused a gap in the fence through which the plaintiff's cattle entered the defendant's close, and having eaten some of the foliage of a yew tree there died in consequence. In an action in the County Court the Judge found as a fact that there was an obligation on the part of defendant to keep the fence in repair for the purpose of preventing cattle lawfully in plaintiff's close from escaping into defendant's close, and that the escape of the cows was caused by negligence of the servants of H., but that defendant had not received notice that the fence was broken down. Upon these facts the Judge held that defendant was not responsible for the injury to plaintiff:—*Held*, that the decision was wrong as it appeared from the evidence that the defendant was bound at his peril at all times to maintain the fence and without notice to repair it, and the damage done to the cattle was proximately due to the defective state of the fence. *Lawrence v. Jenkins*, Q.B., 147

— **duty to fence adjoining lands: liability to persons not owners or occupiers**—When a railway company have neglected the duty imposed on them by the Railways Clauses Consolidation Act, 1845, to fence their line from the adjoining lands, and in consequence of such neglect cattle in the adjoining lands pass on to the line and are injured by the company's trains, an action for the injury may be maintained against the company by the owner of the cattle, though he has no more interest in the adjoining lands

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than a license from the occupier thereof to graze the cattle there. *Dawson v. The Midland Rail. Co.*, Exch., 49

— **injury to passenger in omnibus: evidence for jury**—In an action against an omnibus proprietor for injury to a passenger, it was proved, on behalf of the latter, that he was sitting inside the omnibus, and was injured by one of the horses kicking the front panel constituting the back of his seat, and that on a subsequent examination marks of other kicks were seen:—*Held*, that there was evidence of negligence of the defendants to go to the jury. *Simpson v. The London General Omnibus Company*, C.P., 112

— **causing death of servant: action for loss of service: expense of burying servant who was also a child**—To a declaration alleging that by reason of the negligence of defendant's servant plaintiff's daughter and servant was killed, and claiming damages for loss of services and for the burial expenses paid by plaintiff, defendant pleaded—first, that the daughter and servant was killed on the spot by the act complained of, so that plaintiff did not and could not sustain damage entitling him to sue; and secondly, that the act complained of was a felonious act on the part of defendant's servant, and that the servant had not, before the action been tried, committed or prosecuted in any way in respect of the same:—*Held*, *per totam curiam*, that the second plea afforded no answer to the declaration; and held by KELLY, C.B., and FROST, B., that the first plea afforded a good answer, on the ground that, apart from Lord Campbell's Act (9 & 10 Vict. c. 93), no civil action is maintainable against a person who has by negligence caused the death of another. But held by BRAMWELL, B., that the first plea afforded no answer, and that the action was maintainable. *Osborne v. Gillett*, Ex., 53

— for injuries to passengers. See Carriers by Railway. And see Arbitration. Equitable Plea. Master and Servant.

NEW TRIAL. See Practice.

NONSUIT. See False Imprisonment.

NUL TIEL RECORD. See Jurisdiction.

PARLIAMENT—county vote: rent-charge: actual possession: operation of the statute of uses—A rent-charge was granted to A., B. and C. to hold to the said A., B. and C. to the use of the said A., B. and C., their heirs and assigns for ever as tenants in common:—*Held*, that such grant took effect at common law and not by operation of the Statute of Uses (27 Hen. 8. c. 10) and that therefore neither A., B. or C. had the actual possession of such rent-charge as required by 2

D

Will. 4. c. 45. s. 26, to entitle him to be registered as a voter in respect of his interest in the same until he had actually received such rent or some part thereof. *Webster v. The Overseers of Ashton-under-Lyne—Orme's Case*, C.P., 38

PARLIAMENT (continued)—*county vote: rent-charge: actual possession: previous decisions*]

—Where the conveyance granting a rent-charge operates under the Statute of Uses, 27 Hen. 8. c. 10, the person to whose use the rent-charge is granted is, by force of the statute, in the actual possession of such rent-charge, within the meaning of section 26 of the Reform Act, 2 Will. 4. c. 45, as soon as the grant is executed, according to the decision in *Heelis v. Blain*, which the Court followed. *Webster v. The Overseers of Ashton-under-Lyne; Hadfield's Case*, C.P., 146

Semble, the Court is not bound by its former decision, though it is a Court of ultimate appeal in registration cases, and its decision in such cases is made final by 6 & 7 Vict. c. 18. s. 66; but the Court will not overrule such former decision unless it be shewn to be clearly wrong. *Ibid.*

—*county vote: qualification: incapacity: peer of Parliament*—A peer of Parliament is incapacitated by law from voting at elections for members of the House of Commons, and is therefore not entitled to have his name on the register of voters. *Earl Beauchamp v. The Overseers of Madresfield; Marquis of Salisbury v. The Overseers of South Mimms; Same v. Bontems; Same v. Bulwer*, C.P., 32

—*county vote: qualification for borough vote*]

—A., a minister of a church, was stated to have, as minister, such a freehold interest in the rents received from the letting of pews in the church as entitled him to a vote for the county. He occupied as such minister the parsonage house, and in respect of such occupation acquired a right to a vote for the borough:—*Held*, that there was no such unity of occupation as would, according to section 24 of 2 Will. 4. c. 45, dis-entitle A. to the county vote. *Beswick v. Alker*, C.P., 26

—*county vote: rating members of a firm: description on rate amendable as inaccurate*—A., who had been solely rated in respect of the premises occupied by him in his business, got the overseers to alter the rating to "A. & Sons" on the occasion of his taking his two sons into partnership, and carrying on business with them on the said premises under the partnership name of "A. & Sons." When A. retired from the business, which he did some time afterwards, the two sons continued the business under the same name of "A. & Sons," and paid the rates when called for:—*Held*, that the sons were rated within the meaning of section 6 of the Representation of the People Act, 1867 (30

& 31 Vict. c. 102), being described on the rate, though inaccurately, by the partnership name, and that such inaccuracy was cured by 6 & 7 Vict. c. 18. sec. 75. *Little v. Overseers of Penrith*, C.P., 28

—*county vote: occupation franchise: rateable value*—The rateable value of the premises required by section 6, sub-section 2 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), for the 12th occupation franchise in counties, is the real rateable value (which the Revising Barrister is at liberty to ascertain for himself), and is not necessarily the value at which such premises are rated in the rate-book. *Cooke v. Butler*, C.P., 25

—*county vote: inmates of a hospital: interest in land: rent-charge: tenement*—A hospital, consisting of a master and three "ancient brethren," was incorporated, and by the terms of its constitution, as afterwards regulated by statute, its revenues, derived from lands vested in the corporation, were received by the master, who annually, after paying thereout taxes and other outgoings and reserving one-third to himself, was to pay 25^l. to each of the three ancient brethren, 70^l. to the chaplain, and after reserving a balance, not exceeding 60^l., to meet current expenses, was to divide the residue between certain other brethren called "younger brethren," who were added to the number of the brethren from time to time, as the revenues of the charity increased, but no younger brother was to take under such division more than 25^l., and the surplus, if any, was left to accumulate until further additional brethren were appointed:—*Held*, that the younger brethren had no equitable estate in the lands of the hospital and that the annual payment to which they were entitled, not being a rent-charge nor a free tenement within the statute 8 Hen. 6. c. 7, they were not entitled to the county franchise. *Simsey v. Marshall*, C.P., 49

—*consolidated appeal: notice to respondent*—

A consolidated case of appeal, naming the returning officer of a borough as respondent, was signed on the 31st of October; notice of appeal was not given to him till the 4th of November; the first day appointed for hearing appeals was the 13th of November:—*Held* (the respondent not appearing), that the appeal could not be heard. *Brown v. Tamplin*, C.P., 37

PARTIES—to actions. See Amendment. Carriers by Railway. Marine Insurance.

PATENT—*effect of dating back grant of patent to day of application*—To an action for infringing letters patent granted to the plaintiff and sealed as of the date of his application for the same, it was held to be no answer that the alleged infringements were done in exercise of certain letters patent for a similar invention granted

to the defendant and sealed as of a subsequent date, *i.e.*, the date of his application for the same, although the complete specification of the plaintiff's patent was not filed in the patent office till after the defendant's specification had been filed. *Sarby v. Kennet*, Ex., 137

PAWNBROKER—loss of ticket—A person who had pledged goods, having unknowingly given the ticket amongst other matters to a third person, obtained under the (now repealed) statute, 39 & 40 Geo. 3. c. 99. ss. 15, 16, the form of affidavit, &c., therein mentioned, went immediately with it to a magistrate as therein provided, and shewed it afterwards to the pawnbroker:—*Held*, that under that statute the pawnbroker was not justified in afterwards delivering the goods to the ticket-holder, as the ticket was "lost or mislaid," and it was not necessary to deliver the affidavit and redeem the goods. *Burslem v. Attenborough*, C.P., 102

PAYMENT—proof of. See Evidence. Executor.

PAYMENT INTO COURT—bond to secure payment of money by instalments: penalty—Plaintiff sued for the penalty in a bond conditioned for avoidance if half the penalty with interest were paid by instalments on several fixed days, and alleged as a breach the non-payment of one of the instalments, the time for the payment of the subsequent instalments not having yet arrived. Defendant paid into Court the sum due in respect of the one instalment, with interest:—*Held*, a bad plea, such a bond not being within section 25 of the Common Law Procedure Act, 1860. *Preston v. Dania*, Ex., 33

PEDLARS ACT—carrying a missionary basket is not trading. *Gregg v. Smith* (M.C., 121), Q.B., 170

PENALTY—Local Government Act, 1858. Byelaws. Structure of party-walls. Continuing offence. New buildings. Public Health Act, 1848. *Marshall v. Smith* (M.C., 108), C.P., 155

— Evidence of Scier. Contagious Diseases (Animals) Act, 1869. Animals Order of 1871, part II. sect. 19. Discovery of Disease. Appeal from Justices. Costs. *Nicholls v. Hall* (M.C., 105), C.P., 157

— See Payment into Court.

PERPETUAL CURATE. See Churchwardens.

PHYSIC. See Medical Act.

PLEADING—argumentative general issue. See Equitable Plea. And see Bills of Exchange. Company. Mortgage.

POOR LAW—Amendment, on *certiorari*, of order of justices made on a bastardy summons. *R. v. Tomlinson* (M.C. 1), Q.B., 12

— A judgment for a sum of money obtained by a pauper in receipt of relief is a valuable security for money belonging to the pauper within 12 & 13 Vict. c. 103. s. 16. *The Guardians of the West Ham Union v. Owens* (M.C. 29); Ex., 15

POOR LAW AUDIT—Proceedings against overseer to recover sum certified to be due. Certificate of treasurer. *R. v. Fordham* (M.C., 153), Q.B., 243

POOR RATE—Sunday and ragged schools (exemption from Rating) Act, 1869, 32 & 33 Vict. c. 40. Discretion of rating authority. *Bell v. Crane* (M.C., 122), Q.B., 155

— Occupation. Rateable value. Cemetery. Sale of plots of land. *R. v. The Abney Park Cemetery Co.* (M.C., 124), Q.B., 245

— Docks, warehouses, and machinery occupied as one estate. Warehouses capable of beneficial occupation apart from docks. Increased value by connection with docks. Separate rating. *Mersey Docks and Harbour Board v. The Overseers of the Poor of Birkenhead* (M.C., 141), Q.B., 236

PRACTICE—new trial in Liverpool Court of Passage: verification of assessor's signature to notes—In moving in the Court of Exchequer for rules for a new trial or to enter a nonsuit in cases tried in the Liverpool Court of Passage, a rule to shew cause will not be granted unless either the counsel moving was present at the trial, or the assessor's notes are produced with an affidavit verifying the assessor's signature. When cause is shewn the assessor's notes must be produced with a similar affidavit. *Welsh v. Mercer*, Ex., 52

— See Amendment. Attachment of Debt. Attorney and Solicitor. Bills of Exchange. Inferior Court. Interrogatories. Jurisdiction.

PRINCIPAL AND AGENT—foreign correspondent: commission agent: right of principal against third person—Where a foreign correspondent instructs his English agents to order goods for him in this country the person contracting with the agent to supply such goods is not, although he knew for whom the goods were intended, liable to an action for breach of his contract at the suit of the principal. *Die Elbinger Actien-Gesellschaft für Fabrication von eisenbahn-Materiel v. Clay*, Q.B., 151

— *contracting and signing as agent: evidence of custom making agent liable*—Where a person contracts in the body of a charter-party and signs "as agent," his principal being undisclosed, evidence is admissible to shew a custom that he shall be personally liable if he does not disclose his principal's name within a reasonable time. *Hutchinson v. Tatham*, C.P., 260

— See Stock Exchange.

PRINCIPAL AND SURETY—master and servant: alteration of terms of service: discharge of surety—A bond was given by the obligor as surety that a servant would from time to time, and at all times during the service, satisfactorily account for and pay over to the master all moneys received by the servant for the master's use. One of the terms of the service was that it should be terminable by one month's notice on either side, but this was not known to the surety. After the commencement of the service the master and servant agreed, without the knowledge of the surety, that the service should be terminable at three months' notice:—*Held* by KELLY, C.B., PIGOTT, B., and POLLOCK, B., *dubitante* MARTIN, B., that the surety was not discharged. But the servant having failed satisfactorily to account for or pay over moneys which he had received for the master's use, and the master, having with knowledge and without informing the defendant thereof, retained the servant in his service,—*Held*, that the surety was discharged as to defaults committed by the servant after he was so retained. *Sanderson v. Aston*, Ex., 64

— **joint and several debtor: release of debtor as if discharged in bankruptcy: discharge of surety**—Of two obligors of a joint and several bond one executed it as surety for the other, whereof the obligee then had notice. Afterwards, and without the consent of the surety, the principal debtor by deed conveyed to the obligee of the bond, as trustee for the creditors of the principal debtor, all his estate to be administered for the benefit of the creditors, in like manner as if the principal debtor had been at the date thereof duly adjudged bankrupt, and in consideration thereof each of the creditors did thereby release the principal debtor "from his and their respective debts, in like manner as if" the principal debtor "had obtained a discharge in bankruptcy." The obligee having sued the surety on the bond,—*Held*, by KELLY, C.B., and BRAMWELL, B. (*dissentiente* PIGOTT, B.), that the obligee by executing the deed had released the surety. *Gragee v. Jones*, Ex., 68

PRISONER—Debtors Act: discharge: imprisonment after judgment—A defendant who has been arrested and imprisoned before final judgment, under the 6th section of the Debtors Act, 1869, is entitled to be discharged under the 4th section after final judgment has been obtained, notwithstanding that the judgment is still unsatisfied, and that the absence of the defendant from England may prejudice the plaintiff in obtaining the fruits of the judgment. *Hume v. Druff*, Ex., 145

PRIVILEGED COMMUNICATION. See Defamation.

PROHIBITION—Admiralty Court: cause of damage by collision: foreign ship: sovereign potentate—

The ship C. ran down the ship B. in the river Thames. The C. was arrested under a warrant of the Court of Admiralty issued in a cause of damage instituted in the said Court on behalf of the owners of the B. A rule *nisi* was granted for a prohibition on the ground that the C. was the property of the Khedive of Egypt. In shewing cause against the rule, affidavits were used alleging that the C. was, at the time of the collision, in reality used for carrying cargo and passengers. The Court declined to issue the prohibition: the question whether or not the C. was the property of a sovereign potentate, so as by the law of nations to be exempt from liability being one which might properly be decided in the Court of Admiralty. *In re The Steam-ship "Charkiah,"* Q.B., 75

— **inferior court: jurisdiction: cause of action**

—The Mayor's Court of London being an inferior Court, the whole cause of action must arise within its jurisdiction, and therefore, where a material fact necessary to be proved in order to sustain the plaintiffs' case occurs out of the jurisdiction of such Court, the garnishee against whom process of foreign attachment has been issued to attach moneys owing by him to the defendant, is entitled to a prohibition against such Court proceeding with the suit. *Cooke v. Gill*, C.P., 98

QUARTER SESSIONS—Signature to notice of appeal. *R. v. The Justices of Kent* (M.C., 211), Q.B., 170

— **Invalidity of rule of practice as to entry of appeals.** *R. v. Paulett* (M.C., 157), Q.B., 241

QUO WARRANTO—information in the nature of: want of grievance: delay: discretion of court—A rule for an information, in the nature of a *quo warranto*, in respect of an annual office of guardian of the poor, the election to which was on the 14th of May, on the ground that the mode of election adopted was not a proper one, was not applied for till the 13th of January following, and it was then not shewn that any ratepayer had been prevented from voting, or that the result of the election was affected by the mode adopted. In the exercise of its discretion, the Court discharged the rule. *R. v. Cousins*, Q.B., 124

— **irregularity immaterial as to the result**—W. was chairman of a Local Board, and it was his duty under 11 & 12 Vict. c. 63. s. 21 to conduct and complete the elections of members for the ensuing year, and by the same section if the chairman became unable to act, some other person was to be appointed by the Local Board to perform such of his duties as then remained to be performed. F. was appointed by the Local Board to act as returning officer in case of nomination of chairman as a candidate. W. published a notice, fixing day of election and day for receiving nomination papers.

He received a nomination paper nominating himself, and afterwards continued to receive other nomination papers. More candidates were nominated than vacancies. W. filled up the form of voting paper under section 23, and sent it to be printed, with directions for the printer to return it to F., and from that time forward everything was done by F. W. was elected, and returned by F. No improper motive was imputed to W., nor did his acts produce any inconvenience, or in any way influence the result of the election. The Court, in the exercise of its discretion, refused leave to file an information in the nature of a "quo warranto." *R. v. Ward*, Q.B., 126

RAILWAY—Meaning of branch-line in Special Act. See Covenant.

RAILWAY COMPANY—*construction of special Act: special services: tolls: six-mile clause*—A special Act, relating to the above company, provided that where goods were carried on the company's railway, or partly on their railway and partly on some other railway of which they were joint owners, or which they had a right to use, for a less distance than six miles, the company should be entitled to take tolls as for six miles. The Act also provided that the tolls for goods carried over the company's line and over portions of other lines of which they were part owners, or which they had a right to use, should be computed as if the company's line and the said portions of the said other lines formed one railway. Goods were passed over the line of which the company were sole owners for a distance of less than six miles; the same goods on their transit to their ultimate destination passed over another line of which the company was part owner for a distance of more than six miles. This latter line was under the sole management of another company. The goods were accompanied by two declaration notes, one made out in the name of the first company and the other in the name of the other company, but the station of ultimate destination mentioned in both notes was the same:—*Held*, that the company was not entitled to split the contract, that the two lines must be treated as one, and that the six-mile clause was not applicable. *Lancashire and Yorkshire Rail. Co. v. Gidlow* (H.L.), Ex., 129

The same Act of Parliament, while providing the maximum rate of tolls to be charged, made an exception in respect of special services to be rendered by the company for loading, unloading, collection and delivery of goods:—*Held*, that the company were not entitled to charge for special services, though found by a jury to have been actually rendered by them; the customer charged for such services, not having had the offer and option first distinctly given him of either availing himself of such services at the company's rate of charge or of doing them himself, such services being incidental to the ordinary business of a carrier, and such as the

customer, without notice, might have supposed were covered by the company's charges for toll. *Ibid*.

— What is a branch railway. See Covenant.

— Liability for wrongful conduct of servant. See False Imprisonment.

— Liability as Common Carriers, and for Injuries to Passengers. See Carriers by Railway. And see Negligence. Toll Traverse.

RAILWAY STATION—Wilful trespass on premises connected therewith by a cab-driver. *Foulger v. Steadman* (M.C., 3), Q.B., 16

RAILWAYS CLAUSES CONSOLIDATION ACT, 1845, s. 65—Variation by Special Act. Revival of General Act. *London, Chatham and Dover Railway Co. v. Board of Works for the Wandsworth District* (M.C., 70), C.P., 160

RENT-CHARGE—*conveyance of land charged: action of debt for arrears: abolition of real actions*—Plaintiff seized in fee of land granted it unto and to the use of C., subject to the payment for ever to plaintiff, his heirs and assigns, of a yearly rent-charge payable out of the land. C. covenanted for himself, &c., that he, his executors, administrators and assigns would pay unto plaintiff, his heirs or assigns, the said rent-charge. The land became vested in defendant, after which the rent-charge fell in arrear:—*Held*, that plaintiff might maintain an action of debt against defendant for the arrears, the remedy by real action having been taken away by 3 & 4 Will. 4. c. 27. s. 36. *Thomas v. Sylvester*, Q.B., 237

REPLEVIN—*recovery in, a bar to action for same taking: trespass by tenant of tenant at sufferance*—A judgment for plaintiff in replevin is a bar to an action for damages for the same taking of the goods in respect of which the replevin was brought. *Gibbs v. Cruikshank*, C.P., 273

The tenant of a mortgagor, whose tenancy was created after the mortgage, and has never been recognised by the mortgagee, cannot maintain trespass against the mortgagee for entering and distraining on the land under the powers of the mortgage. *Ibid*.

RULE OF COURT—is not a judgment in respect of which a garnishee order can be obtained. See Attachment of Debt.

SALE OF GOODS—in Market overt. See Trover.

— to be delivered by instalments. See Contract.

SERVICE—*writ of summons: service on officer of Scotch corporation: railway booking clerk*—

Defendants, a Scotch railway company, having their line of railway and their principal office in Scotland, employed an ordinary booking clerk to issue tickets at the Carlisle station of the Caledonian Railway, over the southernmost portion of whose line defendants had running powers:—*Held*, that such clerk, although the only officer of defendants resident in England, was not a "head officer" or "clerk," within the 16th section of the Common Law Procedure Act, 1852, so as to render service on him of an ordinary writ of summons a good service on the company. *Mackreth v. The Glasgow and South-Western Rail. Co.*, Ex., 82

SET-OFF. See Banker and Banking Company. Husband and Wife.

SHARES—Registration of. See Married Woman.

— Transfer of. See Company.

SHIPPING—*insurance on chartered freight: loss of freight where no total loss of ship*—By a charter-party, which contained the usual exceptions of dangers and accidents of navigation, the vessel was to proceed with all convenient speed from Liverpool to Newport, and there load a cargo of iron rails for San Francisco, and the freight was to be paid on right delivery of the cargo. The vessel duly proceeded on her voyage from Liverpool to Newport, but before arriving there she took the rocks at Carnarvon Bay. She was ultimately got off the rocks, and though the damage she sustained was not such as to constitute a total loss, either actual or constructive, the time necessary for getting her off and repairing her so as to be a cargo-carrying ship, was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers, and the latter accordingly abandoned the contract and hired another vessel, by which they forwarded the rails to San Francisco:—*Held*, by KRATING, J., and BRETT, J. (BOVILL, C.J., *dissentiente*), that under these circumstances there was a total loss of chartered freight by perils of the sea within the meaning of a policy of insurance on chartered freight on the above voyage. *Jackson v. The Union Marine Insur. Co. (Lim.)*, C.P., 284

— *freight: right to lump freight where part of cargo lost*—By charter-party, the ship was to be loaded with a full cargo, and to have a deck cargo, and being so loaded was to proceed to London, and "deliver the same on being paid freight as follows: a lump sum of 315*l.* . . . the freight to be paid in cash, half on arrival, and remainder on unloading and right delivery of the cargo." The ship arrived in London with the whole of the cargo, with which the charterer had loaded her, with the exception of the deck load, which had been lost during the voyage by one of the excepted perils in the charter-party, and without any default on the

part of the master or crew:—*Held*, that the shipowner was entitled to the whole of the lump freight without deducting the proportion of freight payable in respect of the deck load which had been lost. *Robinson v. Knights*, C.P., 211

— Liability of average adjuster. See Arbitration. And see Bill of Lading. Charter-party. Demurrage. Marine Insurance.

SPECIAL CONSTABLE—Right to be heard against Order for payment of. *R. v. Cheshire Lines Committee* (M.C., 100), Q.B., 182

STATUTE—Parks Regulation Act, 1872. Effect of rules not laid before Parliament. Right of Meeting in royal parks. *Bailey v. Williamson* (M.C., 49), Q.B., 145

— construction of. See Metropolis Gas Act. Railway Company.

STAYING PROCEEDINGS—*action brought without authority*—If an attorney brings an action in the name of a person who has not given him any authority to do so, such person is entitled to have the proceedings stayed. *Reynolds v. Howell*, Q.B., 181

STOCK EXCHANGE—*defaulting broker: liability of principal*—Plaintiffs, brokers on the Stock Exchange, who had at the request of defendant contracted for the purchase of shares for him, were on the 13th of July, the "carrying over day" for the 15th, instructed by him to carry over or continue the contract from the 15th till the 29th of July, the next account day. On the 15th they paid for him (as was necessary in order to have the contract carried over), the difference on the shares at the price of the 13th, amounting to 1,688*l.* On the 18th of July plaintiffs, by reason of many persons for whom they had entered into contracts failing to meet their engagements, became defaulters on the Stock Exchange, whereupon, in accordance with the rules of the Exchange, all their bargains were closed and made up by the official assignees at the prices of that day. The price of the shares purchased for the defendant having fallen, the amount due in respect thereof (including the 1,688*l.* differences) was 6,013*l.*, which plaintiffs then became liable to pay to the official assignees, and now sought to recover from defendant:—*Held*, that plaintiffs' insolvency having been brought about by want of means to meet their other primary obligations, and not by reason of their having entered into any contract on behalf of defendant, no promise could be implied on the part of defendant, as their principal, to indemnify them against the consequences of the enforcement of the Stock Exchange rules with regard to defaulters, and that, therefore, plaintiffs could only recover from defendant the sum of 1,688*l.*, the amount of the differences they had actually paid for him—

reversing the judgment below, 40 Law J. Rep. (N.S.) Ex., 137. *Duncan v. Hill, and Same v. Beeson* (Ex. Ch.), Ex., 179

SUCCESSION DUTY—*alienation by remainderman to body corporate: alienee liable as successor*—Testatrix by will, made in 1839, devised real property to one for life, and after his death to a remainderman in fee, and died in 1841. The remainderman, a cousin of testatrix, died in 1870, having previously sold his reversion in fee to a corporation. The tenant for life died in 1872:—*Held*, on an information against the corporation, first, that the corporation, upon the death of the tenant for life, were “successors” within ss. 2 and 27 of the Succession Duty Act, 1853, and were liable to pay succession duty upon the full value. Secondly, that if necessary the Court would have decided the death of the remainderman to be immaterial, and the rate of duty to be the same as would have been payable by him if he had survived the tenant for life without selling, but that at all events the Crown had made out a *prima facie* case to duty at that rate, since the Crown need not prove the death of the remainderman, nor who was his heir; and that if events had happened by which the duty would be less, the corporation must prove them. *The Solicitor-General v. The Law Reversionary Interest Society, Ex.*, 146

SURGEON AND APOTHECARY—Right of surgeon to sue for medicines. See Medical Act.

TAXATION OF COSTS—*new trial: costs to abide the event*—By a rule for a new trial the costs were to abide the event. On the first trial plaintiff had obtained a verdict for 66*l.* odd; as to 5*l.* there was no dispute, and defendant had leave to move for a new trial, on the ground that the verdict was against the weight of evidence and the damages excessive, unless plaintiff would consent to reduce the damages to 5*l.* Defendant obtained a rule nisi for a new trial on such ground, which was subsequently made absolute, the costs to abide the event, and afterwards and before the second trial, defendant paid into Court 5*l.* 2*s.* 10*d.* under an order by consent. At the second trial defendant had a verdict:—*Held*, that plaintiff was not entitled to the costs of the first trial, and that the “event” referred to in the rule meant the dispute as to the balance between the 66*l.* 19*s.* 6*d.* and the 5*l.* *Jones v. Williams, Q.B.*, 48

—*arbitration: accountant appointed by arbitrator*—On a reference of a cause involving an enquiry into a mass of accounts, an order was made by a judge, on the application of plaintiff, that an accountant, to be named by the arbitrator, should inspect defendant’s books and take copies or extracts from them relating to the matters in question in them. This was done, and the charges of the accountant were paid by plaintiff. The result of the investiga-

tion and report of the accountant to the arbitrator was that much expense in the enquiry was saved:—*Held*, that plaintiff, in whose favour the award was made was not entitled to have the costs of the accountant taxed against defendant. *Nolan v. Copeman, Q.B.*, 44

—*plaintiff’s costs: scale of taxation: action for debt or demand*—If in an action of debt where the writ is endorsed with more than 50*l.* the plaintiff recovers less than 20*l.*, and the Judge certifies, under 30 & 31 Vict. c. 142. s. 5, that there was sufficient reason for bringing the action in the Superior Court, the effect of the seventh direction to the Masters, Hilary Term, 1863, is that the plaintiff’s costs must be taxed on the lower scale. *Smith v. Hailey, Ex.*, 5

—*action founded on contract or tort*—A declaration alleged that defendant at the time of the promise and negligence therein alleged, was the owner of a hackney cab at the time of the promise conducted by his servant; that plaintiff at his request hired it of him, and defendant promised to convey plaintiff’s luggage safely, but not regarding his duty or promise negligently lost the same:—*Held*, that the action was founded on contract, and that as a sum not exceeding 20*l.* was recovered, plaintiff was deprived of costs under 30 & 31 Vict. c. 142. s. 5. *Baylis v. Lintott, C.P.*, 119

TITHES—*modus: conversion into tillage*—The building a house upon land, subject to a modus in lieu of tithe, and converting a part of it into an orchard, is not a conversion into tillage or a breach of the modus. *Dudman v. Vigar (H.L.)*, C.P., 297

The conversion of a small portion of land into a garden for the use and convenience of the house, —*Semble*, not a conversion into tillage. *Ibid.*

TOLL. See Railway Company.

TOLL TRAVERSE—*liability of railway company to ancient toll*—The simple fact of a corporation being entitled to an ancient drift toll on waggons passing to, through or from a borough does not support a claim (even if such a claim can be legal) to take toll on railway waggons passing over a railway made through the borough—affirming the judgment below, 41 Law J. Rep. (N.S.) C.P. 257. *The Brecon Markets Co. v. The Neath and Brecon Rail. Co. (Ex. Ch.)*, C.P., 63

TRESPASS. See Easement. Highway.

TROVER—*sale of horse in market overt: 2 & 3 Ph. & M. c. 7; 31 Eliz. c. 12*—Defendant’s mare, which he had turned out in a public park, was found out of the park, and was sold at public auction by the “pinner.” After an intermediate sale she was sold in market overt to plaintiff, and was subsequently taken possession of by defendant. There was no proof that the

formalities which the stat. 31 Eliz. c. 12 requires upon the sale of horses at fairs and markets had been observed:—*Held*, that in the absence of such proof the Court would not infer that such formalities had been observed, and that plaintiff could not maintain an action for the mare against defendant, the true owner. *Moran v. Pitt*, Q.B., 47

TROVER (continued)—*waiver of tort: petitioning court of bankruptcy and obtaining proceeds of goods sold under bill of sale*—Defendant sold the goods of D. under a bill of sale. D. became bankrupt, and plaintiff, his trustee petitioned the Court of Bankruptcy to set aside the sale as fraudulent or void, and order payment of the proceeds (the amount of which he knew) to him. The Court so ordered, and the money was paid. Plaintiff afterwards being dissatisfied with the amount realised, and desiring to obtain the difference between the value of the goods and proceeds of the sale brought trover against defendant:—*Held*, that he could not do so, as by his acts he had waived the tort. *Smith v. Baker*, C.P., 165

— *interference by assertion of right to possession: acquiescence in assertion of right*—The grantee under a bill of sale of furniture, being in possession in the house of the grantor and intending to remove the goods from the premises, was told by the landlord (who was there for the purpose of distraining) that he would not allow them to be removed till his arrears of rent were satisfied, and that he was prepared to resist the removal by force. The grantee thereupon made no further attempt to remove the goods:—*Held*, by KELLY, C.B., BRAMWELL, B., and POLLOCK, B. (*dissentiente* MARTIN, B.), that such assertion of the intention not to allow the removal of the goods did not, under the circumstances, amount to a conversion by the landlord. *England v. Cowley*, Ex., 80

TRUST and TRUSTEE. See Company.

TURNPIKE TRUST—Power to take tolls on particular road on condition of keeping it in repair. Contribution under 4 & 5 Vict. c. 59. s. 1. *Trustees of Market Harborough and Brompton Turnpike Trust v. Market Harborough Highway Board* (M.C., 139), Q.B., 237

— *Arrears of interest due to mortgagees.* Application of tolls. Contribution under 4 & 5 Vict. c. 59. *Trustees of Market Harborough and Brompton Turnpike Trust v. Kettering Highway Board* (M.C., 137), Q.B., 244

UNION ASSESSMENT COMMITTEE ACT, 1862—Deposit of Amended Valuation List. *R. v. The Guardians of the Chorlton Union* (M.C., 34), Q.B., 40

USER. See Common.

VENDOR AND PURCHASER—*conditions: want of title in vendor: recovery of deposit*—Land was put up for sale by auction, subject to conditions (among others) that "the vendors should within seven days of the sale deliver to the purchaser an abstract of their title, all objections and requisitions not delivered to the vendors within fourteen days after the delivery of the abstract to be considered as waived, and in this respect time to be of the essence of the contract;" that "the vendors being trustees should not be required to obtain the concurrence of any one interested in the proceeds of the sale;" and that "if the purchaser should fail to comply with the conditions his deposit should be forfeited." An abstract was delivered to the purchaser within seven days, shewing that the property had been devised to trustees (of whom the vendor was the survivor) upon trust to pay the income to F. S. for life, and after his death to sell and divide the proceeds among his children; and that F. S. was still alive. The abstract did not state whether he had children living, though there were in fact eight all of age:—*Held*, that the vendor having thus no title to sell the property, the purchaser was entitled to recover back his deposit, although he had made no requisition within the fourteen days—the Court being of opinion that the conditions as to waiver and forfeiture referred only to the waiver of requisitions for further information or security in the case of a defective title capable of being made good on the defects being supplied, but not to the case of a title wholly bad. *Held also*, by KELLY, C.B., that the abstract delivered was not a sufficient abstract. *Want v. Stallibrass*, Ex., 108

Semble, by MARTIN, B., and POLLOCK, B., that the abstract, if a true abstract of such title as the vendors had, sufficiently indicating points calling on the purchaser to make further requisitions, was an abstract of their title within the meaning of the condition, although the title was not such as the purchaser was bound to accept. *Ibid.*

— *objections to and requisitions on title: delivery of untrue abstract without fraud: rescission of contract and damages for loss of bargain*—Real property was sold on the condition that the vendors should deliver an abstract of the title, and the purchaser should make his objections and requisitions in respect of the title within twenty-one days from the delivery of the abstract; and all objections and requisitions which should not be made within the time specified should be taken to be waived; and in case any purchaser should make any objection to or requisition on the title which the vendors should be unwilling or unable to answer or comply with, the vendors reserved to themselves the option at any time to rescind the contract. The vendor having delivered an

abstract, the purchaser within the twenty-one days made a frivolous objection to the title as disclosed in the abstract, and as he insisted on it the vendor filed a bill for specific performance. The purchaser having meanwhile discovered the existence of certain deeds which materially affected the title, and which were omitted from the abstract, raised an objection on this ground for the first time in his answer to the bill. This omission was made intentionally, but *bona fide* and under the advice of counsel, as it was supposed that the deeds did not affect the title. (The vendor, however, had, under a previous contract to sell this property, disclosed these deeds on the abstract then delivered, and had abandoned such contract when an objection founded on these deeds was raised to the title.) Several months after the filing of the answer, the vendor gave the purchaser notice that he rescinded the contract, and the bill was eventually dismissed on the purchaser's motion without costs. The purchaser having brought an action against the vendor for breach of contract in not deducing a good title.—*Held*, in the Exchequer Chamber, per BLACKBURN, J., KEATING, J., BRETT, J., ARCHIBALD, J., and HONYMAN, J., that the objection founded on the omission of the deeds was an "objection to the title" within the meaning of the condition, and entitled the vendor to rescind, and that the action was not maintainable. Per GROVE, J. (agreeing with the decision of BRAMWELL, B., in the Court below), that the vendor was not entitled to rescind, since the option reserved by the condition applied only to objections to the title as disclosed in the abstract. *Gray v. Fowler* (Ex. Ch.), Ex., 161

WARRANTY. See Charter-party.

WATER COMPANY—water-rate varying according to "rent" of houses: rent meaning "annual value" deductions]—Plaintiffs were required by their special Act to furnish water to every inhabitant occupying a house within a certain district, at a rate which varied according to the amount of the "rent per annum" of such house. Defendant was the owner of several houses, which he let to tenants for various terms not exceeding three months. In respect of some of the houses defendant paid poor-rates, district rates and water-rates, instead of the tenants, either because he had let the houses on those terms or because the obligation was imposed on him by statute.—*Held* (affirming the judgment of the Court below, 41 Law J. Rep. (n.s.) Exch. 233), that in calculating the water-rate, the payments made by the defendant in either case must be deducted from the rents at which the houses were let. *The Company of Proprietors of the Sheffield Water Works v. Bennett* (Ex. Ch.), Ex., 121

WATER COURSE—riparian rights: diverging stream confined in artificial course]—A mill on the bank of
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a river had been supplied for more than twenty years by water flowing from a stream through an ancient divergent channel, and conducted thence through a reservoir and tunnel constructed in his own land by a former proprietor of the mill, who was also the owner of both banks of the divergent channel. At the place where the reservoir was constructed the divergent stream had formerly, after filling and overflowing a cattle-trough, been allowed to waste itself over the adjoining land, whence it found its way by percolation to the river, into which the stream itself also flowed.—*Held*, following *Nuttall v. Bracewell* (36 Law J. Rep. (n.s.) Exch. 1), that an action was maintainable by the present owner of the mill, who had purchased it with all existing water rights, against a riparian proprietor above the point of divergence in the original stream, for obstructing the flow of water to the mill. *Holker v. Porritt*, Ex., 85

WEIGHTS AND MEASURES—selling on highway by incorrect spring balance. *Booth v. Shadgett*, (M.C., 98), Q.B., 212

WILL—"so specifically devised"]—A specific devise or bequest is a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie either directly or indirectly. *Giles v. Melsom* (H.L.) C.P., 122

A testator devised three properties to his three sons respectively for life, with remainder in fee to their respective children, and in case of the death of either of them without issue between the others "in the same manner as the estates devised were limited to them respectively," subject to the proviso that if either died leaving a widow, but no children, the widow should have an estate for life in the premises "so specifically devised" to her husband.—*Held*, that the devise to such widow attached, not only to the property originally devised to her husband, but also to property coming to him under the contingent limitations. *Ibid.*

— *general rules of construction: all and every other the issue of my body: for default of such issue*—Testator had issue living at the time of his will, a son F. (who had then living two sons F. and R. and three daughters E., I., and S.), a daughter I. and four grandchildren issue of a deceased daughter S. By his will he devised his hereditaments to his son F. for life, with remainder to his eldest grandson F. for life, with remainder to the first and other sons of the grandson successively in tail male; and for default of such issue to R. the second son of his son F. for life, with remainder to his first and other sons successively in tail male, or for default of such issue to the third, fourth and other sons of his son F. thereafter to be born successively in tail male; and in default of such issue, to the testator's daughter I. for life, with remainder to her first and other sons

E

successively in tail male; and for default of such issue, to his granddaughter E. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter I. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter S. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth, fifth and other daughter or daughters of his son F. successively, and in remainder, one after another, and the heirs male of their bodies; and "for default of such issue, to the use and behoof of all and every other the issue of my body; and for default of such issue, to my right heirs for ever." And he expressed a desire "to prevent as far as might be the dispersion of his estates among several persons":—*Held*, that the words

"all and every other the issue" were not to be read in the strict sense of intending to exclude those coming within the class who were provided for before, and were supposed to have failed, but rather to complete a provision for all the issue, so as to make the estate go over by force of the words in the limitation "in default of such issue" only upon failure of all the testator's issue; and that thus a vested remainder in tail general was created which descended to the testator's grandson F.; and that, he having executed a disentailing deed, and all the previous estates having expired, his devisees were entitled to the property. *Allgood v. Blake; Reed v. Blake; and Roach v. Blake* (Ex. Ch.) Ex., 101

WITNESS. See Interrogatories.

WRIT OF SUMMONS. See Amendment.

ERRATA.

Court of Queen's Bench, page 57, line eight of the Head Note, for "consignors, read "consignees."

Also, Court of Common Pleas, page 24, second column, fourth line, for "conceded, read "contested."

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PRINTED BY SPOTTISWOODE & Co.
New-street Square ; 87 Chancery Lane ; 30 Parliament Street ; 38 Royal Exchange.



